



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KISII**

**E.L.C CASE NO. 773 OF 2016**

**KENYA FARMERS ASSOCIATION.....PLAINTIFF**

**VERSUS**

**KHETIA DRAPERS LIMITED.....1<sup>ST</sup> DEFENDANT**

**THE LAND REGISTRAR KISII.....2<sup>ND</sup> DEFENDANT**

**PRIME BANK LIMITED.....INTENDED 3<sup>RD</sup> DEFENDANT**

**ATTORNEY GENERAL.....INTENDED 4<sup>TH</sup> DEFENDANT**

**RULING**

**INTRODUCTION**

1. This ruling is in respect to two applications. The first application dated 15<sup>th</sup> November 2019 is brought by the Plaintiff for leave to enjoin Prime Bank Limited and the Attorney General as the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in this suit. Consequent upon the said orders being granted, the Plaintiff amended in terms of the draft Amended Plaintiff. In the second application dated 23<sup>rd</sup> January 2020, the 1<sup>st</sup> Defendant seeks that the suit against the 1<sup>st</sup> Defendant be struck out. The applications were prosecuted together by way of written submissions with brief oral highlights.

2. The application dated 15<sup>th</sup> November 2019 is based on the grounds stated on the face of the Notice of Motion and the supporting affidavit of Japheth Ombongi, the Applicant Manager, Kisii branch sworn on 15<sup>th</sup> November 2019. In the said affidavit it is averred that the intended 3<sup>rd</sup> and 4<sup>th</sup> Defendants are necessary parties to the suit as the Plaintiff intends to include a prayer for general damages against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

3. The application is opposed by the 1<sup>st</sup> Defendant through the Replying affidavit of Ashok D. Khetia sworn on the 9<sup>th</sup> January 2020 in which he depones that the Plaintiff filed an application for leave to enjoin 4 other parties to the suit but the said application was dismissed by the court's ruling dated 14<sup>th</sup> June 2019. He depones that one of the parties sought to be enjoined, namely Prime Bank Ltd was sued by the Plaintiff in HCCC No. 94 of 2004 over the same subject matter but the suit was dismissed for want of prosecution. An application to have the said suit reinstated was similarly dismissed. He therefore depones that the intended joinder of Prime Bank Ltd in not made in good faith. He further depones that the intended amendments would not serve any useful purpose in this suit as they are caught up by the law of limitations. He also depones that the 1<sup>st</sup> Defendant would be prejudiced if the application was allowed.

**PLAINTIFF'S SUBMISSIONS**

4. Learned counsel for the Applicant filed his written submissions on 20<sup>th</sup> January 2020. He gave a background of the matter, the long and short of which is that the Commissioner of Lands processed a new lease in favour of one Abdul Sultan Rajwani and Quasar Limited for land parcel No. KISII MUNICIPALITY/BLOCK 111/143 while the Plaintiff had applied for extension of lease of the said property. Quasar Limited then charged the title to Prime Bank Limited to secure a loan which he failed to repay. Prime Bank Limited subsequently exercised its statutory power of sale and sold the suit property to Oshwal Supermarket Limited who in turn sold it to the 1<sup>st</sup> Defendant. This was done after the court removed a restriction entered by the Land Registrar in Kisii CMCC No. 927 of 2002 between Quasar Limited and Kenya Farmers Association. He argued that in accordance with section 77 (3) of the Registered Land Act (repealed) any person suffering damage by an irregular exercise of power of sale shall have his remedy in damages only against the person exercising the power. He submitted that Prime Bank Limited is the one that caused the suit property to be sold and it is therefore necessary to have it enjoined in the suit. In his oral submissions, he argued that even though Kisii HCCC No. 94 of 2004 in which the Applicant sued Prime Bank Limited and the Land Registrar was dismissed for want of prosecution, the said suit did not disclose any cause of action as there were interim orders removing the restriction placed on the suit property.

## 1<sup>ST</sup> DEFENDANT'S SUBMISSIONS

5. Learned counsel for the Respondent submitted that 1<sup>st</sup> Defendant was not the one who exercised the statutory power of sale as he bought the property from a third party who had not been sued and there was therefore no cause of action against the 1<sup>st</sup> Defendant. In his written submissions he argued that the application was an afterthought as it was being made 7 years after the suit was filed. This follows the dismissal of a previous case filed against Prime Bank Limited and the Chief Land Registrar. He further submitted that the proposed amendments were a departure from the initial cause of action and the 1<sup>st</sup> Defendant would be seriously prejudiced.

