



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC. CASE NO. 293 OF 2017

(FORMERLY MACHAKOS ELC NO. 102 OF 2012)

NTIANTA OLE NDORKO.....PLAINTIFF

VERSUS

ALEX NTEKESSE PUUTI.....1ST DEFENDANT

PARTOTI NKEENE (THE CHAIRMAN LORNGOSUA GROUP RANCH)....2ND DEFENDANT

RULING

What is before court for determination is the Plaintiff's Notice of Motion application dated 12th January, 2021 brought pursuant to Order 8 Rule 3; Order 51 Rules 1, 2 and 3; and Order 9 of the Civil Procedure Rules as well as Sections 1A, 1B, 3D & 63 of the Civil Procedure Act. The Plaintiff seeks leave to amend the pleadings and for an order of injunction to restrain the 1st Defendant or her agents/servants from entering into, fencing or settling on land parcel number KAJIADO/LORNGOSUA/369 pending the hearing and determination of this suit.

The application is premised on the grounds on the face of it and the supporting affidavit of NTIANTA OLE NDORKO where he deposes that he discovered that his pleadings needed to be amended to bring on board Kuyieta Ene Puuti, the alleged proprietor of land parcel number KAJIADO/LORNGOSUA/369. He explains that he was shown that the registered proprietor of the alleged KAJIADO/LORNGOSUA/369 was Kuyieta Ene Mereru Puuti and not her son Alex Ntekesse Puuti whom he had sued. He avers that he was alerted that it is Lorngosua Group Ranch that had mistakenly, irregularly and illegally reduced his parcel of land to 46.5 hectares from 75.5 hectares as per his title deed. He claims the whole of the alleged LR No. KAJIADO/ LORNGOSUA/369 was created inside his parcel of land. He states that whereas his title number KAJIADO/LORNGOSUA/368 was issued to him on 5th February, 2001, the intended 1st Defendant's title was issued on 25th August, 2010. Further, that the 1st, 2nd and 3rd Defendants conspired and grabbed his 28 hectares of land and registered it in the 1st Defendant's name. He avers that the 3rd Defendant secretly and clandestinely undertook illegal investigation on his parcel of land from 13th November, 2011 to date. He insists the 1st Defendant has never resided on the illegal KAJIADO/LORNGOSUA/369 which parcel is entirely in KAJIADO/LORNGOSUA/368. Further, that the dispute before court is an ownership one, as parcel number KAJIADO/LORNGOSUA/369 does not exist on the ground. He reiterates that the Court has jurisdiction to entertain and determine the dispute between the Plaintiff and the 1st to 4th Defendants as the same is a land ownership dispute and a case of fraud propagated by the 1st, 2nd and 3rd Defendants to deprive him of 28 hectares of his rightful entitlement. Further, the 1st Defendant was never a member of the 2nd Defendant hence her alleged allocation is fraudulent, more so since she has not demonstrated that she is the legal heir/legal representative to Mereru Puuti, the deceased son. He contends that George Ole Mereru (deceased) was allocated parcel No. 249 and not 369. Further, that his estate is unadministered since his demise on 7th July, 1988 to date. He reaffirms that Kuyieta Ene Mereru Puuti was number 248 in the forged register of Lorngosua Group Ranch and there is no evidence that she was registered as an heir to her son.

The 1st Defendant opposed the application by filing a replying affidavit sworn by Alex Ntekesse Puuti who confirms swearing the affidavit on his behalf and that of the 2nd Defendant. He deposes that he is the son of Mrs. Kuyieta Ene Mereru, who is the registered proprietor of parcel number KAJIADO/LORNGOSUA/369. He contends that the Plaintiff seeks leave to amend his pleadings to have the case against the 1st and 2nd Defendants withdrawn and to enjoin three (3) new parties. Further, the proposed amendments by the Plaintiff amount to an attempt to withdraw the case against the 1st and 2nd Defendants through the backdoor. He contends that the proper procedure for a party seeking to withdraw a case against another would be to file a Notice of Withdrawal of Case against the 1st and 2nd Defendants and pay the requisite costs for bringing them to Court unfairly. He insists they should be compensated for the trouble undertaken for defending this case. He states that the Plaintiff has not annexed the relevant documentation to support his claim for injunctive orders from court. He reiterates that the application is made in bad faith and is meant to withdraw this case against the Defendants without following proper procedure. Further, that it is bad in law, frivolous, scandalous, vexatious and an abuse of the court process and the same should be dismissed with costs.

