



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 139 OF 2018

SAMUEL KINTALELE KIPAREN.....1ST PLAINTIFF
ROTIKEN OLE KIPAREN.....2ND PLAINTIFF
MOKINYO OLE KIPAREN.....3RD PLAINTIFF
JOB MALOVA ABOKI.....4TH PLAINTIFF
ABRAHAM CHOTI ARATI.....5TH PLAINTIFF
JOSIAH MACHUKI MANDIEKA.....6TH PLAINTIFF
PHELLIS MANDIEKA.....7TH PLAINTIFF
MERUKANA INVESTMENTS LIMITED.....8TH PLAINTIFF

VERSUS

TIMOTHY T. SAIYORI.....1ST DEFENDANT
SAMSON N. SAIYORI.....2ND DEFENDANT
GEORGE OLOBUTI SANYORIRI.....3RD DEFENDANT
JANE WAITHIRA MWANGI
(On behalf of 20 others purchasers).....4TH DEFENDANT
LAND REGISTRAR - NGONG.....5TH DEFENDANT
HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

What is before Court for determination is the 4th Defendant's' Notice of Motion application dated the 11th March, 2020 and the Plaintiffs' Notice of Motion application dated the 25th June, 2020. In the 4th Defendant's' application, they seek to strike out the Amended Plaintiff filed on 18th February, 2020 while in the Plaintiffs' application they seek for a variation of the directions granted on 3rd February, 2020 requiring them to file a formal application seeking leave to amend their Plaintiff and for the said Amended Plaintiff to be deemed to have been duly filed by leave of Court. The 4th Defendant's application is premised on the grounds on the face of it and the supporting affidavit of JOB M THIGA where he deposes that in clear deliberate and flagrant disregard of the orders including directions of the court, the Plaintiffs filed their Amended Plaintiff on 18th February, 2020 without the requisite leave of court. He contends that the Amended Plaintiff is scandalous, vexatious and offends the rules and laws governing pleadings. The Plaintiffs' application is based on the grounds on the face of it and the supporting affidavit of WINCATE MUTHONI MWANGI where she explains the proceedings in court on 3rd February, 2020. She confirms having inadvertently proceeded to file the Amended Plaintiff on 18th February, 2020 under the misapprehension that leave was already granted to file the same. Further, they proceeded to serve the Amended Plaintiff on 10th March, 2020 upon the 4th Defendant's only to be served with the 4th Defendant's' instant application. She insists no prejudice will be occasioned upon the 4th Defendant's if their application is granted. She

beseeches the Court not to punish the Plaintiffs' for their Counsel's mistake. She reiterates that the dispute herein involves land matters which are very emotive and striking out the Amended Plaintiff will cause injustice and hardship to them. Further, that the court has inherent powers to review its directions to meet the interest of justice. The deponent filed a replying affidavit opposing the 4th Defendant's application where she reiterated the facts as per her supporting affidavit.

The 4th Defendant's in opposing the Plaintiffs' application filed a replying affidavit sworn by ERICK MURITHI MUGIRA where he deposes that the Plaintiffs' application dated the 25th June, 2020 is misconceived, unsupported, unmeritorious, frivolous and vexatious. Further, that the Plaintiffs' Notice of Motion is fatally defective and incompetent with the alleged grounds set out being otherwise an abuse of the court's process. He proceeded to highlight the directions of the court granted on 3rd February, 2020 and insists the Plaintiffs advocates had the benefit to peruse the court file to ascertain the fact. He contends that the 4th Defendant's purchasers are ageing and shall be hard pressed to trace some of the witnesses or even find vital evidence in respect thereof as facts in issue happened several years ago. He claims the application is an afterthought and calculated to have the Plaintiffs introduce a new case and change the cause of action to the prejudice of the 4th Defendant's.

The two applications were canvassed by way of written submissions

Analysis and Determination

Upon consideration of the two Notice of Motion applications including the rivalling affidavits and submissions, the issues for determination are:

- Whether the Plaintiffs' Amended Plaintiff should be struck out.
- Whether the Court should vary the orders granted on 3rd February, 2020 and allow the Amended Plaintiff to be deemed to have been duly filed by leave of Court.
- Who should bear the costs of the two applications?

