Cheruiyot v Siror (Environment & Land Case 117 of 2016)
[2022] KEELC 2367 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2367 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 117 OF 2016

FO NYAGAKA, J

JULY 7, 2022

BETWEEN

JEREMIAH CHERUIYOT ..... PLAINTIFF

AND

MICHAEL BETT SIROR ..... DEFENDANT

RULING

1. On June 4, 2019, the plaintiff filed an Application by way of Motion on Notice dated May 24, 2019. He brought it pursuant to section 3 and 3A of the *Civil Procedure Act*, Order 8 Rules 3(1), 5(1), 7(1) and (2) and Order 51 Rules 1, 4, 7, 10, 13 seeking the following prayers:

    1. ...spent

    2. ...spent

    3. ...spent

    4. Thattemporary orders of prohibitory injunction be and are hereby issued restraining the Defendant, including the proposed Defendants, their agents, employees and/or servants from evicting, disposing, selling, transferring, charging, leasing and/or whatsoever interfering with the Plaintiff's possession and utilization of the property known as Land Reference Number 6614/6 and/or the resultants subdivisions to wit Land Reference Numbers 6614/51, 6614/52, 6614/53, 6614/54, 6614/55, 6614/56, 6614/57, 6614/58, 6614/59, 6614/60, 6614/61, 6614/62, 6614/63, 6614/64, 6614/65, 6614/66 and/or 6614/67 situated in Trans-Nzoia County pending the hearing and determination of the suit.

    5. Thatthis Honorable court hereby grants the Applicant/Plaintiff leave to amend the Plaint and also enjoin the Betham Investment Company Limited, Director of Survey, Chief Land Registrar, Land Registrar-Trans Nzoia and Attorney General.

6. Thatthe Amended Plaint be filed within the next 14 days of granting this order.

That the costs be provided for.

2. The Application was premised on eleven (11) grounds on its face and further supported by the plaintiff's affidavit sworn on May 24, 2019. In condensing them I note that the Application stated that the suit was filed on August 8, 2016wherein he sought the orders prayed for in the Plaint dated July 28, 2016.

3. Amongst the reliefs the plaintiff sought in the Plaint were a declaration that he is the legal owner of L.R. No. 6614/6 originally measuring thirty-six (37) acres, out of which one (1) acre was surrendered for public utility purposes. He asserted that he acquired the same from the Defendant pursuant to the execution of a sale agreement that was followed by the issuance of consents, resolutions and other documents. He annexed and marked copies of all these documents as JC (i) - (viii). He pleaded that the Defendant had at all times disputed the acquisition of fifteen (15) acres out of the property which was paid for following the advancement of a loan facility from Agricultural Development Corporation. Annexed and marked JC2 (i) and (ii) were copies of the loan advertisement and receipts.

4. The plaintiff maintained that upon acquisition he took possession of the parcel in 1984 and continues to reside on the thirty-six (36) acres. He averred that he had since erected a farmhouse and other structures. He also carried out farming thereon. The Plaintiff deposed that in spite of several forums directing the defendant to transfer the property to the benefit of the plaintiff, the defendant has failed to do so. To him, the defendant wasamongst the people listed in the consent form from the Attorney General. He annexed the defendant's Plaint emanating from HCCC No. 3269 of 1991 and was marked JC3.

5. He listed 360 people including himself, as having acquired interest in the suit property from the defendant. The list was marked JC4. He maintained that in spite of this, and during the pendency of the suit, the defendant caused seventeen (17) subdivisions on the suit land namely L.R. No. 6614/6 issuing titles for L.R. Nos. 6614/51 - 6614/67. He annexed the Certificates of Title marked JC5 (i-xvii).

6. Out of the subdivisions, L.R. No. 6614/51 was transferred to Betham Investment Company Limited, the proposed 2nd defendant, which to his best knowledge, is a family owned company. The directors of the company, he deposed, were parents and children of the defendant. The company's official search and Certificate of Title were annexed and marked JC7 and JC6 respectively.

7. The plaintiff continued that in Kitale ELC Petition No. 5 of 2017, the said proposed 2nd defendant applied to be enjoined in the suit on the strength of its proprietorship over L.R. No. 6614/51. The Plaintiff challenged the subdivisions and in the alternative, sought an order that the said thirty six (36) acres be reverted back to him.

