



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 516 OF 2017

(Formerly Machakos ELC 180 of 2015)

OPERATION BLESSING INTERNATIONAL

RELIEF & DEVELOPMENT CORPORATION.....PLAINTIFF

VERSUS

TININA NAKASRI SHORDE.....1ST DEFENDANT

JEFFERSON NYATUKA NYANGWO.....2ND DEFENDANT

BENJAMIN OMURWA NYATUKA.....3RD DEFENDANT

(SUED AS TRUSTEES OF EASTLANDS COMMUNITY DEVELOPMENT INITIATIVE)

LAND REGISTRAR, KAJIADO.....4TH DEFENDANT

RULING

By the Plaintiff's Notice of Motion dated 13th May, 2019, brought pursuant to Article 159 (2) (d) of the Constitution, Sections 1A, 1B and 3A of the Civil Procedure Act including Order 1 Rules 1 & 10 as well as Order 8 Rules 3 & 5 of the Civil Procedure Rules, the Plaintiff seeks leave to amend the Plaint dated the 3rd July, 2015. Further, that the Court should direct that the notice of the suit to all members of the community be effected through personal service or through representation.

The Application is premised on the grounds on the face of it and the supporting affidavit of PETER KIMARU GICHURU where he deposes that he is the National Director of Operation Blessings Kenya which is an affiliate to the Plaintiff herein. He claims to be duly authorized by the Plaintiff to swear this affidavit. Further, that he is desirous of amending the Plaint to include additional statement on crucial issues concerning the suit which the court ought to be aware of so as to determine the dispute herein. He explains that the community has a certificate issued on 18th October, 2018 and the group has over 90 members from within the locality where the suit property is located with a representation of every homestead. Further, that the Plaintiff wishes to make amendments touching on the parties to the suit. He avers that it is necessary to amend the Plaint to include the 2nd Plaintiff so as to enable the court effectually as well as completely adjudicate upon including settle all questions central to the ownership of suit property. Further, no prejudice will be occasioned by the Defendants which cannot be compensated by costs.

The 2nd Defendant JEFFERSON NYATUKA NYANGWO opposed the application and filed a replying affidavit where he deposes that the application is fatally defective, frivolous, an abuse of the court process and wholly intended to delay finalization of the cause. He insists the application lacks merit as the Plaintiff is a foreign registered company and does not have capacity to institute this suit. He claims the Plaintiff has not disclosed the interests of the proposed persons in the subject matter and attached documents to prove their claim. Further, there is no draft statements of the proposed parties and the Plaintiff has failed to disclose what loss they have suffered. He insists the Plaintiff cannot move court to seek orders on the addition of Plaintiffs nor force a party to be added as a Plaintiff. He reiterates that the Plaintiff lacks locus in bringing this suit and the supporting affidavit of PETER KIMARU has not disclosed any letter of authority.

The Plaintiff filed a further affidavit sworn by PETER KIMARU where he explains that the Court granted it leave to file the application to amend the Plaint. He contends that the amendment intends to include additional statement on crucial issues concerning this case. Further, that the Plaintiff bought the suit property for the interest of the Naishorua Community Group who are all members of the community where the land is situated. He insists the 2nd Defendant was employed as the Director of the Plaintiff but conspired and registered the suit property with different names including himself. He reiterates that they have attached minutes of the meeting, list of members as well as certificate of registration of the group. He insists the community has lost huge profits from the fraud perpetuated by the 2nd Defendant and the other co –

defendants. Further, that the instant application is competently before the Court.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 13th May, 2019 including the respective affidavits, annexures and submissions, the only issue for determination is whether the Plaintiff has established sufficient grounds to warrant leave to amend its Plaintiff.

The Plaintiff in its submissions reiterated its claim and contended that the application is not time barred. Further, that no prejudice would be occasioned upon the Defendants. It relied on the provisions of Order 1 Rule 10 (2) of the Civil Procedure Rules as well as the decisions of **Eastern Bakery V Castelino (1958) EA 462 (CAU), Thomas Magut Sambu & Another V County Government of Kericho & Another (2019) eKLR; Martin Wesula Machyo V Housing Finance Company of Kenya & Njiru Enterprises ELC 665 of 2013; Elegant Freighters Vs Oriental Commercial Bank (Formerly Delphis Bank Limited) HCCC 66 of 2005; Ochieng Vs First National Bank of Chicago Civil Appeal No. 147 of 1991 cited in the case of St. Patrick’s Hill School Vs Bank of Africa Kenya Limited (2018) eKLR; Josiah Magena Vs Wakenya Pamoja Sacco Society Ltd Nrb ELRC Cause No. 510 of 2014 and Institute for Social Accountability & Another V Parliament of Kenya & 3 Others (2014) eKLR** to support its arguments.

I note the Plaintiff is seeking to amend its Plaintiff to include new Plaintiffs in the suit. Its major reason is that the amendment intends to include additional statement on crucial issues concerning this case. Further, that the Plaintiff bought the suit property for the interest of the Naishorua Community Group who are all members of the community where the land is situated and the Plaintiff seeks to include some of the members from the said community group. The 2nd Defendant opposed the application and as per the grounds above and contends that the group can file their own suit.

Section 100 of the Civil Procedure Act gives the Court discretion on whether to allow an amendment or not.

While Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide that: **‘(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings. (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.’**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **‘(1) For purposes 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.’**

In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, the Court of Appeal in dealing with issues of amendment held a follows:’ The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitation Acts.”

In the current case, I note the Plaintiff has annexed various documents confirming the relationship between the proposed new parties and the suit property. In relying on the legal provisions cited above and the judicial authority, I find that the Plaintiff has indeed explained the relationship of the proposed new parties and the suit property. Further, that the amendment it seeks is necessary for the determination of the real question in controversy and will proceed to grant it leave to do so. I find that the 2nd Defendant has not demonstrated the prejudice he stands to suffer if the amendment sought is allowed. I opine that he can also proceed to amend his Defence if need be.

It is against the foregoing that I find the application dated the 13th May, 2019 merited and will allow it. I direct the Plaintiff to file and serve its amended Plaintiff within 14 days from the date hereof. Upon service, I grant the Defendant’s leave of 14 days to amend their respective Defences if need be.

Costs will be in the cause.

Dated signed and delivered via email this 6th Day of May, 2020.

CHRISTINE OCHIENG

JUDGE