



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT AT BUSIA

ELC CASE NO. 76 OF 2014

CHRISTOPHER JAKONYA ASIKA.....1ST PLAINTIFF

BENJAMIN ODERA ASIKA.....2ND PLAINTIFF

VERSUS

CHARLES OPONDO OYENGA.....1ST DEFENDANT

MAGDALINA OPONDO.....2ND DEFENDANT

(An appeal from the ruling of the Deputy Registrar at Busia delivered on 23/9/2020 by Hon. P.Y. Kulecho)

J U D G E M E N T

1. This appeal arises from the decision of Hon. Kulecho Deputy Registrar rendered on 23rd September 2020 in this suit. The appellants raised the following grounds in their memo of appeal dated 29th September 2020;

- 1. The learned Deputy Registrar erred in law and misapprehended the intention, meaning and import of Order 1 Rule 10 (2) and (4) of the Civil Procedure Rules;*
- 2. The learned Deputy Registrar erred in law in fettering her discretion on an application for amendment of pleadings;*
- 3. The learned Deputy Registrar erred in law and fact in failing to find that the Application dated 10/3/2020 was merited;*
- 4. The learned Deputy Registrar erred in law and fact in dismissing the application dated 10/3/2020 on extraneous grounds.*

2. They urged the court to find merit in their appeal and enter judgment in their favour for orders that the Deputy Registrar's decision/order of 23/9/2020 be set aside and in its place be made an order allowing the Appellants' application dated 10/3/2020.

3. The appeal proceeded by way of written submissions with the Appellants filing their submissions on the 14th of January, 2021. They submitted that the crux of this suit revolves around the ownership and occupation of MARACHI/ESIKOMA/1309 which land is contested between two families: that of **Charles Omolo Asika** (deceased) and that of **Lawrence Oyenga** (deceased). They submit further that the Plaintiffs, the proposed 3rd and 4th Plaintiffs, the defendant and the proposed 2nd, 3rd and 4th Defendants all lay claim to the Suit Property. They continued further that the Respondents did not demonstrate that they stood to suffer any prejudice if the orders sought were granted and that the issues raised in their Replying Affidavit can be well canvassed through production and interrogation of evidence from all the concerned parties.

4. While relying on Order 8 Rule 3 of the Civil Procedure Rules, which provides for the amendment of proceedings at any stage of the proceedings, the Appellants urged this Court to set aside the Deputy Registrar's ruling of 23rd September, 2020 and in its place allow their application dated 10th March, 2020.

5. The Appellants supported their submissions with the following case law: **Bertha Wanjiru Mwori & Another vs. Samwel Njoroge Mwangi & 4 others (2020) eKLR**, **Eric Peter Wanjau vs. Margaret Kasera & 5 others (2015) eKLR** where the applications were for enjoining interested parties. They further relied on the case of **Printing Industries Limited & Another v. Bank of Baroda (2017) eKLR** where the application for amendment of the defence was allowed after three witnesses had testified for the Plaintiff. The cases of **Stephen Oloo Afwande vs. John Francis Muyodi & Another (2020) eKLR** and **Kenya Medical Laboratory Technicians & Technologists Board & 6 others vs. Attorney General & 4 Others (2017) eKLR** were also cited upon by the Appellants.

6. The Respondents filed their submissions in opposition to the appeal on the 1st of February, 2021. They opposed the appeal on the following grounds:

a. *It has been emphasized by the Appellants that a party who seeks to be enjoined to a case must establish that he has a high interest in the case and must demonstrate that the orders sought in the main suit would directly and legally affect him;*

b. *That the Plaintiffs only seek orders for trespass and eviction against the CHARLES OPONDO OYENGA and for him to be restrained by an injunction once evicted in respect of suit parcel no. 1309;*

c. *That the intended Plaintiffs do not own Suit Parcel 1309;*

d. *That the intended Defendants do not reside on Suit Parcel 1309;*

e. *That new causes of action for declaration of trusts over parcel No. 1088 which no longer exists and new parcel 1310 owned by GEOFREY OGUDE ASIKA and 1311 owned by ASIKA OMOLO CHARLES (deceased) and whose estate is yet to be succeeded and cannot thus defend himself;*

f. *That new causes of action on the ownership of parcels Nos, 1310 and 1311 allegedly invaded by the newly proposed 2nd, 3rd and 4th Defendants and the need for their eviction or otherwise by the respective owners of parcel 1310 and 1311.*

7. The Respondents urged this Court to dismiss the appeal and uphold the Deputy Registrar's ruling as the Deputy Registrar properly refused the application on account of delay and because it was bound to cause prejudice to the Respondents in a way that can most likely not be compensated by an award of costs.