8. In light of all the above, the Application sought to amend the Plaint to enjoin the parties as delineated in his prayers and include the titles birthed from the subdivision. The Application further demystified the mandate of the proposeddefendants as the reason for their enjoinment. In enjoining the Chief Land Registrar and the Land Registrar Trans Nzoia County, he stated that the said offices issued correspondence on the suit land. He annexed to this deposition, letters from the said offices marked JC8 and JC9 respectively. He maintained that the proposed amendments would assist the court decide the matter on full merits effectually. The draft Amended Plaint was annexed and marked JC10.

9. In the end, the Plaintiff stated that the orders sought would occasion no prejudice on the part of the Defendant. On the prayer for injunction, he was apprehensive that if the orders sought were not

granted, further dispositions on the property would take place. It was thus in the interest of justice that the Application be granted as prayed.

The Response

10. Thedefendant opposed the Application in its prolix replying affidavit filed on July 21, 2019but undated. He deposed that theplaintiff's Application was based on fabrications and concealment of material facts as the subdivisions were done to his knowledge and way before the suit was commenced. He annexed and marked MBS-1A, list of documents (sic) in the present suit. He maintained that either way, this fact was disclosed in this annexure that formed part of his defence in the main suit.

11. He cited that the Application for amendment was filed mala fides as all the proprietors to the subdivision were not enjoined yet adverse orders may be granted against them. As a consequence of this, the same would be prejudicial to innocent third parties in good faith without notice. Furthermore, no statutory notices were issued to the Government and its departments as required. He contended that since the Application was presented three (3) years after subdivision of the suit land, the same was time barred.

12. In addition to this, he posited, since the injunction was sought against the subdivision, the same could not issue. His argument was that the injunctive orders were not anchored on the main suit. His view was that the Court can reverse any dealings if found unlawful hence negating the Plaintiff's averments that the final orders would be academic.

13. It was also deposed that the Application sought to re-litigate on matters that had been previously determined. For instance, the respondent cited HCCC No. 2028 of 1988, CMCC No. 6 of 1982, Kitale HCCC No. 136 of 2000 and Kitale ELC Petition No. 5 of 2017. He annexed copies of the decree in Kitale HCCC No. 136 of 2000 and the petition, response and ruling in Kitale Petition No. 5 of 2017 and were marked MBS-1B.

14. In Kitale HCCC No. 136 of 2000 (O.S), the court directed that theplaintiff be evicted from the suit land as he lacked proprietary interest. Furthermore, the defendant was entitled to peaceful occupation and use of the suit land.

15. The defendant did not deny that he entered into a sale agreement with the Plaintiff on March 1, 1976. He allowed him to stay on the suit land upon execution of the agreement. However, the Plaintiff failed to pay the balance owing by March 30, 1977 thus rendering the contract void. It is at this juncture that the Plaintiff engaged in fraudulent activities to deprive the defendant of the suit land by using his partner, one Stephen Sugut, who had close dealings with persons in high offices. According to him, as a fact, the plaintiff attempted to obtain orders conferring interest over the suit land without a valid and lawful Land Control Board consent. For this proposition, he annexed MBS2 (a) and (b) consents made in 1997 and MBS 5 (a) and (b), applications for consent forged by the plaintiff.

16. The defendant further annexed several letters of complaints to several authorities on the forgery perpetuated by the Plaintiff. They were marked MBS 3 (a) - (d). He further wrote a letter in 1978, MBS6 protesting the sale of his land involving the Agricultural Finance Corporation (AFC) branch manager, Kitale.

17. Still on the fraudulent activities, the Defendant further annexed copies of receipt and letter by AFC dated 18/10/1978 cancelling an auction of his property upon payment thereof. They were marked MBS 4 (a) and (b). He accused the Plaintiff of impersonating as the Defendant so as to divert AFC correspondence sent to the Defendant, colluding with AFC officials to foreclose the Defendant's property and withholding information so that he could gain benefit on the slated public auction. The

said auction was subsequently cancelled on the Defendant's remittance of the balance of Kshs. 6,200/=. He denied ever being assisted to clear the loan and accused the Plaintiff of forging JC2 (ii).

18. He also annexed four (4) letters dated December 5, 2018and December 9, 2018marked MBS8 (a) - (e) respectively, on the Plaintiff's fraudulent activities.

