



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 486 OF 2017

BWK (of unsound mind suing

through the next friend CMK.....PLAINTIFF/ APPLICANT

-VERSUS-

SAMUEL MAINA KUNG'U.....1ST DEFENDANT/ RESPONDENT

JOSEPH MBURU KUNG'U.....2ND DEFENDANT/ RESPONDENT

FRANCIS KUNG'U GACHANJA.....3RD DEFENDANT/ RESPONDENT

JENNIFER WANJIRU KUNG'U.....4TH DEFENDANT/ RESPONDENT

LAND REGISTRAR

MURANG'A.....INTENDED 5TH DEFENDANT/ RESPONDENT

RULING

By Notice of Motion dated **15th July, 2021** and filed on the same day, the Plaintiff/ Applicant sought for orders; -

1. Spent

2. Spent

3. THAT the Court be pleased to enjoin the Land Registrar Murang'a as a party to the suit.

4. THAT this Honorable Court be pleased to grant the Plaintiff/ Applicant leave to amend their *Plaint* as per the amended *Plaint* annexed hereto.

5. THAT the draft amended *Plaint* annexed hereto be deemed duly filed upon payment of the requisite Court fees

6. THAT THIS Honorable Court be pleased to grant the Plaintiff/ Applicant leave to file further list of documents after close of pleadings

7. Costs of this application be in the cause.

The application is premised on the **NINE GROUNDS** stated on the face of the application and the Supporting Affidavit by **ROBERT K.G NDUNG'U Advocate**, sworn on the **15th July, 2021**. The Applicant contend that the *Plaint* dated **14th July 2014**, and filed on **15th July 2014**, did not include the **Land Registrar**, whom the Orders sought shall be executed against. That the Applicant's present counsel upon perusing the pleadings noted the oversight and now seeks inclusion of the **Land Registrar Murang'a**, failure to which Court orders will be in-executable. That the Defendants/Respondents have furnished the Plaintiff/Applicant with documents that are crucial to her claim and in the interest of justice, the *Plaint* ought to be amended. That the Plaintiff is a pauper and it is in the interest of justice that the *Plaint* be amended to include the new information. There is an annexed Amended *Plaint* dated **15th July, 2021**.

The Motion is contested by the 1st – 3rd Defendants/Respondents vide a Replying Affidavit by the 2nd Respondent – **Joseph Mburu Kung’u**, sworn on the **19th August, 2021**. It is the Respondents averments that the documents alleged to be new are not really new, having been filed in **Murang’a High Court**. That the Applicant ought to have withdrawn the instant suit and then challenge the succession proceedings. That the application is misconceived and incompetent as it seeks to challenge succession proceedings. Further that the Applicant lacks **locus standi** to sue, as she is not an administrator of the Estate of **George Kung’u Gachanja**, and her claim for intermeddling is not maintainable in this suit. That the Application is intended to cause delay as this is an old matter and the same should not be allowed.

Counsel for the 4th Respondent and the Interest Party informed the Court on **26th July 2021**, that they were not opposed to the Motion. On **4th October 2021**, as per parties’ proposition, the Court directed them to dispense with the application by way of written submissions. The Applicant was granted **14 days**, to put in her written submissions and a corresponding 14 Days to the Respondents. On **17th November 2021**, the Respondents were granted further **14 Days** to put in their written submissions, but as of **7th December 2021**, when the matter came up for mention there were no submissions on record for the Respondents.

The Applicant crafted two issues for determination.

On leave, the Applicant invoked the provisions of **Article 50(1)** of the **Constitution** on **fair hearing** and enumerated the principles set out in **Ochieng and Others vs National Bank of Chicago Civil Appeal No. 147 of 1991** that guide a Court in allowing application for amendments. The Applicant submits that the new documents raises crucial legal issues that need to be pleaded and relief sought. That the documents were in the custody of the defendants and the Applicant was not privy to.

On joining the 5th Respondent, the Applicant relied on the provisions of **Order 1 Rule 10 (2)**, and the case of **Martin Wesula Machyo vs Housing Finance Co. of Kenya & Other ELC No. 665 of 2013**. She submits that the intended amendment seeks to plead fraud and it is in the interest of justice that the 5th Respondent be included. That the documents that the Applicant wishes to rely on are tainted with fraud which the 5th Respondent is better placed to shed light on how the Defendants acquired them. Further that there will be no prejudice if the orders sought are granted. Reliance was placed on the case of **St Patrick’s Hill School Limited vs Bank of Africa Kenya Ltd (2018) eKLR, where the Court held;**

“The rule of conduct of the Court in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”