On the 17th May, 2021, the Plaintiff's Counsel intimated to court that he would not file written submissions while the Defendants' Counsel stated that they only had an objection on issue of costs.

Analysis and Determination

Upon consideration of the Notice of Motion application dated the 12th January, 2021 including the respective affidavits, the following are issues for determination:

- Whether the Plaintiff has established sufficient grounds to warrant leave to amend its Plaintiff.
- Whether the Plaintiff is entitled to orders of injunction pending the outcome of the suit.

As to whether the Plaintiff has established sufficient grounds to warrant leave to amend its Plaintiff.

I note the Plaintiff is seeking to amend his Plaintiff to include new Defendants in the suit and drop two others who had earlier been sued. His major reason is that the amendment intends to include additional information crucial for this case. He seeks to bring on board Kuyieta Ene Puuti the alleged proprietor of title number KAJIADO/LORNGOSUA/369. He explains that he was shown that the registered proprietor of the alleged KAJIADO/LORNGOSUA/369 was Kuyieta Ene Mereru Puuti and not her son Alex Ntekese Puuti whom he had sued. Further, that it is Lorngosua Group Ranch that had mistakenly, irregularly and illegally reduced his parcel of land to 46.5 hectares from 75.5 hectares as per his title deed. The 2nd Defendant opposed the application insisting the Plaintiff is using a wrong procedure to withdraw the suit against them and they sought for costs.

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 stipulates thus: **'(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 as 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 scenario, I note the Plaintiff has sought to bring in new parties and explained the relationship between the proposed new parties and the suit land. I note the Defendants' only concern is costs. I further note that the two Defendants actually have a relationship with the Defendants, the Plaintiff seeks to drop. In relying on the legal provisions cited above and associating myself with the quoted judicial authority, I find that the Plaintiff has indeed explained the relationship of the proposed new parties and the suit land. Further, that the amendment sought is necessary for the determination of the real question in controversy and the Defendants have not demonstrated the prejudice they stand to suffer if the amendment sought is allowed. I opine that the 2nd Defendant had been sued as the Chairman of the Lorngosua Group Ranch which Ranch is still retained as a party in the suit. I note the 1st Defendant, is the son to the proposed 1st Defendant and admits the mother owns the suit land which is the fulcrum of the dispute herein. In those circumstances, I will allow the amendment sought.

As to whether the Plaintiff is entitled to orders of injunction pending the outcome of the suit.

The Plaintiff has sought for orders of injunction against the 1st Defendant and contends that the suit land which is the 1st Defendant's land is within his land. The 1st Defendant has opposed the said application contending that no documents were annexed. It is trite that injunctive reliefs suffice so as to protect the substratum of the suit. As to whether the Plaintiff has established a prima facie case with a probability of success at the trial, I will rely on the principles established in the case of **Giella Vs Cassman Brown & Company (1973) EA 358** as well as the definition of a prima facie case as stated in the case of **Mr Rao Ltd Vs First American Bank of Kenya & 2 Others (2003) KLR 125**. It

has not been disputed that the 1st Defendant's parcel of land is within the Plaintiff's land which culminated in the reduction of the acreage of the Plaintiff's parcel of land. Further, this is the fulcrum of the dispute herein. It is my considered view that if the 1st Defendant was to dispose of the fulcrum of the dispute then this suit would remain an academic exercise. In the circumstance, I find that the Plaintiff has indeed established a prima facie case and can suffer irreparable harm if the 1st Defendant interferes with the suit land. Further, at this juncture, I find that the balance of convenience indeed tilts in his favour.

It is against the foregoing that I find the Notice of Motion application dated the 12th January, 2021 merited and will allow it. I direct the Plaintiff to file and serve its amended Plaint within 21 days from the date hereof. Upon service, I grant the Defendants' leave of 21 days to file their respective Defences if need be. I further make an order that an order of temporary injunction do issue restraining the 1st Defendant or her agents/servants from entering into, fencing or settling land parcel number KAJIADO/LORNGOSUA/369 pending the hearing and determination of this suit.

Costs will abide the outcome of this suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 29TH DAY OF SEPTEMBER, 2021

CHRISTINE OCHIENG

JUDGE