



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA

MISC. CIVIL SUIT NO. 278 OF 1997

REPUBLICPROSECUTOR

VERSUS

THE COMMISSIONER OF LANDS

REGISTRAR OF TITLES, MOMBASA..... RESPONDENTS

AND

CRESENT PROPERTIES DEV. CO. LTDINTERESTED PARTY

LYDIA GICHONI

ROBERT KIPTOO

DANIEL MAHUGU

W. MWAWASI

MWANASITI N. ABDALLA APPLICANTS

R U L I N G:

This is another Ruling that has taken sometime coming and I must apologize to the parties and their Counsel.

I had perused the entire record in readiness for a Ruling on the main application only to find out that Counsel have not exhausted their submissions on that application. The position is that M/s Kinyua and Gikandi learned Counsel for the Applicants had made extensive submissions on the main application. So did learned Counsel Mr. Khanna for the Third Party and State Counsel Mr. Ng'eno for the Respondents. Before replying to those submissions however, the Applicants sought to introduce amendments to the Statement in support of the Application and a further Affidavit. The statement was amended twice before by consent of the parties but this time round it was opposed.

The Amendments were necessitated by the discovery by the Applicants that there were infact two, possibly three, letters of allotment issued to the Interested party in respect of the subject matter of the dispute and an extra part Development Plan (PDP) was drawn. It is intended to challenge this other letter

of allotment also and the PDP prepared prior thereto on the ground that the plot had already been alienated and there was therefore no power to alienate it again and to issue a Title to the Interested Party. It will also be argued that the Land Planning Act and the Government Lands Act were contravened.

Both Counsel for the Applicants submitted that these were new matters raised after the filing of the original statement and the first amended statement and were canvassed during submissions by Counsel. It had become clear that the Title was issued pursuant to a letter of allotment issued on 7.10.97 and it was necessary therefore to reflect the charges in the statement. It had also become clear that plots 428, and 429 were non-existent and that too needed clarification in the statement.

Those charges, they submitted, did not alter the main issue as to whether the Commissioner Lands was in breach of the law in allocating the plot in issue to the interested party and there is therefore no prejudice in accepting the amended statement.

The main opposition to the amendment was that the Applicants became aware of those facts more than one year earlier but had not sought the amendments. There was inordinate delay. It also appeared that the amendments were intended to answer submissions of the interested party and to repair the Applicants case after those submissions. There was no new matter and therefore Order 53 r 4 (2) does not apply. Under that rule amendment may only be made once at the beginning of the hearing and that has already been done. No amendments are allowed once the hearing commences. Support for this proposition was sought in the words used in sub rule (2) i.e. "On the hearing ..." while the words "at the hearing ..." are used in subrule (1). The former relates to the commencement of proceedings while the latter means during the hearing itself. There was no provision for amendment during the hearing or at any time other than at the beginning.

I think the point raised is novel. Although order 53 r 4(2) grants the power to the Court to allow amendment to the statement and use of further Affidavit, it does not say in no uncertain terms when this should be done. The words used as pointed out by Mr. Khanna are "On the hearing ..." which defy precision despite his submission that they mean "at the beginning". It may be pointed out that those same words are used in Rule 5 and 6. Similarly the words "at the hearing" are also used in subrule 4(3). Perhaps the Rules Committee should have used words like "At any stage of the proceedings..." or "at the commencement of the proceedings and no other time..." if it was intended to delineate the timing for taking the actions referred to. In view of the uncertainty in language, I would adopt a liberal construction and hold that a party is at liberty, at any stage of the proceedings to amend its statement subject to the qualifications made in the Rules.

It must be clear however that no amendments would be allowed if they are so substute that they would depart radically from the original case for which leave was obtained.

In this matter, the amendment sought is for pleading a specified letter of allotment the existence of which was known during the hearing of the main application. It stands to reason therefore that the statement should show that fact and indicate the relief sought in respect thereto. I do not think the introduction of the letter of Allotment into the statement after it has been referred to and canvassed in submissions of counsel would prejudice the case for the Respondents or the Interested Party. The central issue still remains as to whether the Law was complied with in issuing the Title to the Plot in issue and depriving the Applicants of it.

Having said that the criticism is justifiable that the amendment is sought long after the Applicants became aware of the facts in Affidavits filed before submissions. Seeking amendment at the tailend of the application will mean heavy penalties in costs.

Accordingly, I grant leave to the Applicants to file and use the further amended statement. The further Amended Statement annexed to the Application filed on 4.11.99 shall be deemed to have been filed and served upon payment of the requisite court filing fees within the next 7 days. The further supplementary Affidavit contains no new matters and is therefore not allowed for filing.

The following further orders shall apply as conditions for allowing the application:-

- (a) The Applicants shall jointly and severally bear all costs thrown away and the costs of the Application for amendment assessed at Shs.10,000/- within 14 days.
- (b) The main application shall be set down for final submissions within 14 days of commencement of the new Court Term.
- (c) The Respondents and the interested party shall be at liberty to respond to further submissions made in reply by the Applicants.
- (d) In default of payment of the costs ordered herein within the time set, the application shall stand dismissed with costs.

Interim orders are in the meantime extended.

Dated at Mombasa this 24th day of January, 2001.

P.N. WAKI

J U D G E

24/1/01:

Waki J

Okongo for interested party

Omondi for Gikandi & Kinyua for Applicants

Mrs. Mwangi for Republic

Ruling delivered dated and signed in chambers.

P.N. Waki, J