



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**ELC NO. 109 OF 2008 (O.S.)**

**PETER KITELO.....1<sup>ST</sup> PLAINTIFF**

**BEN MUIGEI CHEPTUIT.....2<sup>ND</sup> PLAINTIFF**

**FRED MATEI.....3<sup>RD</sup> PLAINTIFF**

**ERIC KAPSIN.....4<sup>TH</sup> PLAINTIFF**

*(Suing as representatives of the Ogiek/ Ndorobo Community of Mt. Elgon)*

**VERSUS**

**THE COUNTY GOVERNMENT OF BUNGOMA.....1<sup>ST</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a notice of motion dated **29/11/2018**, and filed on the same date, the plaintiffs seek the following orders against the defendants:

**(1) That the application be certified as urgent and service thereof be dispensed with.**

**(2) That the applicants be granted leave to amend PETER KITELO & OTHERS -vs- BUNGOMA COUNTY GOVERNMENT & ANOTHER KITALE ELC NO. 109 OF 2008.**

**(3) That there be no orders as to cost.**

2. The grounds on which the application is based are that it would be in the interests of justice to allow the amendment of the plaint in order to fully and comprehensively resolve the issues that go to the root cause of the concerns the plaintiffs have raised in this case; that the plaintiffs are proposing to amend the plaint in order to address issues, that is, whether, before the Gazette Order referred to in **paragraph 5** of the plaint was made, a written Notice was issued to set apart the Trust Land in accordance with **Section 118** of the **Constitution of 1963**, whether the necessary notices were published under **Section 7** of the **Trust Land Act**; whether the Mt. Elgon Council had the authority to agree to the Order being made; whether the Minister of State complied with **Section 58** as read with the **2<sup>nd</sup> Schedule** of the **Environment Management and Co-ordination Act, 1999**; whether the order is incompatible with the African Charter on Human and Peoples' Rights and therefore Kenyan Law and whether the plaintiffs had pre-existing rights which are still cognizable under the Laws of Kenya; that the amendments are necessary for determining the real questions in controversy between the parties; that the plaintiffs would, if their application to amend is granted, will rely on their affidavits and further affidavits that have already been filed in this court.

3. The application is supported by the affidavit of the 1<sup>st</sup> plaintiff on his behalf and on behalf of the other plaintiffs sworn on **23/11/2018** which lays emphasis on the above grounds.

4. The 1<sup>st</sup> defendant filed grounds of opposition dated **1/2/2019** and stated that the amendment sought is against the doctrine of laches since the suit was instituted more than 10 years ago hence meant to delay the expeditious disposal of the suit contrary to the provisions of **Order 2 Rule 15 (1) (c)** of the **Civil Procedure Rules, 2010** and that the application is thus frivolous, vexatious and an abuse of the court process and prays for a dismissal of the instant application with costs.

5. The plaintiffs opposed the 1<sup>st</sup> defendant's grounds of opposition against its application for amendment dated **29/11/2018** on the grounds that the court record shows that the delay was not caused by the plaintiff but rather by the 2<sup>nd</sup> defendant who had requested the court to give

the government and the plaintiff time to find a settlement in the matter; that it was during this time that the court did not proceed with the matter to allow Alternative Dispute Resolution; that the 2<sup>nd</sup> defendant later came on record and stated that they will not enter an agreement with regards to the suit as earlier on intended; that during all these proceedings the 1<sup>st</sup> defendant was served with the requisite court documents including mention and hearing notices; that the delay is not the only reason considered when granting leave to amend and other factors must be taken into consideration and prayed for the dismissal of the grounds of opposition and allow the application for amendment dated **29/11/2018**.

