REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KITALE
Civil Case 53 of 2007

KIPROP KANDA :::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

GABRIEL BIWOTT KANDA)

KIPTOO K. KIBORE)

BENJAMIN RUTO KANDA) :::::::::::::: DEFENDANTS

KILIMO KANDA)

R U L I N G

This is an application made pursuant to section 100 of the Civil Procedure Act, as read together with Order 6A rules 3, 5 and 8 of the Civil Procedure Rules. It is an application for leave to further amend the plaint.

The application is supported by an affidavit sworn by the plaintiff, in which he says that the further amendment to the plaint was necessitated by the fact that there had arisen new issues.

Mr. Maliro, learned advocate for the plaintiff submitted that this was a very complex land matter. He said that many legal battles had already been fought over the matter, but new issues kept on arising from day to day. He therefore expressed the view that it was in the interests of justice to allow the proposed further amendment, so that the real issues in dispute could be brought out.

The plaintiff cited the case of **NATIONAL CEREALS AND PRODUCE BOARD VS. DUBAI BANK KENYA LTD, MILIMANI HCCC NO. 32 of 2005**, as authority for the proposition that an amendment could be allowed at any time provided that there was no injustice to the other side.

In that case, it was further held that there would be no injustice to the other party if he can be compensated by costs.

As the defendants herein would have an opportunity to amend their defence, in the event that the plaint was further amended, the plaintiff submitted that the defendants would suffer no injustice.

It was the plaintiff's further submission that the application had been made in good faith, and without delay.

The plaintiff also cited the case of **SHABBIR ESMAIL VS. KENYA DUTY FREE COMPLEX, HCCC NO. 3137 OF 1992**, as authority for the proposition that the court had jurisdiction to allow amendments to pleadings even if it meant that it resulted in either the substitution of the cause of action, or alternatively if a new cause of action was added.

The plaintiff insists that the new issues which he seeks to introduce into the plaint, by the proposed amendments, were not within his knowledge at the time he commenced this case.

He also submitted that the proposed amendments were not res judicata, as the prayers sought were totally different from those which had been raised in Kitale HCCC No. 128 of 1998. The distinction between the two actions was said to be the fact that in Kitale HCCC No. 128 OF 1998, (hereinafter cited as "the former case"), the plaintiff had sought an order for eviction, which has not been asked for in this case.

In answer to the application, Mr. Kigamwa, advocate for the defendants, first submitted that there was no competent application before the court. His submission was based on the contention that the application was not signed by the advocate for the plaintiff.

As the application on record had a signature endorsed on it, the defendants' submission was, initially, somewhat startling. However, it then became clear that the defendants were taking issue with the fact that the signature had been appended "for" or on behalf of Mr. J.M. Wafula. In effect, the signature on the face of the application was not that of Mr. Wafula.

That being the factual position, as conceded by the advocate for the plaintiff, the defendants' submitted that the plaintiff's application had flouted both Order 3 rule 1 and order 50 rule 15 (1) of the Civil Procedure Rules.

Pursuant to Order 3 rule 1, a party can only act either in person or by his recognized agent or by an advocate duly appointed to act on his behalf.

I therefore failed to appreciate the application of that rule to this application, as the defendants did not at any time contend that the firm of J.M. Wafula & Company Advocates had not been duly appointed to act on behalf of the plaintiff.

Order 50 rule 15(1) of the Civil Procedure Rules reads as follows:-

"***A motion or summons taken out in any proceedings need only be signed by the advocate representing the applicant, or the applicant himself if acting in person, and need not be signed by or on behalf of the court."***

In this case the advocates acting for the plaintiff are Messrs J.M. Wafula & Company Advocates. The application filed by that firm of advocates has a signature, against which there is an endorsement that the person who had signed it, had done so;

"**FOR J.M. WAFULA**

ADVOCATE FOR THE APPLICANT"

When I asked the advocate appearing before court, for the identity of the person who had signed the application, he said that it is he, (Mr. Maliro) who had signed it.

Accordingly, I do find that the application had been signed appropriately, and that therefore, the application was competent.

However, it is important to emphasize the need for advocates to strive to indicate the identity of the person who signs any pleading, motion or summons, so that it is evident from the outset whether the said signatory was a recognized agent or an advocate.

The second issue raised by the defendants was that the parties to this suit have known all the facts for over 40 years. Therefore, the defendants assert that the plaintiff cannot plead ignorance of facts.