### ISSUE FOR DETERMINATION

6. Having considered the applications, rival affidavits and counsel's submissions, the following issues fall for determination:

- a) Whether the Applicant should be allowed to enjoin 2 more parties to the suit.
- b) Whether the Applicant should be granted leave to amend the Plaintiff.

Order 8 Rule 3 (1) of the Civil Procedure Rules provides that:

*“Subject to order 1 rules 9 and 10. Order 24 rule 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”.*

Order 8 Rule 3 (5) provides that:

*“An amendment may be allowed under sub-rule 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 been claimed in the suit by the party applying for leave to make the amendment”.*

Order 1 rule 10 (2) 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 either as plaintiff or defendant be struck out and that the name of any person who ought to have been enjoined whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit be added”.*

7. The principles that should guide the court in dealing with applications for amendments are elaborated in **Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752** which has been cited in various authorities including the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR** where it is stated as follows:

- i. *“Amendments should be allowed which are necessary for determination of the real controversies in the suit;*
- ii. *The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;*
- iii. *Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;*
- iv. *Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;*
- v. *Amendments of a claim or relief barred by time should not be allowed;*
- vi. *No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time*
- vii. *No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties*
- viii. *The delay in filing the petitions for amendment should be properly compensated by costs*
- ix. *Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”*

8. Although it is clear that the court has a wide discretion when dealing with applications for amendment of pleadings, the discretion should be exercised judiciously. In the case of **Rubina Ahmed & 3 others (2019) eKLR** the Court of Appeal declined to set aside an order for

refusal of joinder of other parties and amendment of pleadings on the grounds of delay and prejudice. The court upheld the ruling of the trial court to the extent that there was a long period of delay, there was no explanation as to why the parties had not been enjoined earlier on and that there was no contention made that it was not possible to adjudicate the claim effectively without enjoining the intended parties.

9. It was submitted by counsel for the 1<sup>st</sup> Defendant that in the instant case there is a delay of 8 years which has not been explained. He also submitted that the 1<sup>st</sup> Defendant would be seriously prejudiced. The question of prejudice was addressed by the court in its ruling in a previous application by the Plaintiff seeking to enjoin 4 more parties. In the said ruling Justice Mutungi observed as follows:

*“In my view allowing the Plaintiff’s application to enjoin the 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> Defendants would not serve the ends of justice as it would cause them injustice and amounts to allowing them to be vexed a second time yet the Plaintiff was not keen in pursuing its rights against them in the suit where they were named as parties. Secondly, the Plaintiff has not shown that the parties it seeks to enjoin in this suit have any interest in the land.”*

10. The Plaintiff did not appeal or apply for review of the said ruling and instead filed another application for leave to enjoin different parties including Prime Bank Limited, whom it had sued in a previous suit which was dismissed. This is clearly an abuse of the court process.

11. In the proposed Amended Plaintiff, the Plaintiff seeks compensation, general damages and punitive damages. I agree with counsel for the 1<sup>st</sup> Defendant that this is a total departure from the initial cause of action filed in 2012, where the Plaintiff sought the removal of a caution over the suit property and a permanent injunction to restrain the Defendant from interfering with the suit property. It is also instructive to note that the prayers sought in the proposed amendment have nothing to do with the 1<sup>st</sup> defendant. Granted that the Plaintiff may have the right to sue the proposed Defendants for damages, there is no reason why the 1<sup>st</sup> Defendant’s case should be delayed on account of the Plaintiff’s lack of diligence. The court already held that allowing the Applicant to enjoin more Defendants would prejudice the 1<sup>st</sup> Defendant and result in injustice and the Plaintiff has not demonstrated that this has changed.

12. Moreover, one of the proposed Defendants is the Attorney General and the amendment would run afoul of the provisions of the Government Proceedings Act and the Limitation of Actions Act. In the circumstances I am not persuaded that the application is merited.

13. I will now turn to the application dated 23.1.2020 for striking out of the 1<sup>st</sup> Defendant’s name from the suit. The said application which is anchored on the affidavit of Ashok D. Khetia in which he depones that the Plaintiff has not been keen or desirous to prosecute his case as evidenced by the numerous applications filed herein. He depones that they are bona fide purchasers for value of the suit property and they were not party to the fraud pleaded in the draft amended plaintiff. He further depones that since HCCC No. 94 of 2004 which was also predicated on fraud was dismissed, the instant suit cannot lie. He further depones that since the Plaintiff is desirous of seeking damages as against Prime Bank which allegedly disposed of the suit property the said prayers do not affect the 1<sup>st</sup> Defendant.

