



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA

ELC NO. 275 OF 2016

SAMERA AZIZ (Suing as the administrator of the estate of Mohamed

Bashir Merajdin Ahmed Bux).....PLAINTIFF

VERSUS

DOUGLAS MWANGI MUTERU & OTHERS.....DEFENDANTS

RULING

(Application for amendment of plaint; plaintiff having initially sued two persons and later amending plaint to include other parties; plaintiff now wishing to further amend the amended plaint to add two more defendants; plaintiff's case being that title of the deceased was fraudulently transferred to the 1st defendants; person who transferred the title being one of the proposed new parties; the other proposed new party being the County Government of Mombasa; argument that the County Government only keeps land rate records; claim of plaintiff that there was fraud which involved the County officials cannot be wished away or ruled upon at this stage without first hearing the evidence; argument by plaintiff that the amendments are late and that plaintiff has filed applications to amend before; plaintiff not having completed her evidence; no res judicata in applications to amend; application allowed)

1. The application before me is that dated 27 February 2019 filed by the plaintiff and principally seeking orders to amend the further amended plaint. The application is opposed.

2. To put matters into context, this suit was commenced through a plaint which was filed on 27 October 2010 with two persons as defendants, that is Douglas Mwangi Muteru and Samuel Wachira, who were jointly named as 1st defendants. In this original plaint, it was pleaded that the land parcel Mombasa Block XVII/35 (the suit land) was registered in the name of Mohamed Bashir Meraj Din Ahmed (Mohamed Bashir) who died on 18 September 2004. It is pleaded that upon his death, the property was devolved to Mohamed Jan Din (Jan Din) but she died before the process of transfer was complete. I have seen from the documents that she died on 17 July 2006. It is pleaded that on 25 February 2010, one Muhiddin Alhad Mohamed transferred the property to himself purporting to have obtained a transfer from Mohamed Bashir. It was the plaintiff's contention that this transfer was fraudulent and that any subsequent transfers were also fraudulent. In the suit, the plaintiff sought orders for a cancellation of titles issued to the defendants.

3. The two original defendants filed defence, wherein they pleaded that they entered into a sale agreement with a person who described himself as Mohamed Bashir and this was done before Advocate Angelo Owino. The property was then transferred to them. They then sold their interest to Westmall Supermarket Limited and a transfer was effected on 15 October 2010.

4. Following this information, the plaintiff applied to amend the plaint, and leave was granted, with an amended plaint being filed including Westmall Supermarket Limited as an additional defendant. This amendment was however withdrawn on 20 June 2012 when the matter came up for hearing and the court gave leave to re-amend the plaint to remove Westmall Supermarket Limited as a party. On that day, the plaintiff gave evidence and was cross-examined by counsel for the 1st joint defendants, who were then the only defendants in the suit. The plaintiff did not complete her cross-examination and the matter was adjourned. It did not take off on the few occasions that it came up for hearing as it was mentioned that the plaintiff was out of the country and not available. The plaintiff is thus yet to complete her evidence.

5. Through an application dated 2 November 2018, the plaintiff applied to further amend the plaint, with intention to reintroduce Westmall Supermarket Limited as 2nd defendant, the Chief Land Registrar Mombasa, as 3rd defendant, The Attorney General as 4th defendant, Angelo Morris Owino Advocate as 5th defendant and the National Land Commission as 6th defendant. This application was allowed on 5 December 2018 and the further amended plaint was duly filed. Nothing much transpired in the matter until the subject application was filed.

6. The proposed amendment seeks to add two more parties as defendants, that is the County Government of Mombasa, and Mohamed Bashir Meraj Din Ahmed, as the 7th and 8th defendants respectively. The affidavit in support of the application is sworn by the plaintiff. She has

deposed inter alia that the two are important defendants, as they feature in her pleadings. She has annexed a draft further re-amended plaint which I have gone through. There is a pleading that the proposed 8th defendant miraculously obtained title to the suit land and sold it to the 1st defendant. It is averred that the transaction involved issuance of fake documents issued by the 3rd defendant with the knowledge of the proposed 7th defendant. It is further pleaded that the proposed 7th defendant facilitated changes in the rate payer's names using forged documents and illegally endorsed the name of the 1st, 2nd and proposed 8th defendants in their records. There is a prayer to have the proposed 7th defendant revert the records back to the original owner.

