



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 35 of 2018

NDERI MWANIKI.....1ST APPLICANT

BENARD KINYUA.....2ND APPLICANT

VERSUS

JANE GACHUI MWANGI.....1ST RESPONDENT

TIMOTHY MAINA MWANGI.....2ND RESPONDENT

HAROUN KARIUKI MWANGI.....3RD RESPONDENT

RULING

1. By a Notice of Motion dated 11th March 2020 and supported by an affidavit of even date, the Plaintiffs/Applicants herein approached the Court seeking the following orders:

- (i) That leave be granted to amend the Plaintiff in the terms set out in the draft thereto attached to enjoin other Defendants.**
- (ii) That costs be in the cause.**

2. The Applicants application is grounded on the following premises:

- a) That since the pleadings have closed, leave must be sought and obtained to make any amendments;
- b) That the intended amendment aims at enjoining the 4th (Esther Njeri Mwangi), 5th (Haroun K Mwangi) and 6th (The Honourable the Attorney General) Defendants to the suit;
- c) That the Applicants had registered a caution against Land Reference No. Inoi/Thaita/1001 on 24th January 1994, but that the caution had been removed on 20th April 2015, without the Plaintiff's consent;
- d) That the Land Registrar, Kirinyaga after removing the said caution proceeded to allow a subdivision of Land Reference No. Inoi/Thaita/1001 into three portions, being: Land Reference Number Inoi/Thaita/2772; Land Reference Number Inoi/Thaita/2773 and Land Reference Number Inoi/Thaita/2774;
- e) That in the interest of justice, the Plaintiff ought to be amended to include the registered owners of the subdivided land.

3. The Applicants' application is opposed. Vide a replying affidavit filed on 25th May 2020, the 2nd Respondent admits that the Land Registrar, Kirinyaga did indeed remove the caution placed on Land Reference Number Inoi/Thaita/1001 and effected subdivisions thereon without the consent of the Applicants. He however contends that the removal of the caution followed the due process set out in law. It is his further contention that the present application is an abuse of court as it seeks to bar the Respondents herein from executing the costs awarded in a decree issued by a Nyeri Court on 15th June 1999. He avers that the Applicants have filed several matters relating to Land Reference Number Inoi/Thaita/1001 (hereinafter referred to as the Suit Land), including Nyeri CMCC No. 169 of 1995; Nyeri HCCA 14 of 1999 and Nyeri Court of Appeal No.35 of 2018, all of which have been decided in favour of the Respondents. The 2nd Respondent therefore prays for the application to be dismissed as the matter before the court is *res judicata*.

4. By consent, parties agreed to canvass the application by way of written submissions. The Applicants filed their submissions on 1st

December 2020 and reiterated the contents of the Notice of Motion and supporting affidavit. The Applicants insist that they were not aware that the caution placed on the Suit Land had been lifted and that sub-divisions had been done. It is their submission that the amendment is necessary to include the registered proprietors of the subdivided Suit Land in order to give them a chance to be heard and in order to allow the court to make effective orders. The Applicants further submit that the intended amendments will in no way prejudice the present Respondents and therefore urge the court to exercise the discretion donated by **Order 1 Rule 10 of the Civil Procedure Rules, 2010**. They cite the decision in **James Muchoria Maina Vs Kenya Power & Lighting Company Ltd (2005)e KLR** in support of their submissions. The Respondents filed their submissions on 1st December 2020 as well. They also rehash the contents of their replying affidavit. It is their submission that the question of the ownership of the Suit Land has already been determined and that therefore the Applicants ought to appeal against that decision. They cite the decision in **Telkom Kenya Limited v John Ochanda (Suing on his own behalf and on behalf of 996 former employees of Telkom Kenya Limited) (2014) e KLR** to the effect that there ought to be finality to proceedings. In conclusion, the Respondents argue that the Applicants are forum shoppers, having instituted the same suit in different courts and that therefore the court ought to dismiss the present application.

5. The court has considered the notice of motion application and the parties' rival affidavits and submissions.

Order 1 Rule 10 of the Civil Procedure Rules, 2010, governs the amendment of pleadings to enjoin new parties. The provision provides as follows:

'[Order 1, rule 10.] Substitution and addition of parties.

