REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA

ELC CASE NO. 9 OF 2016

SHADRACK MUSE ANDAI ..... PLAINTIFF/APPLICANT

VERSUS

BENARD MULIANGO

SILAS MULIANGO

BILHA VIHENDA .....DEFENDANTS/RESPONDENTS

RULING

The application is dated 12th November 2019 and seeks the following orders;

1. This application be certified urgent and service be dispensed with in the first instant.

2. The honourable court be pleased to strike out the defendants' statement of defence dated 17th May, 2016 as it discloses no reasonable defence.

3. The plaintiffs' suit be allowed in its entirety and judgment be entered as prayed in the plaint.

4. In the alternative, the plaintiff be granted leave to amend his plaint as per the annexed draft and the same be deemed duly filed upon paying the requisite fee.

5. Costs of this application be in the cause.

It is based on the following grounds that the main suit herein is due for hearing on 14th November, 2019. That the defendants filed a defence that is sham and does not disclose a reasonable defence. That the defendants have neither filed any supporting documents nor counter claim. That the defendants' statement of defence is a mere denial. That the suit land is duly registered in the name of the plaintiff. It is supported by the Annexed Affidavit of Shadrack Muse Andai

The respondent submitted that the defence on record is meritorious as it raises triable issues worth going for a full trial so as to determine the matter herein on merit. That it is clear that there is a dispute as to ownership of the suit land herein which fact cannot be determined summarily without the matter herein going for full trial so as to establish who legally owns the suit land. That whereas the plaintiff claims to be the owner of the suit land having purchased the same from one Mary Nthoki Mumbu and obtained a title deed, yet the truth of the matter is that he is neither the equitable owner of the said parcel of land nor is he the registered owner thereof. That the DCIO Lugari conducted investigations on charges of fraud and forgery of the title deed allegedly issued to the plaintiff (annexed and marked BVM1 (a) and (b) are copies of letters by the DCIO confirming that the said investigations were ongoing) and upon completion of the said investigations charged the plaintiff's herein with several counts of forgery (annexed and marked BVM2 is a copy of the charge sheet). That Mary Nthoki Mumbu whom he claims to have bought the suit land from has never transferred the same to him as such he cannot claim to be the lawfully registered owner of the suit land. That based on the foregoing it is quite clear that these are issues worth going for full trial so as to have the suit herein determined on merit and upon presentation of full facts and evidence before court. That the application is made in bad faith with the aim of misleading this honourable court as to the true facts of the matter herein. The plaintiff is merely seeking a shortcut to confirm ownership of the suit land with a view of obtaining judgment summarily so that he can evade full trial wherein he will be required to prove his claim to the required standards yet his claim is based on falsehoods. That the defendants are legally in occupation and utilization of the suit land herein as there is no order barring them from occupation and utilization of the land in force. That they have proprietary interests in the suit land by virtue of the fact that they are joint owners of the suit land with one Mary Nthoki Mumbu whom the plaintiff claims to have bought the suit land from. That the claim referred to by the plaintiff in paragraph 9 of the supporting affidavit being Eldoret H.C. Civil suit No. 166 of 1996 (O.S.); Luka Muliango Beru vs. Mary Mumbu Mulata was dismissed not on merit and/or having the matter proceed to full trial but by virtue of the fact that the suit was not prosecuted. That the claim referred to by the plaintiff in paragraph 10 being Environment and Land Cause No. 609 (c) of 2012; Bilha Vihenda Muliango vs. Mary Nthoki Mumbu was a claim by virtue of adverse possession of which they do

not presently claim the suit land by virtue of adverse possession but by virtue of being joint owners with Mary Nthoki Mumbu. That the application for amendment of the plaint is brought in bad faith with the aim of misleading this court as to the truth of the matter. The plaintiff is not the registered owner of the suit land and as such he cannot claim mesne profits from the said land. In any case there has been unexplained inordinate delay in seeking leave to amend the plaint which is a clear indication that the application is merely an afterthought brought upon the plaintiff realizing that he has no chances of proving his case to the required standard due to the fact that his allegations are purely based on falsehoods.

This court has considered the application and the submissions therein. This court has perused the defence and finds that indeed it raises triable issues. The issue in this suit is ownership of land and this can only be determined if the matter goes to full trial. Prayers 2 and 3 cannot be granted. Order 1 Rule (10) (2) of the Civil Procedure Rules empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

> *"all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."*

It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. 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 even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings In the case of **AAT** Holdings Limited v Diamond Shields International Ltd (2014) eKLR, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 of 1998 as shown below:-

> *(i) That are necessary for determining the real question in controversy.*
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> *(ii) To avoid multiplicity of suits provided there has been no undue delay.*
>
> *(iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.*
>
> *(iv) That no vested interest or accrued legal rights is affected; and*
>
> *(v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.*

It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaint is wide and unfettered except is should be exercised judicially upon the foregoing defined principles.

In the case of Isaac Awuondo vs Surgipharm Ltd & Another (2011) eKLR the Court of Appeal had the following to say:

In MOI UNIVERSITY v VISHVA BUILDERS LIMITED - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

> *"The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-*
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> *"In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN , J put it "* a triable issue*" that is an issue which raises a prima facie defence and which should go to trial for adjudication."*

I have perused the proposed amended plaint and I see that no prejudice will be suffered by the parties should the amendment be allowed. I take note that this matter was filed in 2016, be that as it may, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application is dated 12th November 2019 is merited to that extent and I grant prayer 4. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED THIS 30TH DAY OF APRIL 2020

N.A. MATHEKA

JUDGE