



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. NO. 29 OF 2014

IN THE MATTER OF OWNERSHIP OF LAND PARCEL NOS. MBETI/GACHURIRI/746 AND MBETI/GACHURIRI/747

(Under Section 38 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya)

BETWEEN

BONIFACE NJIRU NYAGA.....1ST PLAINTIFF

BERNARD NDII NJAGI.....2ND PLAINTIFF

(REPRESENTING THE HOUSE OF CHARLES NJAGI NYAGA)

VERSUS

KENNEDY MUGO ELIJAH.....1ST DEFENDANT

(CHAIRMAN MUGWE GROUP)

DICKSON CIIRA.....2ND DEFENDANT

(SECRETARY MUGWE GROUP)

ANTONY NYAGA alias NDII.....3RD DEFENDANT

(TREASURER MUGWE GROUP)

AND

MUGWE GROUP.....4TH DEFENDANT

RULING

A. INTRODUCTION

1. By a notice of motion dated 10th July 2020 brought under **Order 1 Rule 10, Order 8 Rules 3, 4 & 5** of the **Civil Procedure Rules** (*the Rules*) and **Section 68** of the **Land Registration act, 2012** the Plaintiffs sought the following orders:

a) Spent

b) Spent

c) That Mugwe Group be enjoined as a Defendant in this suit.

d) That the honourable court be pleased to grant leave to the Plaintiffs/Applicants to amend their originating summons in terms of the Draft Amended Originating Summons annexed hereto.

e) That the honourable court be pleased to inhibit any dealings with parcel of land No. Mbeti/Gachuriri/2183 which is a

combination of parcels of land Nos. Mbeti/Gachuriri/746 and Mbeti/Gachuriri/747 pending the hearing and determination of the originating summons.

f) That costs of the application be provided for.

B. THE PLAINTIFFS' APPLICATION

2. The said application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st Plaintiff, Boniface Njiru Nyaga, on 10th July 2020. It was contended that the Defendants had during the pendency of the suit amalgamated *Title Nos. Mbeti/Gachuriri/746 & 747* into *Title No. Mbeti/Gachuriri/2183*. The Plaintiffs further contended that it was necessary to amend the originating summons in order to bring out the real issues in controversy. The Plaintiffs were apprehensive that the Defendants might deal further with the suit properties with the consequence that the suit properties may not be available upon conclusion of the suit.

C. THE DEFENDANTS' RESPONSE

3. The 1st – 3rd Defendants filed a replying affidavit sworn by the 3rd Defendant, Anthony Ndi, on 20th September 2020 in opposition to the application. He swore the said affidavit on his own behalf and on behalf of his co-Defendants. It was contended that the application was vexatious, lacking in merit and an abuse of the court process. It was contended that the proposed amendment would change the action into one of a different character and that their existing rights would be prejudiced. It was further contended that there was undue delay in making the application for amendment.

4. The Defendants also contended that the application for interim orders was *res judicata* since the Plaintiffs' earlier application for injunction dated 24th May 2011 seeking similar orders was dismissed with costs on 1st February 2012. The Defendants stated that there was no court order restraining them from combining parcel Nos. 746 and 747 into one parcel and that in any event they did not intend to dispose of parcel 2183. The rest of the responses were on the merits of the main suit which need not be dealt with at this interlocutory stage.

D. DIRECTIONS ON SUBMISSIONS

5. When the said application was listed for hearing on 22nd July 2020 it was directed that the same shall be canvassed through written submissions. The prayer for joinder of Mugwe Group as a Defendant was granted. The Plaintiffs were granted 21 days to file and serve their submissions whereas the Defendants were granted 21 days upon the lapse of the Plaintiffs' period to file and serve theirs. By the time of preparation of the ruling, however, none of the parties had filed their submissions.

E. THE ISSUES FOR DETERMINATION

6. The court has considered the Plaintiffs' said application, the Defendants' replying affidavit in opposition thereto as well as the material on record. The court is of the view that the following issues arise for determination herein:

- a. *Whether the Plaintiffs should be granted leave to amend their originating summons.*
- b. *Whether the Plaintiffs should be granted the order of inhibition sought.*
- c. *Who shall bear costs of the application.*

F. ANALYSIS AND DETERMINATIONS

a. Whether the Plaintiffs should be granted leave to amend their originating summons

7. The Plaintiffs' application was based upon **Order 8 Rules 3, 4 & 5** of the **Rules** which empower the court to grant leave for amendment of pleadings at any stage of the proceedings where such amendment is necessary for the purpose of bringing out the issues in controversy.