This Court being cognizant of the age of the matter notes that the same had been set down for hearing on **23rd June, 2021**. However, the matter did not kick off on account of discovery of new documents by counsel for the Plaintiff, documents which were furnished by counsel for the Defendants on the same day. The Plaintiff sought to amend the Plaintiff which, is the substance of the instant application. Upon perusing the application, the annexures thereto, the response and the submissions, the issues for determination by this Court are as crafted by the Applicant.

i. Whether the Land Registrar Murang’a should be joined in this suit.

ii. Whether leave should be granted

iii. Whether the annexed draft amended plaint should be admitted

iv. Who should bear costs of the application

(i) Whether the Land Registrar, Murang’a should be enjoined in this suit

Before delving into the merits of the application, this Court appreciates the Ruling of the Court in **Re Estate of Barasa Kanenje Manywa (Deceased) (Succession Cause 263 of 2002) [2020] KEHC 1 (KLR) (30 July 2020)**, where the Court drew a distinction between the terms “join” and enjoin” which are often used interchangeably. It was held:

To “join” a party to a suit means to add that person to the suit. To “enjoin,” in law, means to injunct, or to bar a party from doing something. “Enjoinder” means a prohibition ordered by injunction.

The Applicant has sought an order for enjoinder and with the meaning of it as elaborated above, the Applicant is seeking orders to bar the Land Registrar. While this Court agrees with the sentiments expressed above on the distinction of terms, the acceptance will technically mean that this application ought to be dismissed. However, invoking the provisions of **Article 159 (2) (d)**, of the **Constitution**, this Court will determine the merits of the application, but caution counsel on the use of the terms.

The law on joining of parties is entrenched under **Order 1 Rule 10(2)** which provides that,

“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”.

This order requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit. The provisions were echoed by the **Court of Appeal of Tanzania** in **TANG GAS DISTRIBUTORS LTD V. SAID & OTHERS [2014] EA 448** as quoted by the Court of Appeal in Mombasa **CoA App No. 15 of 2015 JMK v MWM & another [2015] eKLR** quoted:

“can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage”.

The suit has not been heard and no final orders issued so the application is properly before this Court. Nambuye J, in **Eldoret High Court Civ’ No. 136 of 2000:- Joseph Njau Kingori v Robert Maina Chege & 3 others [2002] eKLR** enumerated four aspects to look at before joining a party to a suit to wit:

- i. Is a necessary party?**
- ii. A proper party;**
- iii. There is a relief flowing from him to the plaintiff;**
- iv. The ultimate order or decree cannot be enforced without his participation in the proceedings.**

Similarly, the Judges sitting in Nairobi High Court case of **Julius Meme v Republic & another [2004] eKLR Misc Criminal App. No 495 of 2003**, when looking at the principles for joinder of parties in Constitutional reference, though different circumstances, held:

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;**
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;**
- iii. Joinder to preempt a likely course of proliferated litigation**

The Applicant contends that the 5th Respondent is the custodian of matters of land registration. That having sought orders for revocation of title and the Orders if granted will be directed on the 5th Respondent, he should be joined. Further that the Applicant has alluded to corruption which stems from the office of the 5th Respondent. The Applicant has sought orders in the intended amended Plaintiff directed to the Land Registrar, to cancel and restore the title to the suit property.

This Court cannot determine the merits of the Plaintiff at this juncture as it will require parties to adduce evidence. The allegations of fraud as enumerated in the Plaintiff paints a picture of illegality in the office of the Land Registrar which this Court cannot pronounce itself without hearing the holder of the office as it would be against the rules of fair hearing. It is trite that allegations of fraud must be proved see **Mombasa Civil Appeal No. 312 of 2012; - Emfil Limited v Registrar of Titles Mombasa & 2 others [2014] eKLR** where the Court held:-

“Allegations of fraud are allegations of a serious nature normally required to be strictly pleaded and proved on a higher standard than the ordinary standard of balance of probabilities.

The presence of the Land Registrar would be necessary to ascertain how title was acquired and whether the requisite process was followed. Should the orders for cancellation be issued, the Land Registrar is by the law the party to enforce. (**See R...vs... Registrar of Titles, Mombasa & others Ex parte A.K Abdulgani Limited (2018) eKLR**). There is no prejudice that the Respondents will suffer should the 5th Respondent become a party to the proceedings. Relevantly, the 5th Respondent was not opposed to the application. This Court finds that the application meets the test set out in the foregoing cases and directs that the **Land Registrar Murang’a** be joined in the proceedings.

(ii) Whether Leave should be granted

The law on amendments of pleadings is settled under **Order 8** of the Civil Procedure Rules. Order 8 rules 5 & 3 provides:

5. (1) For the purpose 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.

