REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

ELC CASE NO. 7 OF 2019

ALBERT MWANIKI KWENJA.....1ST PLAINTIFF

LEONARD IRERI KWENJA.....2ND PLAINTIFF

BERNARD KIURA KWENJA.....3RD PLAINTIFF

VERSUS

JERNADO NJOKA KWENJA.....DEFENDANT

RULING

1. By a notice of motion dated and filed on 6th March 2019 and expressed to be brought under **Sections 1A, 1B, 3 and 3A of Civil Procedure Act (Cap. 21) and Order 40 Rule 2, Order 51 Rules 1 of the Civil Procedure Rules 2010** (hereafter Rules) **and all enabling provisions of the law,** the Plaintiffs sought the following orders:

a. Spent

b. That the honourable court do issue an order of injunction restraining the defendant herein either by themselves or their agent or by anyone acting on their behalf from interfering, transferring, disposing or alienating or in any way interfering with the ownership of plot No. Embu/Municipality/317 until this application is heard and determined.

c. That the honourable court do issue an order of injunction restraining the defendant herein either by themselves or their agent or by anyone acting on their behalf from interfering, transferring, disposing or alienating or in any way interfering with the ownership of plot No. Embu/Municipality/317 until this suit is heard and determined.

d. The defendant be restrained from receiving or collecting any rent from the premises Embu/Municipality/317 known as Nguviu House until this application is heard and determined.

e. The defendant be restrained from receiving or collecting any rent from the premises Embu/Municipality/317 known as Nguviu House until this suit is heard and determined.

f. That all rents collected by the Defendant in the past and all future rents from plot No. Embu/Municipality/317 be paid into the account No. 1102849954 Nguviu House Investment Limited pending determination of this application.

g. That all rents collected by the defendant in the past and all future rents from plot No. Embu/Municipality/317 be paid into the account No. 1102849952 Nguviu House Investment Limited pending determination of this suit.

h. The cost of this application be paid by the defendant herein.

2. Whilst the said application was pending and before the close of pleadings, the 1st Plaintiff, Albert Mwaniki Kwenja, filed a notice of motion dated 1st October 2019 expressed to be brought under **Order 8 Rule 3, Order 40 Rules 1 & 2, Section 3A of the Civil Procedure Act and Civil Procedure Rules 2010 and all other enabling provisions of the law,** seeking the following orders:

a. That I be granted leave to amend the plaint on my part and that the attached draft amended plaint be allowed as the amended plaint of the first Plaintiff.

b. That the honourable court do issue an order of injunction restraining the first Respondent herein either by himself or his agent or

anyone acting on his behalf from interfering, transferring, disposing or alienating or in any way interfering with the ownership of Plot Number Embu/Municipality/317 until this application is heard and determined.

c. That his suit be referred to the Court Annexed Mediation process.

d. That the costs of this application be in this cause.

3. The grounds upon which the said two applications are based are essentially the same. The subject matter of the dispute is *Plot No. Embu/Municipality/317* (hereafter the *suit property*) on which there is erected a building known as *Nguviu House*. The Plaintiffs and the Defendant are brothers. The Plaintiffs contended that the suit property was acquired and developed through the joint efforts and contributions of the parties but that the Defendant had excluded them from the management of the suit property. The Plaintiffs further contended that the Defendant had granted her daughter a power of attorney over the suit property and they were apprehensive that it might be alienated or disposed of to their detriment.

4. When the application dated 1st October 2019 was listed for hearing on 26th November 2019, it was directed that the said application shall take precedence over the earlier application of 6th March 2019 and the same was fixed for hearing on 7th November 2019. When the application was listed on 7th November 2019 the parties consented to canvass it through written submissions. Consequently the Plaintiffs were granted 21 days to file their submissions whereas the Defendant was granted 21 days upon the lapse of the Plaintiffs' period to file his.

5. The record shows that the Defendant filed a replying affidavit sworn on 20th November 2019 opposing the application dated 1st October 2019 on several grounds. First, it was contended that leave to amend the plaint was not required since pleadings were yet to close. Second, that the parties had on several occasions attempted an amicable settlement without success hence there was no point of repeating the same motions. Third, that the Defendant was the sole proprietor and investor in the suit property and that the Plaintiffs had failed to demonstrate their contribution. Fourth, that the order of injunction sought in the instant application was the same order sought in the earlier application of 6th March 2019 which was still pending. The 2nd and 3rd Plaintiffs did not oppose the 1st Plaintiff's said application.

6. The court has considered the 1st Plaintiff's said notice of motion dated 1st October 2019, the Defendant's replying affidavit sworn on 20th November 2019 in opposition thereto, the submissions of the parties as well as the material on record. The court is of the opinion that the following questions arise for determination:

a. Whether the 1st Plaintiff has made out a case for leave to amend the plaint.

b. Whether the 1st Plaintiff has made out a case for referral of the suit to court annexed mediation.

c. Who shall bear the costs of the application.

7. The 1st Plaintiff's application for leave to amend the plaint was premised upon **Order 8 Rule 3 of the Rules** which stipulates as follows:

"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 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.

(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 he 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."

8. The 1st Plaintiff did not refer the court to **Order 8 Rule 1** of the **Rules** which provides for amendment of pleadings without leave of court. It stipulates as follows:

"(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed,

(2) Where an amended plaint is served on a defendant—

(a) If he has already filed a defence, the defendant may amend his defence; and

(b) The defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.

(3) Where an amended defence is served on a plaintiff—

(a) If the plaintiff has already served a reply on that defendant, he may amend his reply; and

(b) The period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.

