REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL SUIT 97 OF 2008

ANTHONY KIPKOSKE KIMETTO.....PLAINTIFF/ RESPONDENT

VERSUS

JACKSON CHELOGOI.....DEFENDANT/APPLICANT

RULING

There are two applications being argued simultaneously. The Notice of Motion dated **1st November 2011** is made pursuant to the provisions of **Order 2 Rule 15 (1) (b), (c)** and **(d)** of the **Civil Procedure Rules** seeking that the plaintiff's suit be dismissed with costs on grounds that the Respondent is no longer interested in the suit. The subject parcel **CIS-MARA/ILMOTIOK/3992** is registered in the name of **PRISCILLA CHEPKEMOI KIMETO** and not the respondent and by dismissing this suit, valuable time for both the Judiciary and the parties, will be saved. The suit is described as scandalous, frivolous and vexatious.

It is supported by the affidavit sworn by the applicant in which he deposes that the land obviously does not belong to the Respondent, Title having issued to a the named PRISCILLA on 24/05/2011, then one month later, the Respondent decided to file suit. The filing of this suit is described as not being in good faith and this suit merits being dismissed.

The Respondent did not file any replying affidavit and/or grounds of opposition. The applicant's counsel in his written submissions has urged this court to consider the application unopposed and grant the prayers sought.

With regard to the application dated 7/12/2011, the plaintiff seeks to be allowed to amend his plaint and the annexed amended plaint be deemed as properly filed. The application is supported by an affidavit sworn by the plaintiff's advocate DAVID MONGERI who deposes that after taking instructions from the plaintiff, it has become necessary to amend the pleadings, and unless the amendment is allowed, the plaintiff will be prejudiced.

This application is opposed on grounds that an amendment will not cure the situation for a party who has lost interest in the suit. In any case, the plaintiff lost his cause of action, the moment Title was issued to PRISCILLA. It is contended that the application for amendment is intended to defeat the application seeking to striking out the suit. It is also argued that there is no evidence that plaintiff's counsel has received further instructions, and in any case, an advocate representing a litigant should not swear and file affidavits on behalf of their clients.

The applications were disposed off by way of written submissions, with the plaintiff's counsel arguing that the application dated 1st November 2011 is premature and is made under the wrong provisions of the law as **Order 2 Rule 15(3)** is only applicable to an originating summons and petitions and not an application such as this one. Further, that the land under reference has not changed and justice will be served better by allowing the application dated 7th December 2011 which seeks an amendment.

In any event the provisions of **Article 159 (1) (d)** of the **Constitution** is clear that justice shall be administered without undue regard to procedural technicalities so the objection should not stand. In any event, the amendment will not cause any prejudice to the defendant. This suit was filed in the year 2008,

and although it has not proceeded to substantive hearing, from the record, the file had been active especially in the year 2009. However in the year 2011, there was total inaction on the part of the plaintiff and the only life breathed into the file was the application filed by the defendant to strike out the suit. It was that application that jolted the plaintiff into action by filing the application dated 7th December 2012 – I have no doubt that the application was intended to stall the prayers sought by the defendant. This late application does not explain why for the entire period between **18/11/2009 – 1/11/2011** the plaintiff did not take any steps to have the suit heard. If the 2nd plaintiff has instructed counsel to amend the pleadings to include her, then certainly this has not been satisfactorily explained to this court, since there isn't even an instruction note or letter annexed and the only reasonable inference I can draw is that the plaintiff is patching up its case on account of the issues raised by the defendant in the application and supporting affidavit. I am not persuaded that the plaintiff has any real interest in this matter, other than just to make sure the matter remains in court so as to vex the defendant.

As a result of the aforegoing, I find that the application dated 07/11/2011 is made in bad faith and I disallow it – it is dismissed and costs shall be borne by the plaintiff. The notice of motion dated 1st November, 2011 has merit is allowed with costs to be borne by plaintiff/Respondent.

Delivered and dated this 21st day of September, 2012 at Nakuru.

H.A. OMONDI

JUDGE