19. It was deposed that a cancellation of some 360 title deeds by the Principal Secretary Lands is what prompted the Plaintiff to file the present suit and obtain orders from the back door. He was thus estopped from claiming that he had just discovered that the suit land had been subdivided. He produced as annexture MBS7 (a), (b) and (c) copies of letters datedOctober 15, 2018, November 13, 2018and May 23, 2019respectively for this presupposition.

20. Regarding annexture MBS9, the Defendant deposed that the letter dated September 15, 1979informed that investigations be stopped as the matters complained of had been heard and determined by a competent court. He accused the plaintiff of flip-flopping on account of his own letter marked MBS10 to the branch manager AFC Kitale.

21. Thereafter, the plaintiff, on several occasions requested the AFC to release the original title to him without the defendant's knowledge. The letters, either personally written by him, or instructing his advocates, were dated September 16, 1996, September 27, 1996, September 28, 1996were marked MBS11 (c), MBS11 (a), MBS11 (b) respectively.

22. He added that the inclusion of list of 360 persons to the suit was preposterous and do not have any relevance to the present suit calculated to subvert the Court's attention. The Defendant maintained that the averments in the supporting Affidavit were untrue and unsubstantiated. He had further not demonstrated the reasons for enjoinment of the proposed parties. He urged this court to dismiss the Application with costs.

Supplementary Affidavit

23. The plaintiff supplemented his Application by way of an affidavit sworn on January 28, 2022. He recapitulated the averments in his supporting affidavit. On the criminal allegations, he maintained that he had never been incarcerated of any criminal offence touching on the suit land. On the list of 360 persons, he maintained that he did not seek a prayer to enjoin them. As a result, the defendant's averments were unwarranted. He accused thedefendant of perjury and misrepresentation of facts. He left it to the court to determine the Application as the same fell within his rights.

Submissions

24. Parties agreed to canvass the Application by way of written submissions. However, as at the time of writing this ruling, I was only in receipt of the plaintiffs submissions dated January 28, 2022and filed on March 8, 2022. Be that as it may, since submissions do not form evidence or facts to be relied on in determining an issue before thecourt, as was stated by the Court of Appeal in *Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another* [2014] eKLR, this Court shall, nevertheless, consider the Application on its merits. The Court of Appeal stated as "Submissions cannot take the place of evidence. The 1st respondent had failed to prove his claim by evidence. What appeared in submissions could not come to his aid. Such a course only militates against the law and we are unable to countenance it. Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented."

25. The Plaintiff submitted that he met the threshold for the grant of injunction having met the three (3) fold threshold. Firstly, he stated that he had demonstrated a prima facie case since his rights to acquisition of property are safeguarded in article 40 of the *Constitution* fortifying the copies of agreements, consents and resolutions annexed. Secondly, on whether he stood to suffer irreparable harm, the Plaintiff submitted in the affirmative. He submitted that the suit land was subdivided during the pendency of this suit with a view to defeating the ends of justice. Lastly, on whether the balance of convenience titled to the favor of the plaintiff, it was submitted that the illegal subdivision and issuance of titles will render the court's award a mere academic exercise. As a result, the question was answered in the affirmative.

26. On whether the order for amendment should be allowed, the plaintiff relied on Order 8 Rule 5 (1) of the *Civil Procedure Rules* for the proposition that the Court had wide discretionary powers. That the said amendment was necessary and did not occasion injustice or prejudice to any party. He maintained that it was necessary for the purpose of determining the real issue in controversy.

Analysis and Determination

27. I have considered the Application and the affidavits both in support and opposition thereto. I have also considered the law and the submissions on record. The following issues arise for determination:

    (a) Whether the plaintiff has satisfied the requirements for grant of injunction relief?

28. It is worthy of note that in his Application, the plaintiff failed to invoke the relevant provisions of the law underpinning this prayer. Whilst courts are mandated to inject the oxygen principle and decide an Application on its merit, I will stand to caution parties against this practice of failure to cite the proper provisions. They were not enacted in vain. After all, he who alleges must prove. Whether the Plaintiff advertently or deliberately omitted, it is for good purpose and order that a party counterchecks any pleadings presented to court for hearing and determination and confirms that they are in order. That alone will go a long way in expeditiously disposing of matters in court.