3. (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 sub rule (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 sub rule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

The applicable principles of amendments were settled in the Court of Appeal Case of **Joseph ochieng & 2 others trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR**. And also echoed by the Court in **Nairobi HCC Civil No 2715 of 1987 LAKHAMSHI KHIMJI SHAH & another v AJAY SHANTILAL SHAH & 2 others [2010] eKLR** where it was held;

i. The application should be made timely

ii. The application should be made in good faith

iii. The Court should examine the nature and extent of amendments

iv. The Court must ensure there is no new or inconsistent cause of action

v. That no injustice will be occasioned to the other party

The application was filed on **15th July 2021**, and this is **seven years** after instituting the suit. However, the amendment was based on a document availed to the Applicant on **23rd June, 2021**. As per the Court record, the Applicant on the said date was ready to proceed for hearing but was served with documents by counsel for the 1st-3rd Respondents. On **8th April 2021**, counsel for the 1st-3rd Defendant was on record and stated that they had complied and needed a date for hearing. At the filing of the Defence, **Order 7 Rule 5** required of the Defendant to file the documents to be relied upon. There was no compliance and hence the unjustifiable ambush on 23rd June, 2021.

The Applicant has a right to interrogate documents and a rebuttal may issue based on the documents, hence the need for timely exchange of documents. Apart from benefiting parties, this will also save on judicial time and resources. Counsel for the Plaintiff/Applicant sought an adjournment to seek further instructions from his client, circumstances which led to the filing of the instant application on **15th July, 2021**. This Court finds the application was filed on time and in good faith.

The intended amendments seek to join the **Registrar of lands Murang'a**, and to amend the Plaint on the strength of discovery of new documents. That the documents will affect the substance of the prayers sought. From the annexed Draft of amended Plaint, the Applicant alludes to lack of inclusion of the suit property in succession proceedings. Attached to the Notice of Motion are copies of Grant indicating the assets of the deceased. Technically, this Court is invited to examine whether the property belonged to the deceased or not. Also there is a prayer for cancellation of title, which the Plaintiff/Applicant wishes this Court to compel the Land Registrar to cancel. The amendments does not introduce a new a cause of action that will alter the substance of this case. Moreover, there is no injustice or prejudice that will be occasioned to the Respondents should the application be allowed.

The discretion to allow an application for leave to amend is wide and often times, it is a judicial one to be exercised on the basis of laid down principles. This Court shall exercise its discretion in favor of the Plaintiff/Applicant for the ends of justice in furtherance of section 3A and 3B of the Civil Procedure Act and the overriding objectives therein as provided by Section 1A & 1B of the said Civil Procedure Act.

(iii) Whether the draft amended Plaint should be admitted

The Applicant has attached a copy of a draft amended Plaint. **Order 8 Rule 7**, makes provisions on the mode of amendments.

“All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words”.

The provisions carry a mandatory requirement which this Court notes are non-compliance. The Applicant opted to use black ink as though it was a subsequent amendment. This is a procedural technicality which this Court finds can be cured by the provisions of **Article 159 (2)(b)** of the **Constitution** and the Oxygen principles. (*See Malindi CoA App No. 62 of 2016 Christopher Orina Kenyariri t/a Kenyariri & Associates Advocates v Salama Beach Hotel Limited & 3 others [2017] eKLR*)

However, the document having not been duly filed, the Court will not adopt the draft amended Plaint, but will direct the Plaintiff/Applicant to amend the Plaint as per the provisions of **Order 8 Rule 7** of the **Civil Procedure Rules**, within 14 Days from the date hereof.

As to costs of the instant application, this Court in exercise of its discretion under **Section 27** of the **Civil Procedure Act** directs that costs of the application shall abide the outcome of the main suit.

In a nutshell, the Notice of Motion application dated **15th July, 2021**, is found **merited** and the same is allowed in terms of prayers **No 3, 4** and **6**. However the Draft amended Plaintiff will not be deemed as duly filed, but the Plaintiff/Applicant is granted leave of **14 days** from the date hereof to file an amended Plaintiff and comply with **Order 8 Rule 7** of the **Civil Procedure Rules** accordingly.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MURANG'A THIS 21ST DAY OF DECEMBER, 2021.

L. GACHERU

JUDGE

Delivered online

In the presence of;

Kuiyaki - Court Assistant

Mr. Kiroko Ndegwa HB for Mr. Ndungu for the Plaintiff/Applicant

M/s Wanjiru H/B for Mr Mburu Machua for Defendants/Respondents

N/A for Intended 5th Defendant/Respondent

L. GACHERU

JUDGE