



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MOMBASA**

**ELC NO. 51 OF 2019**

**LYDIA KAGUNA JAPETH.....PLAINTIFF**

**VERSUS**

**HOMELAND EXPRESS LIMITED.....1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR MOMBASA C/O. A.G.....2<sup>ND</sup> DEFENDANT**

**JOSEPHINE KATANA.....3<sup>RD</sup> DEFENDANT**

**LEONARD SHIMAKA.....4<sup>TH</sup> DEFENDANT**

**HASHIM GOT SAT.....5<sup>TH</sup> DEFENDANT**

**RULING**

**I. Preliminaries**

1. Before this Honorable Court for determination is the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant. It is brought under the dint of the provisions of Sections 1A, 1B, and 3A of the Civil Procedure Act Cap 21, Order 2 Rule 6 (2), Rule 10 Order 8 Rule 3(2), 3 (5) and 5 (1) and Order 51 Rule 1 of the Civil Procedure Rules 2010.

**II. The Plaintiff's/Applicant's Case**

2. The Plaintiff/Applicant seeks for the following orders:-

***(a) That the Plaintiff/Applicant be granted leave to further amend the Amended Plaintiff dated 23<sup>rd</sup> January, 2019 as set out in the Draft Amended Plaintiff annexed herein.***

***(b) That the Draft Amended Plaintiff be deemed as duly filed.***

***(c) That the Costs of this application be provided for.***

3. The Plaintiff/Applicant application is premised on the facts, grounds testimony and averments of the 13 Paragraphed Supporting Affidavit of LYDIA KAGUNA JAPHETH dated and sworn on 4<sup>th</sup> February, 2022 and filed on the even date and the one annexure marked as "LKJ-1" annexed thereto. The Deponent avers that she instructed her Advocates on record to amend and file an Amended Plaintiff dated 23<sup>rd</sup> January, 2019 as the intended amendments would bring to light the actual culprits on the scheme to divest her of her proprietary rights in respect of the suit property.

4. She deposed that she sought to enjoin the relevant parties who were not initially enjoined in the matter to further shed light as to the roles each played resulting in the registration of two (2) parallel titles in respect to the suit property. She held that it was also important to include the particulars of fraud in the pleadings against the parties seeking to be enjoined. She urged court to allow the prayers sought and have the Draft Amended Plaintiff to be deemed as duly filed.

5. From the very onset on 29<sup>th</sup> September, 2021 by consent 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 5<sup>th</sup> Defendants/Respondents herein agreed that the application

for amendment and joinder by the Plaintiff 4<sup>th</sup> February, 2022 be allowed and the same was therefore allowed accordingly. On 17<sup>th</sup> February, 2022 the 4<sup>th</sup> Defendant/Respondent indicated they would be opposing the Notice of Motion application by the Plaintiff/Applicant and sought leave to file a Replying Affidavit to that effect.

### **III. The Replying Affidavit by the 4<sup>th</sup> Defendant/Respondent**

6. On 16<sup>th</sup> February, 2022 the Advocates for the 4<sup>th</sup> Defendant/Respondent the Law firm of Messrs. Marende Necheza and Company Advocates filed a 8 Paragraphed Replying Affidavit sworn by SHIMAKA N. LEONARD dated 16<sup>th</sup> February, 2022. He deponed that he was an Advocate of High Court and the 4<sup>th</sup> Defendant/Respondent herein therefore competent to swear this affidavit. He held that the application was an abuse of court process and a waste of court's time.

7. He averred that the suit was filed in the year 2019 and the facts sought to be introduced by the Plaintiff/Applicant were already within her knowledge by then. Therefore he argued the amendment was an afterthought meant to delay the hearing and determination of this matter. He stressed that the Plaintiff/Applicant was aware of the 6<sup>th</sup> and 7<sup>th</sup> Defendants/Respondents even at the time of filing this suit. He urged court to dismiss the Notice of Motion application with costs.

### **IV. Analysis and Determination.**

8. I have read the pleadings by the Plaintiff/Applicant and the 4<sup>th</sup> Defendant herein and considered the relevant provisions of the law in this matter founded on the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant for amendment of Plaintiff and joinder of parties as the 6<sup>th</sup> and 7<sup>th</sup> Defendants/Respondent herein.

