



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 66 OF 2013

GEORGE KAMAU KIMANI & 5 OTHERS PLAINTIFF

VERSUS

COUNTY GOVERNMENT OF TRANS-NZOIA DEFENDANT

RULING

1. The applicants herein who are six in number brought a notice of motion dated 9/12/2013 seeking an order preserving the prevailing status quo regarding the occupation by the applicants of six houses collectively referred to as Cherangani Estate situated within Kitale town.
2. The six applicants are tenants of National House Corporation (NHC). Each of the six applicants has individual lease agreements with N.H.C. This application was prompted by a notice dated 3/5/2013 from the County Government of Trans-Nzoia giving each of the applicants notice to vacate their houses by 30th May, 2013. The reason given in the notice was that the County Government was facing a challenge in housing its incoming state officers who had been recently appointed and others elected.
3. The applicants contend that they are not tenants of the County Government of Trans-Nzoia and if there was to be any termination of the lease agreement, it will only be in terms of the lease signed by them with the N.H.C.
4. The application was opposed by the respondent the County Government of Trans-Nzoia based on the grounds of opposition dated 8/4/2014. The grounds are as follows;-

(i) That the application is incompetent, misconceived and fatally defective.

(ii) The said application has violated or failed to comply with mandatory provisions of the law.

(iii) The amendment of the said application and the plaint has been irregular and without leave of court.

(iv) The application and the plaint have been amended twice without leave of court.

(v) The said application seeks to enforce a lease that is void and totally unenforceable at law as it relates to a title registered under the Registration of Titles Act.

(vi) The County Government of Trans-Nzoia has been wrongly joined in this suit, the plaintiffs having joined it without first seeking and obtaining leave of the court.

(vii) The plaintiffs are not entitled to the orders sought in the application.

5. Mr Kiarie for the applicants submitted that the applicants are contesting the manner in which notices

were issued by the respondent. He argued that the applicants have been paying rent to the N.H.C. as shown by the annexed receipts and deposit slips. He contended that the notices were an affront to the leases signed by the applicants with the N.H.C. which could only be terminated in the manner provided for in the lease agreement.

6. Mr Kiarie further submitted that the amendment complained of was done with leave of court. He further argued that in any case under order 8 Rule 1 of the Civil procedure Rules there was no leave of court required to amend. He finally referred to Order 1 Rule 1 of the Civil Procedure Rules which provides that a suit cannot be defeated merely on ground of misjoinder or non joinder. He also relied on Order 51 Rule 10 (2) of the Civil Procedure Rules which provides that an application cannot be defeated for want of form. He also urged the court to invoke Article 159 of the Constitution.

7. Professor Sifuna for the respondent submitted that the applicants amended their plaint and application twice without leave of court. He further argued that an application is not a pleading and as such it cannot be amended. Professor Sifuna also took issue with the leases arguing that the same are unenforceable as they were not registered. He contended that he was not raising any issue as to joinder or misjoinder. He further argued that Article 159 of the Constitution cannot be invoked to assist a party who has not complied with mandatory provisions of the law.

8. In response to Professor Sifuna's submissions, Mr Kiarie argued that the issue of registration of the lease is a matter which can only be addressed during the hearing. On the contention by Professor Sifuna that the leases were not sealed, Mr Kiarie responded that a seal cannot be visible in a photocopy.

9. I have carefully gone through the applicants application together with its annexures as well as the grounds of opposition and submissions by counsel. In order to bring out the issues herein, a brief background of the application has to be set out. The applicants had initially sued the Transition Authority. The Attorney General filed a notice of appointment on behalf of the Transition authority on 17/6/2013. On 12/7/2013 grounds of opposition were filed by the Attorney General.

10. On 2/10/2013 the applicants filed an amended plaint and amended notice of motion bringing in a second defendant. Again on 9/12/2013 the applicants further amended their plaint and notice of motion.

11. The issues which emerge for determination are (1) Was the plaint amended without leave of the court? (2) Can a notice of motion be amended? (3) If an amendment is done without leave of court, can provisions of Article 159 (2) (d) be invoked to cure the anomaly? (4) What is the effect of a lease which is supposed to be registered but is not so registered. (5) Are the applicants entitled to the prayers sought?