10. (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(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.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.' (Underline, mine)

For purposes of the present application, **Order 1 Rule 10(2)** is the most relevant. The Section donates to the court discretion to either allow or refuse an application for the enjoinder of new parties to a suit. The considerations to guide the court in exercising this discretion include ensuring that justice is done as between the parties but also, more importantly, a weighing of whether the intended enjoinder will illuminate the issues in dispute, allowing for the prescription of the most effective remedy.

The Court of Appeal in **Institute for Social Accountability & Another Vs Parliament of Kenya and 3 Others 2014 KLR** restated the object of amendments in the following words:

".... The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings."

The Court of Appeal in **Sanyu International Limited Vs Oriental Commercial Bank Limited [2017] e KLR** cited with approval the decision in **Eastern Bakery Vs Castelino (1958) EA 461**, where the court opined as follows:

"It will be sufficient to say that 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."

Guided by the foregoing legal provisions and case law, the question for determination is whether or not the court ought to exercise its discretion in allowing for the intended amendments. The Applicants' case is that the parties to be enjoined as Defendants are the registered proprietors of the resultant sub divisions of the Suit Land. The Applicants intimate that they came to the knowledge of the subdivisions after they had already filed their Plaint. It is their position, and the Court agrees, that any orders to be made in respect of the Suit Land (and the resultant subdivisions) will inevitably involve the proposed Defendants. Based on the foregoing analysis, the Court finds that the intended enjoinder is likely to occasion justice between the parties, to illuminate the issues in controversy and to allow for effective reliefs to be given once the main suit is determined. The present case is therefore a candidate for the favourable exercise of the courts discretion in allowing the amendments sought.

Now, the Respondents' main ground of opposition is that the application is res judicata by reason of the decisions in Nyeri CMCC No. 169 of 1995; Nyeri HCCA 14 of 1999 and Nyeri Court of Appeal No. 35 of 2018. The Respondents have attached the relevant decrees,

judgements and rulings in the said matters. It has been decided in numerous decisions that a ground of *res judicata* ought not to be raised by way of preliminary objection, but through a Notice of Motion. The obvious reason is that, should the Court entertain the Respondents' assertions at this stage, it will not have the benefit of taking into account the Applicants' input on the matter. The Court finds persuasion in the following decisions:-

Wilmot Mwadilo, Edwin Mwakaya, Amos Nyatta & Patrick Mbinga Vs Eliud Timothy Mwamunga & Sagalla Ranchers Limited [2017] e KLR:

“Upholding the said Preliminary Objection at this stage would be draconian as there appeared to be substantive issues that had emerged that needed to be heard and determined at the time of the hearing of the said Notice of Motion application. Indeed, the question of whether they have a cause of action against the Defendant and if they can sustain the same against him ought to be considered during the hearing of their Notice of Motion application when this court will consider whether or not leave should be granted for them to continue with the derivative action against him. The said question cannot be considered at this stage as there is potential of the court inadvertently delving into the merits or otherwise of their said application”.

George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia& Another (2014), e KLR,

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection.” (Underline, mine)

Henry Wanyama Khaemba Vs Standard Chartered Bank (K) Ltd & another [2014] e KLR:

“That re-statement of the limited scope of a Preliminary Objection brings me to the point where I hold that the Preliminary Objection by the 1st Defendant is not a true Preliminary Objection in the sense of the law. The issues of res judicata, duplicity of suits and suit having been spent will require probing of evidence as it is already evident from the submissions by the 1st Defendant. They are incapable of being handled as Preliminary Objections because of the limited scope of the jurisdiction on preliminary objection. Courts of laws have always had a well-founded quarrel with parties who resort to raising preliminary objections improperly”.

From the foregoing, it is evident that the Respondents' *res judicata* claim is improperly brought before the court and cannot be dealt with in the course of determining the present application. The upshot of my analysis is that the Applicants' application is allowed. Costs shall be in the cause.

RULING READ, DELIVERED physically and SIGNED in open Court at Kerugoya this 11th day of June, 2021.

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E.C CHERONO

ELC JUDGE

In the presence of:-

1. Mr. Wanyige holding brief for Wandaka for Applicants
2. Respondents – absent
3. Kabuta – Court clerk.