In order to arrive at an informed, just and fair decision, I have framed three (3) the following issues for determination

- a) *Whether the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant meets the threshold of joinder of parties as founded under Order 1 Rule 10 of the Civil Procedure Rules 2010.*
- b) *Whether the orders sought from the Notice of Motion Application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant for amendment of Plaintiff dated 23<sup>rd</sup> January, 2019 should be granted as per Order 8 Rule 3 of the Civil Procedure Rules 2010.*
- c) *Who will bear the Costs of the Notice of Motion application dated 4<sup>th</sup> February, 2022.*

#### **ISSUE No. a). Whether the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant meets the threshold of joinder of parties as founded under Order 1 Rule 10 of the Civil Procedure Rules 2010.**

Under this sub-heading, the Honorable Court wishes to look at the concept and legal substratum of joinder of parties. This concept is solely governed by the provisions of Order 1 Rules 1 to 25 of Civil Procedure Rules, 2010. The Black Law Dictionary 9<sup>th</sup> Edition defines "**Interested Party**" as a party who has a recognizable stake and therefore a standing in a matter"

Similarly, under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedures Rules 2013 (hereinafter referred to as "The Mutunga Rules") provides it thus:-

**".....as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not directly involved in the litigation ....One who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless himself or she herself appears in the proceedings and champions his or her cause ....."**

**Also refer to the case of HCCC. Civil Suit No. 115 of 2019 - John Harun Mwau – Versus - Simeone Haysom & 2 Others, AG (2021) eKLR.**

9. It is trite law that on the decision for joinder, court has discretionally power to do so. Which means it should be applied capriciously and judicially without any biases or abuse of the power. What to be considered for joinder are the following facts. Firstly, it is based on the principles of natural Justice – not to be condemned unheard and accorded an opportunity to be heard (**Principle of audi alteram partem**).

Secondly, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions alleged to exist – whether jointly or severally or in the alternative or in the alternative where of such persons brought separate suits any common question of law of fact would arise – Order 7 Rule 9 of Civil Procedure Rules, 2010.

Suffice to say, a court even on its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore joinder of parties is permitted by law and it can be done at any stage of the proceedings.

10. But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in

joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (*See Lucy Nangari Ngigi & 128 Others –Versus- National Bank of Kenya Limited & Another (2015) eKLR*)

11. The above illustrated legal litimus test on joinder is what I shall apply to the instant case. In consideration and application of all the facts stated here, this Court strongly holds that although the Plaintiff/Applicant has not made a strong demonstration that the Proposed Defendants to be joined in the instant case, in that its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

12. While arriving at this rather difficult decision, the Court is persuaded by the fact that the Plaintiff/Applicant has emphatically continued though, and concurs with the Learned Counsel for the Proposed Defendants, without any empirical documentary evidence such as a sale agreement, Transfer Forms, official search or Mutation Form referring to her in his pleadings to wit *‘that she has bought several parcels of land and was in the process of construction on it....’* the Honorable Court, **‘Suo Moto’** and by invoking the inherent powers (the Overriding principles/Oxygen rule) of this Court vested on it under the provisions of Sections 3 (1) and 13 (1) of the Environment and Land Act, No. 9 of 2011; Section 150 of the Land Act, No. 6 of 2012 and Section 101 of the Land Registration Act, No. 3 of 2012 and Article 159 (1) and (2) of the Constitution of Kenya feels it imperative to have one Mr. Katana Vuto Nyawa and Mr. Mweno Mwandeyo Vuto joined as the 6<sup>th</sup> and 7<sup>th</sup> Defendants respectively. By so doing, they will be necessary for these issues of evidence and facts pertaining to the suit will be critically tackled during a full trial and determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. In any case, this is still a fresh matter and therefore taking that an application for joinder may be considered at any stage of the proceedings, it may not cause any delay and costs to the litigants should this application be considered. For these reasons, the limb on joinder of the afore mentioned Proposed Defendants as the 6<sup>th</sup> and 7<sup>th</sup> Defendants herein to the suit succeeds pursuant to the inherent powers vested to this court.