(4) References in subrules (2) and (3) to a defence and a reply include references to a counterclaim and a defence to counterclaim respectively. (5) Where an amended counterclaim is served on a party (other than the plaintiff) against whom the counterclaim is made, subrule (2) shall apply as if the counterclaim were a statement of claim and as if the party by whom the counterclaim is made were the plaintiff and the party against whom it is made were a defendant.

(6) Where a party has pleaded to a pleading which is subsequently amended and served on him under subrule (1), then, if that party does not amend his pleading under the foregoing provisions of this rule, he shall be taken to rely on it in answer to the amended pleading, and Order 2 rule 12 (2) shall have effect at the expiry of the period within which the pleading could have been amended."

9. There is no doubt in this suit that the Defendant has never entered an appearance or filed a statement of defence. What the Defendant filed was a notice of appointment of advocate after which the parties appear to have concentrated on interlocutory applications. Accordingly, pleadings have not closed hence no leave of court is required to amend the plaint. The 1st Plaintiff is, therefore, at liberty to amend the plaint without leave of court.

10. The second issue is on referral of the suit to court annexed mediation. Although the 1st Plaintiff did not provide any reason in the application for seeking referral to mediation, the court is aware that resolution of disputes through alternative dispute resolution is more beneficial than litigating a matter to its logical conclusion. A court of law should, therefore, be inclined to grant all concerned parties an opportunity to resolve a dispute through mediation where there is a possibility of an amicable settlement. Where parties are related to each other through family ties they should be particularly encouraged to attempt alternative dispute resolution.

11. The court is aware that under **Article 159 (2)** of the **Constitution** it is obligated to abide by the various principles enumerated therein including promoting alternative forms of dispute resolution such as reconciliation, mediation, arbitration and traditional dispute resolution mechanisms. Alternative dispute resolution may enable the warring parties to reach a win-win resolution of their dispute. It may enable the parties to reach a resolution in a timely, cost effective and proportionate manner.

12. The statutory framework for alternative dispute resolution is underpinned in **Section 59C of the Civil Procedure Act (Cap. 21)** which stipulates as follows:

"1) A suit may be referred to any other method of alternative dispute resolution where the parties agree or where the court considers the case suitable for such referral.

2) Any other method of alternative dispute resolution shall be governed by such procedure as the parties themselves may agree to or as the court may, in its discretion order."

13. Those statutory provisions are supported by **Order 46 of the Rules**. In particular, **Order 46 Rule 20** stipulates as follows:

"1) Nothing under this Order may be construed as precluding the court from adopting and implementing, of its own motion or at the request of the parties, any other appropriate means of dispute resolution (including mediation) for the attainment of the overriding objective envisaged under sections 1A and 1B of the Act.

2) The court may adopt an alternative dispute resolution and shall make such orders or issue such directions as may be necessary to facilitate such means of dispute resolution."

14. It is clear from the above cited provisions of the law that alternative dispute resolution may be undertaken either by consent of the parties concerned or upon the court's own initiative where the court is satisfied that a referral would be suitable. The first alternative is obviously not available here because all the concerned parties are not agreed on referral of this matter to alternative dispute resolution. In the court's opinion, an alternative dispute resolution process should not be imposed upon an unwilling party unless there are compelling reasons for doing so. One of the important principles of a credible alternative dispute resolution process is that it should be voluntary. Parties cannot meaningfully engage in an alternative dispute resolution process under compulsion.

15. That leaves the only alternative as the second one whereby the court of its own motion may direct the parties to engage in alternative dispute resolution where it considers a particular case to be suitable for such a process. So, is this one such case where the court may compel the parties to engage in alternative dispute resolution? The court is aware that the disputing parties are close relatives. In fact, when the notice of motion dated 3rd March 2019 filed under certificate of urgency first came up for hearing the court encouraged the parties to attempt an amicable settlement. The court subsequently made inquiries on whether any progress was being made on alternative dispute resolution. It

would appear that the parties were unable to make any meaningful progress in that regard.

16. We have now crossed over to the year 2020 but there is no indication of any progress towards resolution being made. So, would it be prudent for the court to refer the suit to court annexed mediation when it is apparent that there is no possibility of the parties reaching a settlement? The court is of the view that it would not serve any useful purpose to refer the dispute to mediation when it is clear that the disputing parties have not made any progress for about 10 months now. The court is further of the opinion that a referral to mediation should only be made where there is a possibility, even a remote one, of a settlement. A referral order should not be made just for the sake of it, or just for the purpose of pleasing some of the parties. The court is thus not satisfied that an order for referral to mediation should be made.

17. The 3rd issue relates to costs of the application. Although costs of an action are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27 of the Civil Procedure Act (Cap. 21)**. As such, a successful litigant should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohamed & Sons V Twentsche Overseas Trading Co. [1967] EA 287.** Although the 1st Plaintiff has failed in his application, the court shall not penalize him in costs since the disputing parties are relatives. The order which commends itself to the court is that the costs of the application shall be in the cause.

18. The upshot of the foregoing is that the court finds no merit in the 1st Plaintiff's notice of motion dated and filed on 1st October 2019. The same is accordingly dismissed in its entirety with costs in the cause. It is so ordered.

RULING DATED, SIGNED and **DELIVERED** in open court at **EMBU** this **16TH DAY** of **JANUARY, 2020.**

In the presence of Ms. Njoka holding brief for Mr. Gikunda for the Plaintiffs and Ms. Mbwiria holding brief for Ms. Mburu for the Defendant.

Court Assistant: Mr. Muinde

Y.M. ANGIMA

JUDGE

16.01.2020