



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 1196 OF 2004

RAJNI KANT NATHOO.....PLAINTIFF

VERSUS

EDWARD NTHULI.....1ST DEFENDANT

PAUL GITHAIGA NGANGA.....2ND DEFENDANT

RAMJI MANJI SHAMJI.....3RD DEFENDANT

COMMISSIONER OF LANDS.....4TH DEFENDANT

HON. ATTORNEY GENERAL.....5TH DEFENDANT

RULING

What is before Court for determination is the Plaintiff's two applications dated the 19th December, 2018 and 30th January, 2019.

In the two applications the Plaintiff seeks leave to amend the Plaintiff herein to substitute the 4th Defendant with National Land Commission. Further, he seeks leave to reopen his case and cross examine the 1st, 4th and 5th Defendants and for the court to issue witness summons to the 1st and 2nd Defendants. The Plaintiff claims the 4th Defendant has become defunct by operation of the law. Further, the documentation and information reposed with the intended 4th Defendant is essential in aiding the court adjudicate upon and settle all the questions in dispute. He contends that no prejudice will be suffered by the Defendants. The application has been opposed by the 2nd and 3rd Defendants through the affidavits of Harish Ramji Manji and their advocate Peter Kingara. In the affidavit of Peter Kingara, he contends that the Plaintiff seeks to scuttle the hearing as addition of a new party will culminate in the hearing commencing afresh. He explains that he had filed an application dated the 17th March, 2016 seeking to strike out the Plaintiff on the grounds that it had not amended the Plaintiff to comply with the Land Act, Land Registration Act which made the office of the 4th Defendant defunct but the said application was vehemently opposed by the Plaintiff and dismissed by Justice Obaga. He insists the Plaintiff is estopped from changing this position. Further, that National Land Commission is not a successor of the 4th Defendant.

The Plaintiff, 2nd and 3rd Defendants filed their respective submissions to canvass the two applications.

Analysis and Determination

Upon consideration of the Plaintiff's two applications dated the 19th December, 2018 and 30th January, 2019 including the respective affidavits, annexures and submissions the following are the issues for determination:

- Whether the Plaintiff should be granted leave to amend his re amended Plaintiff
- Whether the Plaintiff's case should be reopened for him to cross examine the 1st, 4th and 5th Defendants.

As to whether the Plaintiff should be granted leave to amend his re amended Plaintiff. The Plaintiff filed submissions to reiterate his claim. The 2nd Defendant filed his submissions opposing the amendment sought.

Section 100 of the Civil Procedure Act makes provisions on the General Power to Amend and gives the Court discretion on whether to allow an amendment or not.

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide that: **‘(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.’**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **‘(1) For purposes 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.’**

In the current scenario, I note the Plaintiff seeks to amend his re amended Plaintiff to substitute the 4th Defendant with the National Land Commission which fact is opposed by the 2nd and 3rd Defendants. On perusal of the Court Records I note the issue of substituting the 4th Defendant had actually been dealt with via the Ruling of Justice Obaga dated the 20th September, 2018 where he stated thus: **‘the issue of the Respondent suing the Commissioner of Lands is a matter which was well taken care of by the transitional provisions of the Land Registration Act. This suit was filed before the amendments to the Law which abolished the office of the Commissioner of Lands. This therefore cannot be used to defeat the Respondent’s suit.’** Further, I note the Plaintiff has further failed to annex a draft of the proposed amendments. I find that the issue of substitution of the 4th Defendant had already been dealt with. Insofar as the Court has a discretion to allow amendments at any time, however in this instance, I find that the Plaintiff seeks to reintroduce an issue that had already been determined and has failed to annex a draft to enable the court and the other parties peruse it. Further, the amendment sought is not timeous and would culminate in the reopening of the case. It is my considered view that the Plaintiff seeking to amend his reamended Plaintiff after hearing the 2nd and 3rd Defendants’ case would be prejudicial to them. In the circumstance, I will decline to grant leave to the Plaintiff to do so.

As to whether the Plaintiff’s case should be reopened for him to cross examine the 1st, 4th and 5th Defendants. From a perusal of the Court records, I note the Plaintiff closed his case on 29th November, 2018 after two witnesses had testified. Further, the 1st, 4th and 5th Defendants that he seeks to cross examine never testified. I note the Plaintiff’s counsel indeed cross examined the 2nd and 3rd Defendants’ witness and thereafter the said Defendants’ closed their case. The Plaintiff now seeks to reopen the case to cross examine parties who never tendered their evidence in chief. In the case of **Joseph Ndungu Kamau v John Njihia [2017] eKLR**, while dealing with an issue on reopening a case, the Judge observed that: **‘Reopening will not normally be allowed if failure was deliberate. Needless to state, the decision whether or not to allow such an application is a discretionary one which must be exercised judiciously. While considering a similar application in Samuel Kiti Lewa v Housing Finance Co. Of Kenya Ltd & another [2015] eKLR Kasango J. stated:**

17. Uganda High Court, Commercial Division in the case SIMBA TELECOM –V- KARUHANGA & ANOR (2014) UGHC 98 had occasion to consider an application to re-open the case for purpose of submitting fresh evidence. That court referred to an Australian case SMITH –VERSUS- NEW SOUTH WALES [1992] HCA 36; (1992) 176 CLR 256 where it was held:

“If an application is made to reopen on the basis that new or additional evidence is available, it will be relevant, at that stage, to enquire why the evidence was not called at the hearing. If there was a deliberate decision not recorded, ordinarily that will tell decisively against the application. But assuming that that hurdle is passed, different considerations may apply depending upon whether the case is simply one in which the hearing is complete, or one which reasons for the judgment have been delivered. In the latter situations the appeal rules relating to fresh evidence may provide a useful guide as to the manner in which the discretion to reopen should be exercised.”

18. The Ugandan Court in the case SIMBA TELECOM (supra) held thus:

“I agree with the holding in the case of Smith Versus South Wales Bar Association (1992) 176 CLR 256, where it was held that the question of whether additional evidence should be taken at the trial is considered separately from the question of whether the case should be reopened. Consequently even after the case has been reopened, the court retains its discretionary powers whether to admit any piece of evidence or not.”

20. The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated by inordinate and unexplained delay.’

Based on the facts before me and in associating myself with this cited decision, I find that the Plaintiff cannot compel parties who never attended court to testify by seeking to reopen his case and asking for witness summons to issue to them. It seems to me the Plaintiff is seeking to fill the gaps in his evidence. I opine that the reopening of this old matter will also cause unnecessary delay. In the circumstance, I decline to allow the said prayer.

It is against the foregoing that I find the Plaintiff’s two applications dated the 19th December, 2018 and 30th January, 2019 unmerited and will proceed to dismiss them with costs to the 2nd and 3rd Defendants. I direct the parties to file their respective submissions within 60 days from the date hereof to enable the Court prepare its Judgement.

Dated Signed and Delivered via email this 29th Day of May, 2020

CHRISTINE OCHIENG

JUDGE