In the same vein, it was pointed out that Mr. J.M. Wafula had been on record, as the advocate for the plaintiff, for the last 10 years.

Therefore, as far as the defendants' were concerned, there were no new issues.

In my understanding, even though parties may have had a dispute spanning some 40 years, that by itself is not reason enough to conclude that no new issues could arise between them. Similarly, the fact that an advocate had acted for one party for 10 years, does not imply that a new issue could not arise as between the parties to the suit.

The third point taken up by the defendants was to the effect that the proposed amendments contravened the res judicata rule. In order to explain that point, the defendants delved into the history of the dispute between the parties herein. They drew the court's attention to the fact that in the former case, the plaintiff herein had lodged a counter-claim for the eviction of the defendants herein. However, the High Court denied the plaintiff the said relief.

Thereafter, in **ELD CIVIL APPEAL NO. 219 of 2003**, the Court of Appeal is also said to have made a finding to the effect that the plaintiff had failed to establish a claim for eviction.

Therefore, the defendants contend that the plaintiff ought not to be allowed to bring a separate action, to seek a mandatory injunction for the removal of the defendants.

As far as the defendants were concerned, the plaintiff should only be permitted to invoke the provisions of section 91 of the Civil Procedure Act, to obtain restitution. In other words, if the plaintiff was permitted to bring a separate action, before the High Court, with a view to executing such orders as had been made by the Court of Appeal, the defendants' contend that that constituted an abuse of the process

of the court.

This entire suit is a nullity, so say the defendants. Therefore, they invoked the decision in **D.T. DOBIE (KENYA) LTD VS. MUCHINA (1992) KLR 1** in support of the contention that the proposed amendments ought not to be allowed, because they would not rescusitate the case in any event.

In the face of those competing submissions, I did peruse the draft "Amended Amended Plaint." I noted that the plaintiff wished to bring out the following matters;

(i) At paragraph 9, the assertion that;-

"***The claim by the defendants herein for implied trust having been set aside by the Court of Appeal, for the same not***

having received the relevant Control Board consent, the continued possession of the 40 acres in L.R. Trans-Nzoia/Suwerwa/806 is illegal under section 22 of the Land

Control Board."

In the light of that pleading, the plaintiff then sought the following prayers in the plaint;

"***(i) A declaration that the continued possession of 40 acres in L.R. Trans-Nzoia Suwerwa/806 is illegal under section 22 of the Land Control Act.***

(iv) THAT, a mandatory injunction be issued to remove and/or demolish all structures/buildings on L.R. Trans Nzoia/Suwerwa/806 of the defendants/agents/servants and/or anybody claiming interest through the defendants."

To my mind, those issues could only have arisen, and did arise after the Court of Appeal passed judgment. The plaintiff could not have previously pleaded, in the former suit, that the Court of Appeal had set aside the implied trust which the defendants were claiming. Therefore, that is a new issue.

However, the defendants' contend that pursuant to the provisions of Section 91 of the Civil Procedure Act, the plaintiff does not need to bring a separate action, so as to give effect to the orders already made by the Court of Appeal. Section 91 (1) provides as follows:-

"***Where and in so far as a decree is varied or reversed, the court of first instance shall, on the application of the party entitled to benefit by way of restitution***

or otherwise, cause such restitution to be made as will, so far as may be, place the parties in the position they would have occupied but for such decree or such part thereof as has been varied or reversed; and for this purpose the court may make any orders, including orders

for the refund of costs and for payment of interest, damages, compensation and, mesne profits, which are properly consequential on such variation or reversal."

In my reading of that rule, the defendants are right to say, as they did, that assuming that the Court of Appeal has already made a finding setting aside the defendants' claim of an implied trust, the plaintiff would only need to make an application in the former case, to have the court give effect to the decision by the Court of Appeal.

Section 91 (2) makes the position explicitly clear, in the following words;

"***No suit shall be instituted for the purposes of obtaining any restitution or other relief which could be obtained by application under subsection (1)."***

Therefore, as there is an express statutory bar to a new suit, this court cannot allow the plaintiff leave to introduce into this suit something which he is barred from seeking by way of a suit other than the former suit.

For those reasons, the application dated 30/5/2007 is dismissed with costs.

Dated and Delivered at Kitale, this 24th day of July, 2007.

FRED A. OCHIENG.

JUDGE.