



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT MOMBASA

(Coram: Ojwang J.)

CIVIL CASE NO. 44 OF 2006

ROBERT WAMITHI.....PLAINTIFF/APPLICANT

-VERSUS-

JUMA MASUDI OMARI.....DEFENDANT/RESPONDENT

RULING

The plaintiff moved the Court by Chamber Summons dated **14th July, 2010**, brought under s.3A of the Civil Procedure Act (Cap.21, Laws of Kenya) and Order I [Rules 10(2),(4); and 13] of the Civil Procedure Rules. His prayers were set out as follows:

- (i) that he be granted leave to add or join Indrabhai Natawarlal Nanji Meghji Vaghela and Rajnikant Velji Shah as 2nd and 3rd plaintiffs in this suit;**
- (ii) that he be granted leave to add or joint the Registrar of Lands at Kwale District and the Attorney-General as 2nd and 3rd defendants, respectively, in this suit;**
- (iii) that he be granted leave to amend the plaint dated 16th March, 2006, in terms of the amended plaint annexed with the application.**

The application rests on the following grounds:

- (a) the plaintiff and the proposed co-plaintiffs were the registered proprietors of the suit property;**
- (b) the Registrar of Lands, Kwale District, carried out the purported registration of the defendant, in disregard of the plaintiffs' title;**
- (c) in any event, only the Registrar of Lands at Kwale can effect a rectification, by deleting the registration of the defendant and restoring the plaintiffs' registered proprietorship;**
- (d) all civil proceedings by or against the Government, or by the Land Registrar (who is a department**

of the Government) are required to be instituted against the Attorney-General;

(e) notice of intention to sue the Government has already been served upon the Attorney-General, in accordance with s.13A for the Government Proceedings Act;

(f) joining the 2nd and 3rd defendants will enable the Court to effectually and completely adjudicate upon and settle the questions arising in this suit;

(g) the intended amendments to the plaint will be legitimate and necessary, and will cause no prejudice to the defendants.

The plaintiff swore, on **14th July, 2010**, a 21-paragraph affidavit giving factual information in support of the application. The deponent states, *inter alia*, how he and his partners became the registered owners of the 1.9 Ha. L.R. No. Kwale/Galu Kinondo/465 that constitutes the suit land; and how the Kwale District Land Registrar issued title for the suit land in the name of the defendant.

The respondent swore a replying affidavit on **26th August, 2010** averring that he had always been in possession of the suit property, and so the plaintiffs could only claim beneficial interests; that the Land Registrar in registering the land in his name, acted in all good faith; that a land tribunal at Kwale had returned correct judgment in his favour; and it is noted that the deponent attributes the perceived basis of validity of his factual information to the advice of his Advocate.

Counsel for the respondent contested the plaintiff's prayer for leave to amend the plaint: particularly because "***the particulars of fraud by 1st defendant/respondent (Juma Masudi) are not true***"; for this argument, counsel invoked the Ruling of **Sergon, J of 5th December, 2008**. The learned Judge had in that instance held:

"A close perusal of those orders will reveal that the Land Disputes Tribunal did not cancel the plaintiff's title, neither did it insert the name of the defendant in place of the [plaintiff's] as the registered owner of the suit land. The proceedings and Order [indicate] that the matter was left at the discretion of the Land Registrar to determine the true owner of the parcel of land known as Kwale/Galu Kinondo/465."

Counsel submitted that the decision by the Land Disputes Tribunal which was adopted by the Resident Magistrate's Court at Kwale, had not been challenged either before the Provincial Land Disputes Appeal Committee at Mombasa, or before the High Court, on matters of law, as provided for in the Land Dispute Tribunals Act, 1990 (Act No. 18 of 1990).

Counsel urged that there had been inordinate delay (of more than six years since the Tribunal made its decision) in filing an application for amendment to pleadings. It was submitted that it was now too late to file a suit against the Government: Government Proceedings Act (Cap.40, Laws of Kenya), s.13A; Public Authorities Limitation Act (Cap.39, Laws of Kenya), s.3(2). Counsel urged that the draft amended plaint did not comply with s.13A(1) of the Government Proceedings Act, as "***no Government Department [to] be sued [has] been named on the face of the plaint or on any other page***". It was submitted that the draft amended plaint is "***incompetent...and an abuse of...Court process***"; and that the application to amend the plaint "***does not comply with the provisions of Order II, Rule 1 (2) of the old Civil Procedure Rules***", and Order 3, Rule 4(2) of the Civil Procedure Rules, 2010.

Learned counsel submitted that an application for amendment to pleadings is to be made "***at the earliest possible moment***"; and that "***a plaint cannot be amended so as to introduce a new cause of action which was not [in] existence at the time the suit was filed.***" Counsel urged that the plaintiff's decision to amend the plaint is "***an afterthought to delay the hearing and determination of thesuit.***"

How does the plaintiff respond to the foregoing arguments? Counsel contends that his client's prayers are squarely based on the terms of Order I, Rule 10(2) of the Civil Procedure Rules, which provides:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

Counsel urged that the proposed co-plaintiffs and co-defendants are necessary parties in this suit: (i) at all material times, the plaintiff and the proposed co-plaintiffs were the registered proprietors of the suit property; (ii) since allegations have been made as to the propriety of the change in the title registration, only the Kwale District Land Registrar can explain the circumstances to the Court; (iii) besides, it is only the said Registrar who can affect any necessary rectification of the land register.

Learned counsel submitted that it is in the interest of justice that the plaintiff be granted leave to join the proposed co-plaintiffs and defendants to the suit and to amend his plaint, so as to plead particulars of fraud and illegality as against the Land Registrar; such additional pleading ***“will enable the court to [effectually] and completely adjudicate upon and settle all questions involved in this suit.”***

Counsel submitted that the orders sought will not occasion any prejudice to the defendant and, in the event of any such prejudice, the burden can be covered in costs.

The ultimate question for judicial resolution is that as to title to landed property. Does this property belong to the plaintiff, or to the defendant? Whatever the case, did the Land Registrar follow the prescription of the law, in registering ownership in the name of the defendant?

The answer to those questions bears implications for the protection of the right to property, under the ***Constitution of Kenya, 2010***, Article 40(1) of which provides that –

“Subject to Article 65, every person has the right, either individually or in association with others, to acquire and own property –

(a) of any description...”

The elemental character of a right such as that of *private property*, is further buttressed by an obligation placed upon this Court. **Article 20(3)** of the Constitution (which falls within the Bill of Rights) provides that:

“In applying a provision of the Bill of Rights, a court shall –

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.”

The foregoing provisions clearly determine the general approach this Court must adopt, in the instant matter: an opportunity must be given for a hearing on the *merits*.

In spite of the several technical arguments raised for the defendant, and even though the plaintiff's responses do not squarely address all of them, this matter has, in my opinion, to be determined on the merits; and in this regard, I hereby allow the plaintiff's application to join additional plaintiffs and defendants, and to make amendments to the plaint. The plaint shall be amended in terms of the amended plaint annexed to the application. Costs shall be in the cause.

Orders accordingly.

SIGNED at NAIROBI

**J.B. OJWANG
JUDGE**

DATED and DELIVERED at MOMBASA this 6th day of October, 2011.

**M.A. ODERO
JUDGE**