



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 374 OF 2013

LAZARUS MITHAMBO NDORO.....PLAINTIFF

VERSUS

GICHOBI GEORGE.....DEFENDANT

RULING

What is before me is the Notice of Motion dated 19th August 2019 brought under *Section 1A, 1B, 3A and 100 CPA, Order 8 Rule 3, Order 40 Rule 1 and Order 51 Rule 1 CPR*. The applicant is seeking the following orders:

- 1. That the Honourable Court be pleased to issue a prohibitory order to be registered against L.R. No. KABARE/MIKARARA/589 pending the hearing and determination of this suit.**
- 2. That the plaintiff/applicant herein be granted leave to amend the plaint dated 22nd August 2016.**
- 3. That the costs be in the cause.**

The application is supported by the affidavit of Agnes Maina sworn on 19th August 2019 and grounds apparent on the face of the said application. The application is opposed with a replying affidavit sworn by Gichobi George, the respondent herein and filed in Court on 19th November 2019.

APPLICANT'S CASE

The applicant in her affidavit stated that she bought the suit land parcel No. KABARE/MIKARARA/589 from the defendant's father one George Kabiro Mang'ore in the year 2006 and paid the entire purchase price and the seller duly acknowledged receipt. She further stated that on 2nd August 2007, she was issued with a title deed to the suit land after obtaining the relevant consent from the Land Control Board. The applicant further stated that in the year 2007, the defendant proceeded to institute a suit before the Land Disputes Tribunal at Gichugu being LDT No. 24/07 against his father George Kabiro Mang'ore in respect of the same parcel of land claiming that he was entitled to the land. The applicant deponed that the said case proceeded to conclusion without her knowledge and the Tribunal held that the suit land parcel No. KABARE/MIKARARA/589 be registered in the name of the defendant. The Tribunal also held that the defendant/respondent's father George Kabiro Mang'ore to allocate her another portion of land. The award by the Tribunal was subsequently adopted as a judgment of the Court in S.R.M Land Disputes Tribunal Case No. 8 of 2008. Following the adoption by the SRM Court in LDT No. 8 of 2009 (Kerugoya), the respondent herein proceeded to seek for orders that the Executive officer be authorized to execute all necessary documents to facilitate the transfer of the suit land to himself and that the Land Registrar be ordered to dispense with the production of the old title deed to the suit land. The applicant stated that the prayers sought in the amended plant dated 22nd August 2016 had been necessitated by the prevailing conditions as at that time but the land has now been registered in the name of the defendant/respondent and that the applicant/plaintiff will pray for cancellation of the title deed issued to the defendant/respondent. She stated that the leave sought is necessary and that the same will not introduce any new cause of action and that it will not occasion prejudice or injustice to the defendant/respondent but will be in the interest of justice.

RESPONDENT'S CASE

The respondent opposed the application and deponed that he is the registered owner of the suit land having been given to him by the Land Disputes Tribunal when his father had tried to deny him his share of his Estate. He stated that the plaintiff/applicant has never lived, constructed or cultivated on his land since it was given to him and that he has lived in the suit land and had developed it as well as getting his livelihood from the suit land and that he does not intend to sell it or dispose it any time soon. The respondent deponed that after he was awarded the land by the Tribunal, the applicant did not appeal or set aside the same through the appropriate channels set out in law. He

stated that the applicant was given an alternative land by his father but she insisted on the suit land where he has developed and lived with his family for over 10 years. The respondent further stated that the applicant has refused to take up the idle parcel of land adjacent to his land and that the application is farfetched, actuated by malice, lacks merit and bad in law.

SUBMISSIONS BY THE PARTIES

The parties did not file submissions but asked the Court to render itself on the basis of the affidavit evidence and the annexures alone.

ANALYSIS AND DETERMINATION

I have considered the affidavit evidence and the applicable law. The two prayers sought in this application are for a prohibitory order and amendment of pleadings. *Section 68 (1) of the Land Registration Act (No. 3 of 2012) Laws of Kenya* provides as follows:

“The Court may make an order (hereinafter referred to as an inhibition) inhibiting for a particular time, or until the occurrence of a particular event, or generally until a further order, the registration of any dealing with any land, lease or charge”.

The plaintiff/applicant has explained how the suit land was transferred and registered in her name after she bought it for value and thereafter the defendant/respondent went to the Land Disputes Tribunal where the title was cancelled without his knowledge and ordered the land to be registered in the name of the defendant/respondent. I find that those reasons given by the plaintiff/applicant are sufficient to warrant the grant of an order of inhibition as sought.

As regards the second prayer for leave to amend the plaint, the principles governing the amendment of pleadings are provided under *Order 8 Rule 3 (1)*:

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 are 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”.

Numerous Court decisions have construed the application of that order and rule. In the case of *Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limited (2013) e K.L.R.*, the Court of Appeal held thus:

“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 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 plaint, the defendant would be deprived of his right to rely on Limitation Acts”.

I agree with the decision by the Court of Appeal and the principles for amendment of pleadings as set out thereunder. Applying those principles to the application before me, I find no prejudice the defendant/respondent is likely to suffer if the proposed amendment is allowed.

The upshot of my analysis is that the Notice of Motion dated 19th August 2019 meets the threshold for the grant of the orders sought and the same is allowed in the following terms:

- 1. An order of prohibition be and is hereby issued to be registered in respect of L.R. No. KABARE/MIKARARA/589 prohibiting any transactions and/or dealing in the said land pending the hearing and determination of this suit.**
- 2. That the plaintiff/applicant herein is granted leave to amend, file and serve the plaint in terms of the draft amended plaint annexed to the supplementary affidavit sworn on 15th November 2019 within 7 days from today.**
- 3. The costs of this application shall be borne by the plaintiff/applicant.**

READ, DELIVERED and SIGNED in open Court at Kerugoya this 13th day of March, 2020.

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E.C. CHERONO

ELC JUDGE, KERUGOYA

In the presence of:

1. Ms Maina for Plaintiff/Applicant
2. Defendant in person – present
3. Mbogo – Court clerk – present