



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC. CIVIL CASE NO. 128 OF 2014

GEORGE GATERE KIBATA.....PLAINTIFF

=VERSUS=

GEORGE KURIA MWAURA.....1 ST DEFENDANT

EMBAKASI RANCHING CO. LTD.....2 ND DEFENDANT

RULING

1. On 22/10/2018, the 1st defendant brought a notice of motion of even date under the provisions of Order 40, Rules 1(a), 2 & 4, Order 51 (1), Sections 1A, B, and 3 A of the Civil Procedure Act seeking the following orders:-

1. That a temporary order of injunction be issued restraining the 2nd defendant or any other third party from registering Nairobi Block 136/5070 and 136/8539 respectively, in the name of Mr George Gatere Kibata, pending the hearing and determination of this application.

2. That a temporary order of injunction be issued restraining the 2nd defendant or any other third party from registering Nairobi Block 136/5070 and 136/8539 respectively, in the name of Mr George Gatere Kibata, pending the hearing and determination of the main suit.

3. That leave be granted to the 1st defendant to amend his defence introduce a counterclaim and other parties in this suit.

4. That the draft amended statement of defence and counterclaim be deemed as filed upon payment of the statutory fees to the court.

5. That costs of this application be provided for.

2. The application was premised on the grounds set out therein and was supported by the 1st defendant's affidavit sworn on 22/10/2018. He contended that the 2nd defendant in collusion with the Ministry of Lands intended to transfer the suit properties to the plaintiff while there was a dispute in court relating to the ownership of the properties. He added that he had done some developments on the suit properties worth Kshs.60,000,000 and was likely to suffer loss if the 2nd defendant was not restrained against effecting the transfer. He further deposed that it was necessary that he amended his defence and brought a counterclaim to introduce other necessary parties. The plaintiff and the 2nd defendant did not put in any replying affidavit.

3. The application was canvassed by way of oral submissions. Mr Owang, counsel for the 1st defendant, submitted that the suit properties were allocated to both the 1st defendant and the plaintiff. He argued that the 1st defendant was in possession of the suit properties, which position had been admitted by the 2nd defendant through its defence. He added that the suit properties had been developed by the 1st defendant. He further submitted that the 2nd defendant was in the process of transferring the suit properties to the plaintiff.

4. Mr Maina for the plaintiff submitted that the properties listed in the application were different from the suit properties. He argued that a counterclaim is only allowed where it can be conveniently disposed off together with the main suit. He submitted that joining the new parties to the suit will prejudice the hearing and determination of this suit. He added that six of the intended new parties were officials of the 2nd applicant and therefore it was not necessary to join them as parties to the suit. Lastly, he submitted that although Order 8 allows for amendments, the proposed amendments added no new facts to the defence.

5. Mr Owang in rejoinder argued that amendments are allowed before trial commences and are necessary to avoid multiplicity of suits. He contended that the parcel numbers in the application and the ones in the survey plans were the same. He added that joining the 9th and 10th

defendants in this suit was necessary because of their statutory roles.

6. I have considered the application, the annexures thereto as well as the submissions by counsel. Three issues fall for determination in this application. The first issue is whether the eight intended parties should be joined in this suit. The second issue is whether the 1st defendant should be granted leave to amend his defence and to bring a counterclaim. The third issue is whether an injunction should be issued against the 2nd defendant restraining it against registering the plaintiff as the owner of the suit property. I will make my pronouncements on the three issues sequentially in that order.

7. The first issue is whether there should be an order of joinder of the eight intended parties. Order 1 rule 10(2) of the Civil Procedure Rules grants this court powers to allow joinder at any stage of the proceedings upon application by a party to the suit or on the court's own motion. The criteria which that jurisdiction is exercised is that the party to be joined should be one whose presence before the court will be necessary in enabling the court to effectually and completely adjudicate upon and settle all questions involved in the suit.

