



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU
Civil Suit 478 of 1994

JOHN MUREITHI GITARA & 98 OTHERS.....PLAINTIFFS

VERSUS

MILTON KAMAU & 3 OTHERS.....DEFENDANTS

RULING

John Mureithi Gitara & 98 Others being the Plaintiffs/Applicants in this application by way of Chamber Summons dated 18th July, 2003 have sought for orders that:-

Ø 568 Persons listed as 5th to 572 Defendants

in the proposed Amended Plaint annexed

to the Supporting Affidavit be added as

Defendants in this suit.

Ø That the Plaint be amended in the manner

proposed and the exhibit marked as CNN'3' in the

Supporting affidavit be deemed as duly filed

and that the Amended Summons and Plaint be

served on the new Defendants and original

Defendants.

This application is premised on the grounds stipulated on the body

of the application and more specifically expounded in the

Supporting Affidavit of one Charles Njehia Nganga one of the

Plaintiffs /Applicants.

The gist of the matters deposed to in the said affidavit and which were

further put forward as arguments by Counsel for the Plaintiff/

Applicants can be summarised as follows:-

Ø That by a ruling of this court (Rimita, J.) made on 7th June, 2000, orders of Injunction against the Defendants was discharged and the Defendants were set at liberty to carry on with its programme to subdivide the land and issue Title Deed to its members as it deems fair and just.

Ø The issuance of the said Titles have altered the Plaintiff's claim and they cannot litigate without the participation of the 568 Defendants who have been issued with Titles for the suit premises.

Ø The original suit was against the 1st and 4th Defendants who were the members of TAYANI FARMERS CO. LTD., and since the Plaintiffs Sought for orders to nullify the Survey plans by M/S Muritu & Surveyors, that would entail also the cancellation of Titles issued to the proposed Defendants and thus Counsel for the Plaintiffs urged this court to allow the amendment which is meant to bring all the matters in dispute into consideration.

On the part of the Defends this application was opposed. According

to Counsel for the Defendants the parties sought to be brought to Court through the amendment as defendants were issued with Title Deeds pursuant to an order made by this court on 7.6.2000 and the Plaintiffs tried to set aside the said orders without success all the way to the Court of Appeal culminating in the dismissal of the appeal. Thus this is a backdoor method of bringing in a fresh suit against 3rd parties who were issued with Titles.

Furthermore, this suit was filed in 1994, it took the Applicants Seven(7) years to move the court

and that is how the orders of injunction were discharged. It is now almost twelve (12) years since the suit was filed and the Plaintiffs have never moved to prosecute the matter, the application for amendment itself was filed 28 months ago and has been pending and for these reasons Counsel for the Defendant argued that the Plaintiffs/Applicants are guilty of laches and the orders of amendment would be highly prejudicial to his clients.

Two authorities were cited by Counsel for the Defendant namely:-

KASSAM -VS- BANK OF BARODA(K) LTD

2002 – 1 KLR Page 244

and

ATIENO –VS- OMORO [1985] KLR 677

In those decisions the principles and factors to be considered while deciding whether to allow an amendment or not are well articulated.

I have carefully considered the submissions by both Counsels and addressed my anxious mind to all the material that was placed before me.

It is intriguing to note that this suit was filed in July, 1994, and there is no explanation offered by the Plaintiffs why no action was taken to prosecute their claim against the named Defendants for a period of Seven (7) years. The order of injunction was lifted on 7.6.2000 when the Defendants were set at liberty to process Titles to their shareholders. It is noteworthy that it took the Plaintiffs another two years to file the present application for amendments and not to mention a further 28 months to prosecute that application for amendment.

The question that comes to mind is whether due to this inordinate delay on the part of the Plaintiffs are they making this application out of mala fide? What was the cause of delay and was the delay deliberate? The other issue that I wish to address my mind to is whether the amendment will cause some injury or prejudice to the other side.

It is clear that the Defendants whom the Plaintiffs intend to bring in this suit are third parties who were issued with Title Deeds pursuant to a Court order. The order was sought to be set aside all the way to the Court of Appeal without success. As pointed earlier the Plaintiffs had an opportunity to prosecute their claim against the Defendants before the issuance of Titles but they failed to do so. I am of the humble view that the amendment will not only alter the character of the suit but it will also prejudice the third parties who were issued with Titles and persons who have nothing to do with the controversy between the Plaintiffs and the Defendants.

Thirdly I have to address my mind as to whether the amendment sought is necessary for the purpose of determining the real questions in controversy between the parties and to avoid multiplicity of suits.

Without considering the merits of the suit the Plaintiffs have sought for declaratory orders against the Defendants, in my humble view if the legal position as sought by the Plaintiffs regarding the Defendants are determined. The issues in controversy will be desolved as the legal standing of the Defendants will be determined.

For the above reasons I am not satisfied that I should grant the orders sought by the Plaintiffs/Applicants and the application dated 18.7.200 is hereby dismissed with costs.

It is so ordered.

MARTHA KOOME

JUDGE

10TH FEBRUARY, 2006