



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 394 OF 2017

GEOFFREY THIONG'O WAWERU.....PLAINTIFF

VERSUS

GEORGE GIKONYO KAMAU.....1ST DEFENDANT

ROSE MARY WAMBUI GICHURU.....2ND DEFENDANT

JOSEPH GIKONYO KAGWI.....3RD DEFENDANT

LAND REGISTRAR.....4TH DEFENDANT

ATTORNEY GENERAL.....5TH DEFENDANT

RULING

1. In the Notice of Motion dated 13th July, 2021 the Plaintiff has prayed for the following reliefs;

a) That this Honourable Court be pleased to issue proclamation, warrants of arrest or other orders or directions as it deems fit to compel Francis Mburu Maiguah to attend court on a date to be scheduled by the court to testify and give evidence on the basis of his witness statement dated and filed on 16th October, 2019.

b) That in the alternative, this Honourable Court be pleased to issue an order that the witness statement of Francis Mburu Maiguah dated and filed on 16th October, 2019 be and is admitted into evidence in support of the Plaintiff's case without his attendance before court to produce it and be cross-examined on it.

c) That this Honourable Court be pleased to grant the Plaintiff leave to amend the Amended Plaint dated 10th October, 2017 and filed on 13th October, 2017 in terms of the draft further Amended Plaint annexed hereto.

d) That the draft Further Amended Plaint be deemed duly filed and served upon payment of the requisite further court fees on the Further Amended Plaint or in such manner as the Honourable court deems fit and directs.

e) That this Honourable Court be pleased to grant the Plaintiff leave to call a Surveyor as an expert witness to produce a survey report on the suit property

2. The Application is supported by the Affidavit of the Plaintiff who deponed that his advocates on record advised him on the need to file supplementary documents in support of his case; that he filed his supplementary bundle of documents dated 6th October, 2019 pursuant to the leave granted by this Court on 9th October, 2019 and that in the process of compiling the supplementary bundle of documents, the need to file a supplementary witness statement arose.

3. It is the deposition of the Plaintiff that he filed two additional witness statements, including the witness statements of Francis Mburu Maiguah, who is a neighbor and who bought land from the father of the 1st and 2nd Defendants and who was aware of the agreement that he (the Plaintiff) entered into in respect to the suit property.

4. The Plaintiff deponed that on 23rd October, 2019, he testified in this matter; that on 4th May, 2020, the hearing could not proceed because

of the Covid -19 pandemic disruptions to normal operations and that when this matter came up for hearing on 21st September, 2020, Francis Mburu was unavailable although he had confirmed of his willingness to testify.

5. It is the Plaintiff's deposition that later on, Francis Mburu informed him that he had been threatened by the 1st Defendant and some of his siblings had warned him to stop interfering in their family affairs; that on 21st September, 2020, the court issued witness summons to Francis Mburu Maiguah to attend court on 9th June, 2021 to testify in this matter and that Francis Mburu was served with the said witness summons on 27th May 2021.

6. The Plaintiff deponed that Francis Mburu Maiguah has evidence that will greatly assist the court to arrive at a just and fair determination of the suit; that it is in the interests of justice that this court grants such proclamation, warrants or orders to facilitate his appearance to testify and that in the alternative, his witness statements should be admitted in evidence in support of his case without his attendance.

7. According to the Plaintiff, upon taking over the prosecution of the suit, his advocates received all documentation and advised him that because of the various mutations and sub-division of the mother title Dagoretti/Riruta/2243 carried out by the 1st and 2nd Defendants to his exclusion, all the previous land referencing assigned to his portion of land measuring 0.2 acres may have changed.

8. It is the Plaintiff's case that his surveyor prepared a report dated 2nd February, 2021 which confirmed that the mother title was sub-divided into six portions being Dagoretti/Riruta/4468, 4470, 4471, 4472,4473 and 44 74, together with an access road and that the 0.25 acres became Dagoretti/Riruta/4472.

9. According to the Plaintiff, parcel of land known as Dagoretti/Riruta/ 4472 has further been sub-divided into three portions which are Dagoretti/6628, 6629 and 6630 together with an access; that the RIM (Registered Index Map) was amended on 16th May, 2016 and that he only became aware of these activities after the Defendants filed their pleadings.

10. The Plaintiff deponed that due to the said sub-division of the suit property by the Defendants, it is only fair that he be granted leave to call the surveyor to testify in this matter and that he should be granted leave by this court to further amend his Amended Plaint to reflect the said sub-divisions of the suit property.

11. The 1st Defendant swore a Replying Affidavit in which he deponed that the Plaintiff has been amending his pleadings since he filed the suit; that the proposed amendments by the Plaintiff have totally changed the cause of action and will substantially alter the character of the case which has already progressed and that the introduction of new witnesses will alter the character of the case to the detriment of the 1st and 2nd Defendants.