8. In the case of **Castellino V Eastern Bakery [1958] EA 461** the principles were summarized as follows:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (1) (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R 262. The case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitale p. 1313”.

9. Similarly, in the case of **Central Kenya Ltd Trust Bank Ltd** it was held by the Court of Appeal that:

“The overriding consideration in an application for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot be compensated for in costs.”

10. The court has considered the material on record on the issue of amendment. It is evident from the record that the main question for determination is whether the properties in dispute belonged to Mugwe clan or Mugwe Group Ranch. The Plaintiffs contended that the land was clan land to which they were entitled as members of Mugwe clan. The Defendants all along maintained that Mugwe clan and Mugwe Group were distinct entities and that the suit land did not belong to the clan but the group. The Plaintiffs initially relied upon prescription in their originating summons but now they intend to rely on trust by pleading that Mugwe clan was registered as proprietor of the suit land in trust for them.

11. The court is of the opinion that the Plaintiffs are not seeking to introduce a new case of a radically different character. The facts of the case have essentially remained the same but the Plaintiffs are seeking to adjust or refine the legal terminology they consider best suits their case. The suit is yet to be heard and the Defendants have not demonstrated what prejudice, if any, they would suffer which cannot be adequately compensated by an award of costs. Accordingly, the court is satisfied that the Plaintiffs have made out a case for the grant of leave for amendment of pleadings under **Order 8 Rules 3, 4 & 5** of the **Rules**.

b. Whether the Plaintiffs are entitled to an order of prohibition under Section 68 of the Land Registration Act

12. The court has fully considered the material on record on this issue. The Plaintiffs are apprehensive that the Defendants may alienate or deal with the suit properties in such manner as to make them unavailable upon the conclusion of the trial. In other words, the Plaintiffs are seeking an order for preservation of the suit properties pending the hearing and determination of the suit.

13. The Defendants have drawn the court’s attention to the Plaintiffs’ previous application for interim orders dated 24th May 2011 which was declined by the court. In the said application, the Plaintiffs were seeking a temporary injunction to restrain the Defendants from, *inter alia*, transferring, leasing, charging or in any way dealing with parcel Nos. 746 & 747. The Plaintiffs also sought an order directing the Land Registrar to register a prohibition against the said parcels.

14. It is thus clear that in their previous application the Plaintiffs were seeking interim orders to preserve the suit properties pending the hearing and determination of the suit. That application was considered by the court on merit and dismissed vide a ruling dated and delivered on 1st February 2012. The material on record shows that although the Plaintiffs appealed against the said ruling, they later withdrew the appeal so that they may pursue the hearing of the originating summons. In the circumstances, the court agrees with the Defendants’ contention that the Plaintiffs are legally precluded from proceeding with the instant application for interim orders. The application is clearly barred under the doctrine of *res judicata*. Accordingly, the court finds no merit in the Plaintiffs’ prayer for an order of inhibition to preserve the suit properties pending the hearing and determination of the suit.

c. Who shall bear costs of the application

15. Although costs of an action or proceeding are at the discretion of the court in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21)** the general rule is that costs shall follow the event. It is noted that although the Plaintiffs have succeeded on the prayer for amendment of pleading, they have failed on the prayer for an order of inhibition. The court has further taken into account the fact that there has been some lengthy delay on the part of the Plaintiffs in seeking amendment of their pleading. The court is thus of the opinion that the Defendants should be awarded costs of the application to be borne by the Plaintiffs.

G. CONCLUSION AND DISPOSAL ORDER

16. The upshot of the foregoing is that the court finds merit in the prayer for amendment of pleading but finds no merit in the prayer for an order of inhibition under **Section 68** of the **Land Registration Act**. Accordingly, the court makes the following orders for disposal of the Plaintiffs’ notice of motion dated 10th July 2020:

a. Leave be and is hereby granted to the Plaintiffs to file and serve an amended originating summons within 14 days from the date hereof in default of which the leave shall lapse automatically. The Defendants shall be at liberty to file further or supplementary affidavits within 7 days upon service.

b. The Plaintiffs’ prayer for an order of inhibition under **Section 68** of the **Land Registration Act, 2012** is hereby declined for being *res judicata*.

c. The Defendants are hereby awarded costs of the application to be borne by the Plaintiffs.

RULING DATED and SIGNED in Chambers at EMBU this 29TH DAY of OCTOBER 2020 and delivered via Microsoft Teams in the presence of Mr. Okwaro for the Defendants and in the absence of the Plaintiffs.

Y.M. ANGIMA

JUDGE

29.10.2020