29. As held in *Giella v Cassman Brown* (1973) EA 358, a court must be satisfied that the following requirements have been met in order to grant injunctive relief:

    i. The applicant has a prima facie case with probability of success;

    ii. The applicant will suffer irreparable loss or damage that will not be adequately compensated by an award of damages;

    iii. If in doubt on the above two (2) requirements, the court will decide the Application on the balance of convenience.

30. I will now proceed to determine the Application for injunction under those heads:

    i. Whether the Applicant has a prima facie case with probability of success

31. The court in defined *prima facie* case in *Mrao v First American Bank of Kenya Limited & 2 others* [2003] KLR 125 as follows:

> " ..... in a civil Application includes but is not confined to a genuine and arguable case. It is a case which, on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter."

32. In the present case, the plaintiff submitted that he had established a prima facie case which was objected to by thedefendant. Turning to the arguments made by the plaintiff, he maintains that he is the legal proprietor of the suit land. However, theplaintiff only furnished several consents and a sale agreement indicating that the defendant refused to transfer the said suit land to him. In essence then, he is not the legal owner as at the instant time. In his response, the defendant stated that while indeed a contract created their relationship, theplaintiff thereafter breached the contractual terms rendering the contract void. The plaintiff did not dispute these facts pitting the defendant's averments on this issue as more probable and pointing to the fact of truthfulness. He has not therefore aptly demonstrated that he is the proprietor of the suit land to my satisfaction.

33. The crux of the Application lies in the plaintiff's assertions that he was not aware that the suit land was subdivided addition further that the same was conducted during the pendency of this suit against the lis pendens aphorism. The defendant denies these claims, accusing the plaintiff of misrepresenting facts. I have carefully scrutinized the annexures to the affidavits. I have paid particular attention to the certificates of title annexed by the Plaintiff and marked JC5 (i-xvii). I take note that the said certificates of titles were rolled out onFebruary 16, 2016. Thereafter, the present suit was filed on August 8, 2016. So that it is clear beyond peradventure that, as rightly put by the Defendant, subdivision took place six (6) months before the present suit was filed. Additionally, in his witness statement (erroneously named list of documents) marked MBS1A, this fact was disclosed by the defendant.

34. If the plaintiff had indeed discovered that the subdivision took place as at the time the Application was being filed, it behooved on him to evince the steps taken by him on this discovery. It would have been more ascertainable if theplaintiff took positive steps in supporting this argument. One wonders why theplaintiff failed, refused and/or neglected to take an even rudimentary step as to conduct an official search on the date of discovery and annex the official search results.

35. In his supplementary affidavit, theplaintiff failed to dispute the facts espoused by the defendant with cogent evidence. The conclusion that can be drawn, and that is very clear, is that theplaintiff was well aware of the fact of the subdivisions having been conducted way before the suit was commenced. What was even more stupefying was the fact that the present Application was filed a whooping three (3) years after commencement of the suit. If this Application carried the probative value that the plaintiff is asserting, the he would not be a sleeping dog.

36. Even if I were to, by any chance, condone the dilatory actions of the plaintiff, the same would still face sharp resistance by thedefendant, given the fact that, as cited, the decree annexed and marked MBS-1B evinced that the Plaintiff had been evicted from the suit land. In addition, the orders sought will affect parties not participating in the present proceedings thus occasioning a grave miscarriage of justice.

37. It appears that the plaintiff is on a fishing expedition to obtain whatever adverse orders he can and by any means necessary. The upshot of this is that I find that theplaintiff has not established a *prima facie* case with a probability of success.

ii. The applicant will suffer irreparable loss or damage that will not be adequately compensated by an award of damages

38. Theplaintiff maintained that he will suffer irreparable loss because the subdivision took place during the pendency of the suit. Since I have established that the subdivision took place way before the suit was commenced, I find that the Plaintiff has not met this requirement.

39. Since both the first two requirements have not been met, I will not waste the preciouscourt time to decide as to whom the balance of convenience tilts in favor of. Consequently, I find that the plaintiff has

failed to meet the threshold set out for a grant of injunctive relief. I now move to the second germane prayer.

(b) Whether leave ought to be granted to the Plaintiff to amend his Plaint?