12. The 1st Defendant deponed that he filed a defence and counter-claim and demonstrated that parcel of land known as Dagoretti/Riruta/2243 was a mother title that was registered in the name of his late father; that he pleaded in his defence that the Plaintiff benefited out of the sub-divisions and got 0.5 acres being Dagoretti/Riruta/4474 and that the Plaintiff should sort out his issues with the witness who has refused to attend court.

13. The Plaintiff's and the 1st and 2nd Defendant's advocates filed submissions which I have considered. I have also considered the authorities filed alongside the said submissions.

14. This suit was commenced by way of a Plaint dated 12th June, 2017 which was amended on 10th October, 2017. In the amended Plaint, the Plaintiff averred that he is the rightful owner of all parcel of land measuring 0.25 acres of land known as Dagoretti/Riruta/2243 having purchased the same from Kamau Waweru (Deceased) vide an agreement dated 23rd May, 1988.

15. The Plaintiff averred in the amended Plaint that despite knowledge that he is the rightful owner of 0.25 Acres of parcel of land number 2243, the Defendants went ahead to cause the sub-division of the property into parcels number 4468, 4469, 4470, 4471, 4472, 4473 and 4474.

16. The record shows that the pleadings having closed, the Plaintiff filed a list of witness on 16th October, 2019. In the said list, one of the witnesses who signed his witness statements is Francis Mburu Maiguah, who had voluntarily agreed to testify in support of the Plaintiff's case.

17. It is not in dispute that when this matter came up for hearing, the court issued a witness summon summoning the said Francis Mburu to testify in this matter. However, he failed to turn up to give his evidence despite having been duly served with the witness summons.

18. **Order 16 Rule 10** of the **Civil Procedure Rules** provides that where the court deems the evidence sought to be produced through the witness to be material, and the witness has without lawful excuse failed to attend court, it may issue a proclamation requiring the witness to attend court at a place and time to be stated in the proclamation.

19. **Order 16 Rule 10(2)** goes further to state that in lieu of or at the time of issuing such proclamation, or at any time afterwards, the court may in its discretion issue a warrant, with or without bail, for the arrest of the witness to enforce attendance to testify.

20. It is not in dispute that Francis Mburu signed the witness statement in support of the Plaintiff's case on 16th October, 2019. Having voluntarily signed the said statement, the said Francis Mburu must attend court and give his evidence, which evidence will be tested by the Defendants in cross-examination. In the event he fails to attend court on a date to be fixed by this court, the Plaintiff's advocate will be at liberty to make an oral application for the issuance of warrants of arrest.

21. The Plaintiff is seeking to further amend his Amended Plaint. The Plaintiff's case is that he purchased the plots from the late Kamau Waweru which formed part of land known as Dagoretti/Riruta/2243. According to the Plaintiff, instead of being given two titles, the Defendants only gave him one title for land known as Dagoretti/Riruta /4474, and refused to give him the title for the other portion.

22. It is the Plaintiff's case that the other plot that he is entitled to (the suit property) being Dagoretti/4472 was sub-divided into three portions, and that one portion has been transferred to the 3rd Defendant. The issue that the Plaintiff is seeking to introduce in the proposed further amended Plaintiff is the sub-divisions that have occurred in respect of the suit property.

23. Considering that the sub-division of the mother title has always been undertaken by the 1st and 2nd Defendants', the Plaintiff must have been incapacitated into pleading the said sub-divisions.

24. In *Central Kenya Limited vs Trust Bank Limited & 5 Others (2000) eKLR*, the Court of Appeal held that a party should be allowed to make such amendments as may be necessary for determining the real question in controversy to avoid a multiplicity of suits. The Court of Appeal further held that the overriding consideration in applications for such leave should be whether the amendments are necessary for the just determination of the controversy between the parties. The court held as follows;

"...The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.

25. The Plaintiff's Application meets all these principles. The proposed amendments are to facilitate the court to determine the real question in controversy by sufficiently describing the land forming the subject matter of the pleadings. While doing so, the Plaintiff has not introduced a new or inconsistent cause of action.

26. To the extent that the Plaintiff is seeking for leave to introduce the mutations and sub-divisions of the suit property, through his surveyor, it is only just that the said amendments be allowed, and the surveyor be called to produce his report.

27. For those reasons, I allow the Application dated 13th July 2019 as follows;

a) Francis Mburu Maiguah be and is hereby compelled to attend court, and testify on a date which will be indicated in the witness summons.

b) If the said Francis Mburu Maiguah fails to attend court to testify on the date to be indicated in the witness summons, warrants of arrest will issue.

c) The Plaintiff be and is hereby granted leave to file and serve his further amended Plaint within 14 days of the date of this Ruling.

d) The Plaintiff be and is hereby granted leave to call a surveyor or an expert witness to produce a survey report in respect to the suit property.

e) The costs of the application to be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 25TH DAY OF NOVEMBER, 2021.

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Rugo for the Plaintiff

Ms Rotich for the 1st and 2nd Defendants

No appearance for the Attorney General

Court Assistant - John Okumu