12. On the issue as to whether the plaint was amended without leave of court, Order 8 Rule 1 of the Civil Procedure Rules provides that a party may without leave of court, amend any of his pleadings once at any time before pleadings are closed. Under order 1 Rule 13 of the Civil Procedure Rules, pleadings in a suit shall be closed fourteen days after service of the reply or defence to counter-claim or if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.

A defence is simply an answer to a plaintiff's claim or any method used to defend the claim. In the present case, the Attorney General filed grounds of opposition to the plaintiff claim on 12/7/2013. On 17/7/2013, Mr Kiarie for the applicants informed the court that he had been served with grounds of opposition and that he needed time to put in a further affidavit in response.

There was no further affidavit filed. On 10/9/2013, Mr Kiarie indicated that he was going to amend the plaint. He asked for a mention to enable him confirm if he had done so. The matter was fixed for mention on 2/10/2013. M/S Munialo appeared in court on behalf of Mr Ngumbi, state counsel for defendant. She indicated that the purpose of the mention, was to confirm whether an application for substitution had been made. The court responded that there was no such application in the file. A further mention was then given for 4/11/2013. On this date Mr Kiarie informed the court that he had amended the

plaint and the application. The amendments which were done were clearly without leave of court as pleadings had closed fourteen days after the service of the grounds of opposition.

13. A second amendment to the plaint and notice of motion was done 9/12/2013. This was clearly without leave of court. A second issue is on whether an application can be amended. My position is that an application can be amended but a supporting affidavit to the same cannot be amended. The amendment must however be made with leave of the court. This then brings me to the third issue as to whether an amendment made without leave of court can be cured by Article 159 of the constitution.

Article 159 (2) (d) provides as follows;-

“Justice shall be administered without undue regard to procedural technicalities”.

The rules of the Civil Procedure regarding amendments are very fundamental to the orderly procedure of bringing parties into suits or introducing material relevant to the issues at hand. These rules cannot be wished away. If parties were to be allowed to amend their pleadings at will without following the rules the courts will lose control of the proceedings. The supreme Court of Kenya at Nairobi in ***Petition No. 12 of 2013 Between Trusted Society of Human Rights Alliance (Petitions) and Mumo Matemo & 5 others*** had this to say as regards parties to suits and the laws regulating the same;-

“A suit in court is a “solemn” process “owned” solely by the parties. This is the reason why there are laws and Rules, under the civil procedure code, regarding parties to suits, and on who can be a party to a suit. A suit may be struck out if a wrong party is enjoined in it”. The corollary of this is that a suit may be struck out if the wrong procedure is followed bringing in the party to the suit.

The Supreme court Judges went on to state thus;-

“The court has its own safety nets for filtering matters before it, through the rules of Civil Procedure as developed over time. These include the Civil Procedure Rules, 2010 for the subordinate and the High Court, the Appellate jurisdiction Act (Cap 9 Laws of Kenya, and Rules for the court of Appeal, and the Supreme court Rules 2012 for this court”.

14. Article 159 of the Constitution does not offer a blanket cover for all manner of non compliance of the relevant rules. For instance a party cannot fail to follow the procedure laid down in amending pleadings and come to court to say that that is a mere procedural technicality. The procedure for amendment was meant to give the court control of proceedings after close of pleadings. It cannot be overlooked as was in this case.

15. As regards registration of the leases, it is not contested that the same were not registered. The law under which the property is registered requires that the lease be registered and if it is not registered, then it follows that the same cannot be enforceable. I have noticed that the leases have no term indicated on the same and no seal was affixed by the corporation.

16. I do not have to address the last issue because I have already found that the amendments herein were done without leave of the court. The upshot of this is that the applicants' application as well as the suit cannot be sustained. The same are hereby struck out with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 4th day of June, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for the applicants and Mr Momanyi for Professor Sifuna for Respondent.
Court Clerk – Kassachoon.

E. OBAGA

JUDGE

4/6/2014