40. The power to grant amendment is enshrined in Order 8 of the *Civil Procedure Rules.* The power is discretionary and must be determined on a case by case basis. In Cropper v Smith (1884) LR 26 ChD, 700 (710), the Court held that the objective behind amendment of pleadings is necessitated by the need to protect the rights of the parties and not to punish them for mistakes they made in their pleadings.

41. Similarly, the High Court sitting at Bombay in *Kishan Das v Vithoba Bachelor* 4 Ind Cas 726 held:

> " All amendments ought to be allowed which satisfy the two conditions (a) of not working in justice to the other side, and (b) of being necessary for the purpose of determining the real questions in controversy between the parties."

42. Further in *Rose and others v Creativity etc and others* [2019] EWHC 1043 (Ch), the court encapsulated key principles the court ought to consider when dealing with an application for amendment as follows:

I. Where amendments to pleadings are introduced at an early stage in the proceedings, the key factor in determining whether to allow an application is allowing the real dispute between the parties to be determined;

II. The later in the litigation process the amendments are introduced, the more likely the Court is to place more weight on the prejudice to the other party and the effect on court time.

III. In determining whether or not an application to amend is "late", the Court will consider (i) the reason for the delay, (ii) whether the amendment could have been introduced earlier, (iii) whether it requires the responding party to revisit any significant steps of the litigation which have already been completed, and (iv) whether allowing the amendment would threaten the trial date.

IV. Any amendments to the pleadings must be properly articulated and have a real prospect of success.

V. Whether the amendment is in the interest of justice for both parties, i.e. any prejudice to either party by either allowing or not allowing the amendments.

43. In his proposition, the plaintiff submitted that the enjoinment of the proposed defendants was necessary in order to determine the real issue in controversy. This was premised on the fact that the plaintiff contended that subdivision took place and created seventeen (17) subdivisions from the suit land. Interestingly, amongst the list of defendants the plaintiff intends to enjoin, only one (1) defendant is a beneficiary of the subdivision. The court wonders aloud why of the Application is made in good faith the Plaintiff did cherry pick in enjoining only one beneficiary. Notably, if his averments were anything to go by, proposed amendment relates to only the company owned by the Defendant's company. It appears to me that the Plaintiff is only interested, by the said proposed amendment adding the 2nd defendant only as the sole beneficiary of the subdivision to the exclusion of all others he mentions, in waging a war against the said 1st defendant and his relatives. That does not and will not bring out the real issue in controversy before this court, if the prayer for amendment was to be granted. The other proposed parties are only brought into the proposed amendment by virtue of, in the averments of the Plaintiff, having participated in the processe and birth of the titles in question. Thus, having found that the proposed amendment to add the intended second defendant will be of

no avail to the Court, allowing the amendment to add them too will not be of any advantage to the determination of the merits of this case. I refuse the same.

44. I have had a further look at the proposed amended particulars in the Draft Amended Plaint. I find that none of the said averments substantially necessitate the enjoining of the parties proposed. This in fact goes against the requirement that the same will determine the real issue in controversy. I thus find that the Application is not made in good faith. The plaintiff has further not demonstrated what prejudice it shall suffer if the Application is not allowed. The prayer therein is a non-starter and will not achieve the purpose of amendment as demystified in our jurisdiction. As a matter of fact, I find the Application an abuse of the process of the court as it continues to pit the present parties over the issues that as pointed out, been the subject of litigious proceedings in other court fora. Consequently, that prayer for amendment must fail.

45. In the end, the Application in its entirety must suffer its fate. I therefore dismiss the plaintiff's Application dated May 24, 2019with costs to the Defendant. In order to expedite the disposal of the suit, I set a mention date on for purposes of parties' taking pre-trial directions.

46. Given the fact that the parties herein pleaded and alluded to a number of issues touching on this matter having been dealt with by my brother and sister judges in as many as four suits, this court directs that the parties file written submissions addressing the question whether or not the issues herein are res judicata or the suit is duplicitous for that matter. The submissions should not exceed 5 pages of New Times Roman Font 12, 1.5 spacing. The Plaintiff to do so within ten (10) days and serve and the Defendant within ten (10) days of service. The matter shall be mentioned on July 28, 2022virtually to confirm the filing of the submissions and taking of a date for ruling.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 7TH DAY OF JULY, 2022.

DR.IUR FRED NYAGAKA

JUDGE, ELC, KITALE.