8. In the instant application, the 1st defendant seeks joinder of directors of the 2nd defendant, the Chief Land Registrar, the Cabinet Secretary, responsible for Lands and the Attorney General. The dispute in this suit relates to two plots situated in Ruai. The two plots are part of a large block of land belonging to the 2nd defendant. The 2nd defendant is a land buying company. The plaintiff contends that he was allocated the two plots by the 2nd defendant and has been the owner of the two plots for decades. The plaintiff brought this suit contending that the 1st defendant had invaded the two plots and was erecting illegal structures thereon. The 1st defendant on his part contends that the two plots legitimately belong to him. It is not clear why the directors of the 2nd defendant, the Cabinet Secretary responsible for Lands and the Attorney General should be made parties to this suit. If directors of the 2nd defendant were to be made parties to this suit, it would mean that every time there is change of directorship, amendments will have to be effected to bring on board the new directors. In my view, directors of the 2nd defendant are bound by court orders directed against the 2nd defendant and it is not necessary to make them parties to the suit. If need be, they can be properly summoned as witnesses. Similarly, I do not see the role of the Cabinet Secretary and the Attorney General in the court adjudication of this dispute. The only necessary party, in my view, would be the Chief Land Registrar whose statutory mandate includes registration of titles and maintenance of land parcel registers. Consequently, subject to the Court's determination of the plea for leave to amend the pleadings to bring a counterclaim, I will only allow joinder of the Chief Land Registrar.

9. The second issue is whether the 2nd defendant should be granted leave to amend his defence and plead a counterclaim. Order 8 rule 3(1) of the Civil Procedure Rules grants this court wide discretionary powers to grant leave to a party to amend pleadings at any stage of the proceedings on such terms as to costs or otherwise as the court deems fit. The principle upon which that discretionary power is exercised was outlined in the case of **Eastern Bakery v Castellino Civil Appeal No 30 of 1958 EA** as follows:

Amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

10. Hearing in the present suit has not commenced. The dispute is about ownership of the two plots. Through the counterclaim, the 1st defendant seeks orders vesting the disputed plots in him in the event that he wins the case. In the circumstances, leave to amend the defence and bring the counterclaim is merited. I say so because, should the 1st defendant succeed without a counterclaim, it might require him to initiate a fresh suit for vesting orders. To avoid the possibility of duplicity of suits, I will grant the 1st defendant leave to amend the defence and plead a counterclaim. However, considering that this suit has been in court for the last five years and the 1st defendant has been fully aware of it, I will condemn the 1st defendant to pay the plaintiff Kshs 20,000 as throwaway costs of this application.

11. The last issue is whether an injunction should issue against the 2nd defendant restraining the 2nd defendant against registering the plaintiff as the proprietor of the suit properties. The criteria upon which an injunctive order is granted was laid down in the case of **Giella v Cassman Brown (1973) EA 358**. First, the applicant is required to demonstrate a prima facie case with a probability of success. Second, the applicant is required to demonstrate that he stands to suffer irreparable damage which may not be indemnified through an award of damages if the injunctive order is not granted. Last, should the court have doubt on either of the above requirements, the application should be decided on a balance of convenience.

12. In the suit before court, the plaintiff claims to be the owner of the two plots. He contends that the 1st defendant invaded the plots and started erecting illegal structures thereon. The plaintiff came to court as soon as the construction commenced. He exhibited a share certificate dated 1/8/1978 and a letter of allocation dated 28/11/1982. The 1st defendant contends that he is the legitimate owner of the suit properties. The 2nd defendant has at this point come out as the author of the ownership dispute. From its conduct, the 2nd defendant, does not appear to be keen to resolve the dispute of ownership of the two plots internally. In the circumstances, doing the best that I can, I will invoke the Court's jurisdiction under Order 40 of the Civil Procedure Rules and preserve the suit properties through *status quo* orders in the sense that I will halt issuance of title and disposition in respect of the two plots. All the other processes relating to survey and titling will continue. There will be no further developments on the suit properties.

Disposal Orders

13. In light of the foregoing, the 1st defendant's notice of motion dated 22/10/2018 is disposed in the following terms:

a) The 1st defendant is granted leave to amend his defence and bring a counterclaim within 14 days. In default the leave granted shall lapse.

b) The 1st defendant is granted leave to join the Chief Land Registrar as a 3rd defendant in the counterclaim.

c) Embakasi Ranching Company Limited and the Chief Land Registrar are restrained against issuing title and registering dispositions in respect of Nairobi/ Block 136/5070 and Nairobi /Block 136/8539 for a period of 12 months.

d) The above restraining orders shall lapse upon expiry of the twelve months.

e) There shall be no further developments on the suit properties pending the hearing and determination of this suit.

f) The 1st defendant shall pay the plaintiff throw away costs of Kshs 20,000 before the next mention date.

DATED, SIGNED AND READ AT NAIROBI ON THIS 4TH DAY OF JULY 2019.

B M EBOSO

JUDGE

In the presence of:-

Mr Langat holding brief for Mr Owang the plaintiff

Court Clerk - June Nafula