9. The Respondents relied on the following case law; ***Kyalo vs. Bayusuf Brothers Ltd (1983) KLR***, which held that amendments should only be allowed if brought within reasonable time and amendments containing allegations inconsistent with the pleadings cannot be allowed. They also cited the cases of ***Nakuru HCCA No. 6 of 2003 Samson Emuru vs. Olsuswa Farm Ltd*** and ***Busia HCCA No. 24 of 2002 Fred Nyongesa Osolo vs. Prof Agola Auma Osolo*** whose facts and decisions did not relate to the issue of amendment of pleadings.

9. I have considered the pleadings in respect to the application dated 10th March 2020 the subject of this appeal and submissions rendered. The questions that fall for my consideration is whether or not the Deputy Registrar erred in refusing the application for joinder of parties. The impugned application was brought under order 1 rule 10(2) and order 8 rule 3 of the Civil Procedure Rules.

10. Order 1 Rule 10 (2) of the Civil Procedure Rules 2010 provides that,

'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 be enable the Court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.'

11. The Deputy Registrar having considered the issues raised before her observed thus *"Regarding the issue of amendment of pleadings, the court finds that the defendant having participated in this matter since 2010 when the same was filed, even participated in the trial when the same partially proceeded cannot seek to amend their pleadings this late in the day as the same would only further delay an already old matter, the effect of allowing the amendment might necessitate the case starting de novo when the same was about to be concluded. The application for amendment is denied on the basis that the same would prejudice the plaintiffs. Further the defendant seeks to amend the pleadings by joining other parties to the suit as additional plaintiffs and defendants"*.

12. The Deputy Registrar's observation / findings in regard to the delay in bringing this application at the stage of the trial was well in order. However, the drafters of the Rules of Civil Procedure must have been aware of such circumstances occurring yet they still drafted the rule making room for amendment at any stage of the proceedings. Therefore the court can always allow for amendment as long as the reason for the delay is explained. One of the applicants before the Deputy Registrar was not a party to the existing proceedings. He should not have been made to suffer the fate of the non-diligence of the defendant without sufficient reasons being given. Secondly, the plaintiff had not closed his case. It was not pleaded whether it is the defendant who made this matter to delay in its prosecution. The Deputy Registrar thus did not exercise her discretion judicially on the cause of delay and in the result erred in denying the applicants the leave sought to amend.

13. The second item picked by the Deputy Registrar is at page 4 of her ruling where she stated thus *"whereas Order 1 rule 10 allows the court to join a plaintiff to a suit where satisfied that the suit has been instituted through a bonafide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit, the same can only be done at the instance of the court, it is not envisaged that a defendant can actually move the court to join a party as a plaintiff to a suit. The court cannot compel a party to agitate for their rights against their will, especially since going to court always has cost implications. Why compel a party to sue another when they are not at all interested, at the risk of condemning them to pay costs should they lose?"*

14. In prayer (a) of the impugned application, the Appellants urged the court to join some two persons as 3rd and 4th plaintiffs. When the issue came for argument/hearing, the Respondents in the application (and this appeal), deposed thus in their replying affidavit,

"9. (ii) GODFREY OGUDE ASIKA is only a witness to the plaintiff's case and is the owner of MARACHI/ESIKOMA/1310 which

is not sued upon by the case herein.

(iii) CHARLES OMOLLO ASIKA is the plaintiff's deceased father and the owner of MARACHI/ESIKOMA/1311 which was never sued upon. As per the expired limited grant exhibited by the defendant/applicant, the said deceased's estate lacks a legal representative in order to be completely and properly enjoined to the case herein hence the subject application is also premature".

15.. If the proposed parties are not interested in pursuing a claim over the land parcel No. 1309 which is the subject matter herein then no party including the court shall forcibly bring them on board. Secondly Christopher Jakoya Asika sought to be joined as a 4th plaintiff is already a plaintiff in this matter. The applicants can thus bring a claim both in his personal capacity and as administrator of estate of Charles Omollo – deceased if they so intend. In the event the Appellants had any claim against proposed plaintiffs, they can always sue through a counter-claim and without suffering any prejudice if not joined as plaintiffs. Therefore I find no error committed by the deputy registrar in reaching this finding. I will not disturb it.

16. In light of the analysis herein above, I conclude that this appeal partially succeeds. Consequently, I set aside the Deputy Registrar's order dismissing the application dated 10/3/2020 in its entirety and substitute it with **an order allowing the said application in terms of prayer 2 enjoining George Otako Oyenga, Charles Otako & Francis Otako as 2nd, 3rd and 4th defendants in this suit respectively. Prayer (3) is allowed that leave is granted to amend the plaint and defence and counter-claim to reflect the changes. Each party to meet their respective costs both of this appeal and the application dated 10/3/2020. These shall be the orders of the court.**

Dated, signed and delivered at BUSIA this 29th day of April 2021.

A. OMOLLO

JUDGE