6. The 2<sup>nd</sup> defendant filed grounds of opposition on **16/9/2019** and opposed the application dated **29/11/2018**. He stated that the application is fatally defective, incompetent, malapropism and untenable both in substance and form and contrary to the provisions of **Order 8 Rule 3** under which its brought thus proper for dismissal; that the application is fatally defective and for striking out, in that the applicant is guilty of laches, the application is an afterthought and does not deserve the orders of this court; that the applicant has not met the parameters for amendment as was set out in the celebrated case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 Others [2000] eKLR** to wit: there has been no undue delay, no new inconsistent cause of action is introduced, no vested interest or accrued legal right is affected and the amendment can be allowed without injustice to the other side; that the amendments sought are an afterthought, as the application seeking those amendments was filed to defeat the hearing of the main case after parties had taken directions and filed agreed issues for determination; that the proposed amendments seek to introduce a new cause of action which was not in existence at the time the suit was filed and that such a move amounts to introducing a fresh suit altogether hence tantamount to defendant's accrued defence of limitation; that the delay of more than 10 years will be very prejudicial to the 2<sup>nd</sup> defendants due to the new constitutional dispensation and that the application dated **29/11/2018** ought to be dismissed with costs.

7. The plaintiffs filed their submissions on **24/7/2019**. The 1<sup>st</sup> defendant filed his submissions on **31/7/2019**. The 2<sup>nd</sup> defendants filed his on **23/9/2019**. I have considered the application, the responses thereto and the submissions.

8. It is necessary to set out the history of this litigation before dealing with the application at hand. By a plaint dated **15/10/2008** and filed in court on **17/12/2008** the plaintiffs sought the following orders against the 1<sup>st</sup> and 2<sup>nd</sup> defendants:

**(a) A declaration that the conversion of trust land to a National Wildlife Reserve was unlawful unconstitutional and without justification**

**(b) An order the said conversation be revoked and the notice of that conversation be gazetted.**

9. In the body of the plaint the plaintiffs avers that they are residents of Kopsiro Division of Mt. Elgon District. In the heading they described themselves as representatives of the Ndorobo/Ogiek Community of Mt. Elgon. They aver that at all material times the 1<sup>st</sup> defendant, Mt. Elgon County Council was vested with the trust land described as Chepkitale trust land held in trust for the Ndorobo/Ogiek community of Mt. Elgon who were and remain the residents of the said parcel wherein they practice pastoralism. On the 6/6/2000, the 2<sup>nd</sup> defendant's client on the instructions of the 1<sup>st</sup> defendant caused the said trust land to be converted into a National Wildlife Reserve pursuant to **(Wildlife Conservation and Management) (Chepkitale National Reserve) Order 2000 Kenya Gazette Legal Notice No. 88**.

10. It is alleged that the conversation was effected at the behest of the 1<sup>st</sup> defendant without any form of consultation consent, regard or consideration of the plaintiffs' community on whose behalf the trust was held. The plaintiffs aver that the conversation of what they consider to be their ancestral land and on which they depend for their livelihood was and is unconstitutional and negates the provisions and spirit of **Chapter IX** of the now repealed constitution. They further aver it was meant to deny them their right to possession of their legal property and has had the effect of dispossessing them and shall cause them irreparable now and in the generation to come.

11. The 1<sup>st</sup> defendant filed a statement of defence on **2/4/2009**. It stated that the suit is incompetent and that it should be struck out on the basis that the plaintiffs lack *locus standi*; that it is not true that the land was held in trust for the plaintiffs or their community or for the exclusive practices of pastoralism by Ndorobo/Ogiek community. That the allegation that the 1<sup>st</sup> defendant instigated the action of the 2<sup>nd</sup> defendant of gazetting the land is not true; that in the alternative if the gazettelement was at the prompting of the 1<sup>st</sup> defendant then it was done in accordance with the provisions of the Constitution and the trust Land Act **Cap 288**; that the suit is premature in so far as the statutory remedy has not been exhausted; that the suit does not invoke the proper jurisdiction of the court, that it is time barred and should be struck out.

12. The 2<sup>nd</sup> defendant filed its defence on 31/8/2009 denying the claim. Specifically it is denied in that defence that the gazettelement was done without consultation, consent, regard and/or consultations with the plaintiffs' community; that it is not true that the plaintiffs had been deprived of their property or suffered loss or damages as alleged; that in the alternative the conversation was lawful property and justified and was done procedurally in consultation with all stakeholders and in good faith and in observance of all the laws rules and regulations as stipulated in the Wildlife (Conservation and Management) Act and allied statutes; that the suit is fatally defective for want of compliance with **Section 13 (a)** of the Government Proceedings Act and Public Authorities Limitations Act.