7. The proposed 7th defendant, the County Government of Mombasa, filed a replying affidavit sworn by Caxton Mbaru Kiai, its acting Chief Valuer. He has deposed that there is no reasonable cause of action raised against the proposed 7th defendant and that allocation and issuance of titles is the sole work of the national government. He has deposed that the proposed 7th defendant is only responsible for rating of properties. He has stated that if the court finds that there was fraud, the proposed 7th defendant is ready to change its records. He believes that it will be a waste of its resources to be included as defendant. Counsel for the proposed 7th defendant filed submissions where she echoed the above.

8. Nothing was filed by the proposed 8th defendants.

9. Counsel for the 1st defendant filed submissions opposing the application. He submitted that allowing the amendment will defeat the overriding objectives of the court as provided in Sections 1A and 1B of the Civil Procedure Act, Cap 21, Laws of Kenya. He has submitted that there is inordinate delay and the defendants stand to suffer prejudice by being taken back and forth by the plaintiff, who it is contended, has invested in endless amendments. He submitted that this application is intended to further delay the prosecution of this case and also submitted that the application is *res judicata*.

10. The Attorney General did not oppose the application.

11. I have considered the application. This is an application for amendment to add two more parties to the suit, and in my view, the provisions of Order 1 Rule 10 (2) apply in our circumstances. The same provides as follows :-

10 (2) 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 enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

12. It will be seen from the above that at any stage of the proceedings, the court has discretion to order the joinder of a person into the suit, if it is felt that the presence of that person is necessary in order to effectively and completely adjudicate the matter. In this instance, the plaintiff has sought to enjoin the proposed 7th and 8th defendants. The proposed 8th defendant is the person who obtained title from Mohamed Bashir and he is the person who sold the suit land to the 1st defendants. I do not think that it can be argued that his presence is not necessary in the suit. As for the proposed 7th defendant, it is the entity that is the custodian of land rates records and the suit land is located within its jurisdiction. I do not know how its rates records changed. It is possible that some personnel of the proposed 7th defendant were involved in the change of the records. It is the plaintiff's case that this was done fraudulently. That being so, I cannot tell, at this stage of the proceedings, if any personnel of the proposed 7th defendant was involved in any fraud. That can only come out after the case is heard. I cannot therefore wish away the presence of the proposed 7th defendant from this suit.

13. What essentially the plaintiff wishes to do is to amend the plaint. Courts are generally liberal in allowing applications to amend unless it is shown that there will be prejudice to the other parties. In our case, the 1st defendants have voiced that there is delay and that the plaintiff has amended before. It is argued that the application is therefore *res judicata*. I do not think that this amendment is coming too late in the day because the plaintiff is yet to complete her evidence. Significantly, the defendants are yet to testify. It cannot also be argued that an application to amend is *res judicata* because there had previously been leave granted to amend the plaint. It can only probably be *res judicata* if it is the same amendment which was previously allowed that is now being sought.

14. Looking at the case as a whole, I think that it is in the best interest of justice, that the plaintiff be given a chance to fully ventilate her case. Any inconvenience to the defendants can be obviated by an award of costs.

15. Given the foregoing, I allow the application. I give leave to the plaintiff to file her further re-amended plaint within the next 21 days. Upon filing the same, the said plaint be served in the usual manner to the parties who are yet to enter appearance to this suit.

16. The costs of this application will however be to the 1st defendant who is most inconvenienced by this application.

Orders accordingly.

DATED and DELIVERED this 6TH DAY OF MAY 2020

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT OF KENYA

AT MOMBASA.