14. The application is opposed by the plaintiff through its Grounds of Opposition dated 27<sup>th</sup> January 2020 in which it is stated that the application is frivolous, vexatious, misconceived and incompetent and an abuse of the court machinery.

The singular issue for determination is whether the 1<sup>st</sup> Defendant ought to be struck out from the suit.

15. Counsel for the 1<sup>st</sup> Defendant submitted that 1<sup>st</sup> Defendant purchased the suit property from Oshwal Supermarket Limited, who has not been sued by the Plaintiff. He submitted that the 1<sup>st</sup> Defendant is the registered owner of the suit property and in terms of section 25 of the Land Registration Act, it is entitled to all the rights, privileges and appurtenances thereto, free from all interests and claims whatsoever. He submitted that in line with section 26 of the land Registration Act, the certificate of title is taken as prima facie evidence that the person named therein is the absolute and indefeasible owner subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate and the title can only be impeached if it is proved that the registration was obtained, made or omitted by fraud.

The said section provides as follows:

**Section 26 “the certificate of title issued by the Registrar upon registration, or to a purchaser of land upon a transfer or transmission by the proprietor shall be taken by all courts as prima facie evidence that the person named as proprietor of the land is the absolute indefeasible owner, subject to the encumbrances, easements, restrictions and conditions contained or endorsed in the certificate, and the title of that proprietor shall not be subject to challenge except**

**a) on grounds of fraud, or misrepresentation to which to which the person is proved to be a party; or**

**b) where the certificate of title has been acquired illegally, unprocedurally or through a corrupt scheme.”**

16. He submitted that none of the alleged particulars of fraud touch on the 1<sup>st</sup> Defendant and therefore section 80 of the land Registration Act could not be invoked to rectify the register or cancel the title. It was counsel’s contention that the Applicant was a bona fide purchaser for value and hence he should be afforded the protection. He referred to the case of **Katende v Hardirar & Company Limited (2008) 2 E.A 173** where the Court of Appeal in Uganda held as follows:

*“For the purposes of this appeal, it suffices to describe a bona fide purchaser as a person who honestly intends to purchase the property offered for sale and does not intend to acquire it wrongly. For a purchaser to successfully rely on the bona fide doctrine he must prove that:*

- (a) He holds a certificate of title;
- (b) He purchased the property in good faith;
- (c) He had no knowledge of the fraud;
- (d) The vendors had apparent valid title;
- (e) He purchased without notice of any fraud;
- (f) He was not party to any fraud.”

17. He therefore submitted that the Applicant had met all the conditions set out in the above-mentioned case and its name should be struck out from the proceedings.

18. On the other hand, counsel for the Respondent submitted that the application was misconceived as the issues raised in the application ought to be dealt with at the trial and not summarily. He however alluded to Order 1 rule 10 (2) of the Civil Procedure Rules which gives the court the discretion to strike out the name of any party improperly joined, whether as Plaintiff or Defendant and the name of any person who ought to have been enjoined whether as Plaintiff or Defendant or whose presence before court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit be added. He submitted that if the court was inclined to strike the 1<sup>st</sup> Defendant from the suit, it should bring on board other necessary parties to enable the court completely adjudicate the matters in issue.

19. Even though the court has the discretion to strike out parties from a suit the said discretion ought to be approached with caution.

In the case of **D.T Dobie v Joseph Mbaria Muchina & Another 1982) KLR 1** the court Madan J. A stated as follows:

*“The power to strike out should only be exercised after the court has considered all the facts but it must not embark on the merits of the case itself as this is solely reserved for the trial judge. On an application to strike out pleadings, no opinion should be expressed as that would prejudice a fair trial and would restrict the freedom of the trial judge in disposing the case*

20. Applying the principles in **D.T Dobie V Muchina** (supra)I am inclined to agree with counsel for the Plaintiff that the issues raised by the Plaintiff ought to be determined at the hearing rather than at this preliminary stage. In the circumstances I decline to strike out the name of the 1<sup>st</sup> Defendant from the suit.

21. The upshot is that both the application dated 19.11.2019 and the one dated 23.1.2020 are dismissed. The costs of both applications shall be in the cause.

**Dated, signed and delivered at Kisii via Zoom this 28<sup>th</sup> day of May, 2020.**

**J.M ONYANGO**

**JUDGE**