13. There was a reply to the 1<sup>st</sup> defendant's statement of defence which was filed on **6/10/2009**. I do not find any reply to defence of the 2<sup>nd</sup> defendant.

14. An amended plaint was filed on **1/4/2016** in which the only amendment was to substitute the Mt. Elgon County Council with the County Government of Bungoma as the 1<sup>st</sup> defendant. Thereafter the 2<sup>nd</sup> defendant filed an amended statement of defence on **19/12/2017** which brought considerable amendments and restructuring to that defence. The new facts included in that amended defence were that Chepkitale National Reserve is public land having been so gazetted via the impugned legal notice, and is under the management of the National Land Commission and that conversion from the status of public land to community land is not within the mandate of this court and hence the court has no jurisdiction; that it forms part of the larger Mt. Elgon ecosystem including Mt. Elgon Forest Reserve and as such the 2<sup>nd</sup> defendant has a duty under the Constitution of Kenya to regulate its use for public good; that the allegations that the land was the plaintiffs' ancestral land

or that the plaintiffs had been in possession of the land is untrue; that the 1<sup>st</sup> plaintiff has no authority to swear the verifying affidavit on behalf of the other plaintiffs and the suit offends the mandatory of provisions of **Order 1** of the Civil Procedure Rules and should be struck out. It is also averred that the suit has been overtaken by events since 17 years have passed since the gazette and the reserve has been recognized by the UNESCO as a biosphere and an important water tower; the 2<sup>nd</sup> defendant also avers that the suit is premature as the mechanism provided for under the Act has not been exhausted and further that it is scandalous, frivolous and vexatious and discloses not reasonable cause of action.

15. Apparently alarmed by these amendments, the plaintiffs filed the application dated **24/10/2018** seeking leave to further amend their plaint. On 20/11/2018 the court and the parties noted some irregularities in that application and the court gave Mr. Bororio for the applicants upto 6/12/2018 to decide what to do with that application. On 6/12/2018 the court was informed that another application dated 29/11/2018 being the instant application has been filed. The application dated 24/10/2018 was orally withdrawn by Mr. Bororio on 4/2/2019; however the court notes that a notice of withdrawal had been filed as far back as 29/11/2018. On 25/2/2019 the court was informed that a task force has been given 6 months under a gazette notice to review the issue and the parties agreed to delay the hearing and determination of the application of the suit pending the findings of that task force. However the petitioners' representatives in court on 17/7/2019 pointed out that the court was unfettered by terms of reference of the task force and could proceed with the matter. On 3/10/2019 parties confirmed filed of submissions and adopted their submissions.

16. The plaintiffs filed their submissions on **24/7/2019**. The 1<sup>st</sup> defendant filed his submissions on **31/7/2019**. The 2<sup>nd</sup> defendants filed his submissions on **23/9/2019**. I have considered the application responses and the submissions.

### **Determination**

#### **17. Issues for Determination**

- (a) Whether the application has been brought after inordinate delay*
- (b) Whether the application introduces a fresh cause of action.*
- (c) What orders should issue?*

18. The issues are addressed as hereinunder:

#### **(a) Whether the application has been brought after inordinate delay**

19. The response that the application has been brought after a long delay is common to both respondents. The 1<sup>st</sup> respondent maintains that the suit was filed more than 10 years ago and the application is meant to delay the expeditious the disposal of the suit contrary to **Order 2 Rule 15 (c)** of the Civil Procedure Rules 2010. In his grounds of opposition the 2<sup>nd</sup> defendant raises the same issue and terms the application as an afterthought.

20. On the part of this court it is not evident from the contents of the defendants' replies that the delay affects their defence to the claim. All that the court perceives is the common apprehension on the defendants' part that the amendments may embarrass the trial of the suit. The 2<sup>nd</sup> defendant quotes **Order 2 Rule 15** of the Civil Procedure Rules which provides that the court may order to be struck out or amended any pleadings on the ground that they may embarrass or delay the fair of the action. The 2<sup>nd</sup> defendant submits that the plaintiffs have not explained what they consider to be inordinate delay in filing the application. The 1<sup>st</sup> defendant maintains that where there is delay on part of a party in moving the court on matters that involve invoking the inherent jurisdiction of the court and seeking orders that a subject to the court's own discretion failure to explain the delay should warrant the dismissal of the application.