As to whether the Plaintiffs' Amended Plaintiff should be struck out or if the Court should vary the orders granted on 3rd February, 2020 and allow the Amended Plaintiff to be deemed to have been duly filed by leave of Court. The 4th Defendant has sought to strike out the Amended Plaintiff filed on 18th February, 2020 as it was filed without leave of court. The Plaintiffs' have sought to vary the orders granted on 3rd February, 2020 to allow the amended Plaintiff to be deemed to have been duly filed by lieu of court. In the 4th Defendant's submissions, she has reiterated their claim and relied on various court decisions which I also deem relevant. The Plaintiffs also filed their submissions and reiterated their claim and relied on various authorities which I deem relevant. From the Court records, the Counsel who held brief for the Plaintiffs' Counsel was directed to file a formal application seeking leave to amend Plaintiff. The Plaintiffs' Counsel claims she filed the Amended Plaintiff under the misapprehension that leave had already been granted. The grounds upon which a court may allow the amendments of pleadings are contained in Section 100 of Civil Procedure Act and Order 8 of Civil Procedure Rules.

Section 100 of the Civil Procedure Act provides that: **"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."**

Order 8, rule 5 (1) of the Civil Procedure Rules provides that: **'For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.'**

While Order 2 Rule 15 (1) of the Civil Procedure Rules, 2010 provides as follows: -

"At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that-

(b) it is scandalous, frivolous or vexatious; or

(c) it may prejudice, embarrass or delay the fair trial of the action; or

(d) it is an abuse of the process of the court."

In this instance, the Applicant seeks to strike out the amended Plaintiff for having been filed without leave of Court. The Plaintiffs' Counsel has explained that the same was filed by mistake and sought for the same to be deemed to be properly on record. The Plaintiffs' Counsel has contended that mistake to Counsel should not be visited upon the clients. I have had a chance to peruse the amended Plaintiff and opine that for determining the real questions in controversy the said amendments are necessary.

I note the issues on whether the amended Plaintiff should form part of the record is procedural. Further, the Court has discretion on whether to grant leave to amend the Plaintiff or nor. The Civil Procedure Act under sections 1A, 1B and 3A has further provided oxygen principles to aid the court in determining disputes.

While Article 159 (2) (d) of the Constitution stipulates that **' in exercising judicial authority, the courts and tribunals shall be guided by**

the following principles(d) justice shall be administered without undue regard to procedural technicalities.’

In the case of **Republic Vs. District Land Registrar, Uasin Gishu & Anor (2014) eKLR** Justice Ochieng held that ... ‘to my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d)in exercising Judicial Authority, the courts ’ in exercising judicial authority, the courts and tribunals shall be guided by the following principles(d) justice shall be administered without undue regard to procedural technicalities. ’

In the case of **RAMJI MEGJI GUDKA LTD –Vs- ALFRED MORFAT OMUNDI MICHIRA & 2 OTHERS [2005] eKLR** held as follows:

“In our view, the power to strike out pleadings must be sparingly exercised. It can only be exercised in clearest of cases. The issue of summary procedure and striking out of pleadings was given very careful consideration by this Court in DT DOBIE & COMPANY (KENYA) LTD. V. MUCHINA [1982] KLR 1 in which Madan J.A. at p. 9 said: -

“The Court ought to act very cautiously and carefully and consider all facts of the case without embarking upon a trial thereof before dismissing a case for not disclosing a reasonable cause of action or being otherwise an abuse of the process of the court. At this stage, the court ought not to deal with any merits of the case for that is a function solely reserved for the judge at the trial as the court itself is not usually fully informed so as to deal with the merits “without discovery, without oral evidence tested by cross-examination in the ordinary way.” (Sellers LJ (supra). As far as possible indeed, there should be no opinions expressed upon the application which may prejudice the fair trial of the action or make it uncomfortable or restrict the freedom of the trial judge in disposing of the case in the way he thinks right.”

It is against the foregoing while relying on article 159 (2) (d) of the Constitution, the above cited provisions from the Civil Procedure Act including Civil Procedure Rules as well as associating myself with the decisions cited above, that I decline to strike out the Amended Plaintiff. It is my considered view that the defect of filing the said Amended Plaintiff could be cured by the Court granting leave to admit the same as part of the record which I proceed to do. I opine that this suit should be set down for hearing and determined on its merits. In the circumstances, I will proceed to vary the orders granted on 3rd February, 2020 and allow the Amended Plaintiff to be deemed to have been duly filed by leave of Court. I will further grant the Defendants leave of 21 days to file and serve their respective amended Defences to the Amended Plaintiff.

It is against the foregoing that I find the 4th Defendant’s instant application unmerited and will disallow it. I find the Plaintiffs’ instant application merited and will allow it.

Costs for the two applications will be in the cause.

Dated Signed and Delivered Virtually this 18th Day of February, 2021.

CHRISTINE OCHIENG

JUDGE