**ISSUE NO. B Whether the orders sought from the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant for amendment of Plaint dated 23<sup>rd</sup> January, 2019 should be granted as per Order 8 Rule 3 of the Civil Procedure Rules 2010.**

13. The legal principles on amendment of pleadings are provided for under Order 8 Rules 1,2 and 3 of the Civil Procedure Rules, 2010. Before the close of pleadings, the leave of Court is not required as opposed to when there has been closure of pleadings. The principles upon which a Court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases. These includes the case of **‘Eastern Bakery – Versus – Castelino (1958) E.A 461 (U) at Page 462 and Civil case No. 7 of 2017, St. Patrick’s Hills School Limited - Versus - Bank of Africa Kenya Limited’ eKLR (2018)** where courts held, *inter alia*:

***“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs....”***

14. The same was later on buttressed by **Bramwell, LJ in “Tildesley – Versus – Harper” (1878), 10 Ch. D. at Page 296 stated as under:**

***“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”***

It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final Judgement is delivered. Pursuant to the above position, this Court agrees with the Plaintiff/Applicant and it concurrently follows, the power to amend pleadings is discretionary. In that case the court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice. The Court has already decided and granted leave to join the two (2) Proposed Defendants in the suit hence an amendment of the Plaint is inevitably vital and of cardinal importance for the purposes of determining the real question in controversy between the parties.

15. In any case as stated by the Plaintiff/Applicant, the instant Plaintiff’s suit and the relief sought against the Defendants expressly pleaded in the Plaint would directly and adversely affect the proposed two Defendants. The Court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3(5) of the Civil Procedure Rules, 2010. Besides, the Court will allow the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants corresponding leave to amend their Defences and the opportunity to respond to the amendment if they so wished so to do. Thus, under this sub – heading the application for the amendment of the Plaint by the Plaintiff/Applicant succeeds.

**ISSUE NO. c Who will meet the costs of the Notice of Motion Application dated 4<sup>th</sup> February, 2022**

16. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 grants court discretion on costs. It holds that costs follow the events. In this case, as the Court finds that the 4<sup>th</sup> Defendant/Applicant has failed in opposing this application the costs will be awarded to the Plaintiff/Respondents accordingly.

**IV. Conclusion and Disposition**

17. Based on the detailed analysis above stated, this Honorable Court finds that the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant is meritorious and the same is allowed with costs under the following guidelines.

a) **THAT** the Notice of Motion application dated 4<sup>th</sup> February, 2022 by the Plaintiff/Applicant be and is hereby allowed with costs.

b) **THAT** Mr. Katana Vuto Nyawa and Mr. Mwero Mwandeyo Vuto respectively be and are hereby joined as the 6<sup>th</sup> and 7<sup>th</sup> Defendants/ into this suit henceforth.

c) **THAT** the Plaintiff/Applicant herein be and is hereby granted leave to file and serve an Amended Plaint afresh upon all parties – 1<sup>st</sup> to the 7<sup>th</sup> Defendants/Respondents herein.

d) **THAT** all the 1<sup>st</sup> to 7<sup>th</sup> Defendants herein to be guided by the consent and directions of this court made on 29<sup>th</sup> September, 2021.

e) **THAT** the 1<sup>st</sup> and 7<sup>th</sup> Defendants herein granted 14 days leave to fully adhere with the case management requirements under the Provisions of Order 11 of the Civil Procedure Rules 2010 and file amended defence. The Plaintiff is granted 14 days to file Supplementary List of documents and witnesses.

f) **THAT** for expediency sake this matter to have been fixed and/or disposed off within the next ninety (90) days from the date of this Ruling. There shall be a Pre-Trial conference session on 26<sup>th</sup> April, 2022 and for fixing of a hearing date thereof.

**RULING DELIVERED, DATED AND SIGNED IN OPEN COURT THIS 7<sup>TH</sup> DAY OF MARCH 2022.**

**HON. JUSTICE L.L. NAIKUNI (JUDGE)**

**(ELC- MOMBASA)**

**In the presence of:-**

*M/s. Yumna – the Court Assistant*

*Mr. Mutugi holding brief for Mr. Kihiko Advocate for the Plaintiff/Applicant*

*M/s. Monari holding brief for Mr. Mogaka Advocates for the 1<sup>st</sup> Defendant*

*Nonappearance for the 2<sup>nd</sup> Defendant*

*Nonappearance for the 3<sup>rd</sup> Defendant*

*Mr. Ondieki for the 4<sup>th</sup> Defendant/Respondent*

*Nonappearance for the 5<sup>th</sup> Defendant*

*Nonappearance for the 6<sup>th</sup> Defendant*

*Nonappearance for the 7<sup>th</sup> Defendant*