21. On his part the 2<sup>nd</sup> defendant quotes the case of **Barclays Bank of Kenya Limited -vs- Martha Karwirwa Anthony [2008] eKLR Milimani HCCC No. 446 of 2007**. In that case the Hon. Justice Mabeya dealt with two applications one seeking that the suit be struck out and the second one seeking leave to amend the plaint.

22. It is true that the suit has lasted for more than 10 years in court but is that sufficient reason to warrant a denial of the orders of amendment sought? The plaintiffs' response to this is that the record shows that the delay was not caused by the plaintiffs but by the 2<sup>nd</sup> defendant who had requested court to give the government and plaintiffs time to seek amicable settlement in the matter only to inform the court later that they would not enter into any agreement over the matters in the suit with the plaintiffs as earlier intended. It is also pleaded that during all these proceedings the 1<sup>st</sup> defendant was served with the requisite court documents including mention and hearing notices. They plaintiffs also aver that delay is not the only ground to be considered and other factors must be considered to.

23. I have examined through the file record and it would appear to me that all the parties failed to take proper action to drive the suit forward with expedition. However the longest delay in this matter is the one that lasted between **23/5/2011 to 2/2/2016**. That delay is not explained. I do note from the court file dismissal for want of prosecution was contemplated in this matter and notice dated 22/1/2016 under **Order 17 rule 2 (1)** of the Civil Procedure rules was issued to the parties leading to the court appearance on 2/2/2016 when the court after hearing the parties observed that the parties present excluding the 2<sup>nd</sup> defendant ordered that the case be spared for dismissal. It was evident from the submissions of the parties and some documentary evidence including a letter of 2/4/2012 that some kind of negotiations had been going on between the parties. Later on the court was informed that the negotiation was at an advanced stage and a consent was likely to be recorded. Since activity resumed in this matter in the year 2016 there appears to have been much progress on the part of the parties in pursuance of the suit, including the previous amendments to the plaint and defence which I have alluded to earlier in this ruling.

24. It is normally the proper approach that amendments at any stage of the proceedings may be granted and indeed **Order 2 rule 15 (2)** of the Civil Procedure Rules confirms the same. **Order 8 rule 3** provides for amendments with leave of court on an application by any party at any stage of the proceedings. **Order 8 rule 3 (2)** provides that where any application for leave 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 if any thinks just to do so.

25. The hearing of the suit has not commenced. I find that in this case justice would be served better in respect of all the parties if the application for leave to amend was granted notwithstanding the delay.

***(b) Whether the application introduces a fresh cause of action.***

26. Regarding this issue I have noted that draft annexed to the application for leave to amend seeks to the inclusion of some particulars that were not there in the amended plaint. I note that all the new allegations regarding alleged failure to comply with the law are targeted at the impugned Order. A party is allowed in law to amend his claim to avail particulars inadvertently omitted in a previous pleading. I also find that the particulars under the sub title "no valid agreement" emanate from the previous pleading in **paragraph 6** of the amended plaint to the effect that there was no any seeking of consent or any consultation with the affected community occurred before the impugned Order was made. Environmental concerns are legal issues and they form part of the new material. The alleged pre-existing rights of the applicants formed the basis of **paragraph 7** of the amended plaint. In the circumstances I do not agree with the respondents that a new cause of action is being introduced in the proposed amendments.

***(c) What orders should issue?***

27. The upshot of what I have stated above is that the application dated **29/11/2018** has merit. The same is granted as prayed in **prayer (2)**. The costs of the application shall be borne by the applicant.

**Dated, signed and delivered at Kitale on this 4<sup>th</sup> day of November, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**4/11/2019**

**Coram:**

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Bororio for plaintiff

Ms. Tigoi for 2<sup>nd</sup> defendant

Mr. Wanyonyi holding brief for Gumbo for 1<sup>st</sup> defendant

**COURT**

Ruling delivered in open court at 2.55 p.m.

**MWANGI NJOROGE**

**JUDGE**

**4/11/2019**