



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT**

**AT MAKUENI**

**ELC CASE NO. 76 OF 2018**

**SAMMY MUTUA MUSWIL.....PLAINTIFF**

**-VERSUS-**

**FRANCIS WAITA DAVID ..... 1<sup>ST</sup> DEFENDANT**

**FRANK MANTHI MUTISYA.....2<sup>ND</sup> DEFENDANT**

**MWANZI DAVID .....3<sup>RD</sup> DEFENDANT**

**DAVID MUTISYA .....4<sup>TH</sup> DEFENDANT**

**MUSYOKA MUTISYA ..... 5<sup>TH</sup> DEFENDANT**

**MORRIS MUTISYA.....6<sup>TH</sup> DEFENDANT**

**MUTUA MUTISYA .....7<sup>TH</sup> DEFENDANT**

**R U L I N G**

1. The application for determination is dated 19<sup>th</sup> November, 2019 and has been brought under Order 8 Rule 3(1) & 5, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 3A & 100 of the Civil Procedure Act and all enabling provisions of the Law. It seeks;

**a) THAT this honorable Court be pleased to grant the Plaintiff/Applicant leave to further amend the amended plaint herein to delete the words ‘pursuant to section 21 (2) of the then Registered Land Act’ indicated in paragraph 6 thereof.**

**b) THAT costs be in the cause.**

2. The application is supported by the grounds on its face and the Plaintiff’s affidavit sworn on the same day. The primary ground is that the indication in the amended plaint that ‘the boundary was determined under section 21 (2) of the Registered Land Act’ was a mere oversight as the actual report by the District Land Registrar and District Surveyor does not make reference to the repealed Act. He has exhibited a copy of boundary summons as SMM-1, a copy of the report as SMM-2 and the draft further amended plaint as SMM-3.

3. The application is opposed through the replying affidavit sworn by Frank Manthi Mutisya on 10<sup>th</sup> December, 2019. The gist of the opposition is that the Respondents have already filed an appeal at the Court of Appeal challenging the ruling of this Court which dismissed their preliminary objection. The memorandum of appeal is exhibited as FMM-1.

4. He has deposed that the appeal raises substantive issues concerning the documents mentioned in the application and the appeal will be rendered nugatory if the amendments are allowed. He deposed that allowing this application will amount to concurrent hearing of the suit (same issues) by two Courts with different jurisdictions.

5. Further, he deposed that the Applicant is not an expert witness and has no capacity to attribute oversight to documents prepared by experts. He deposed that the documents marked SMM-1 and 2 lack interrelationship and contain a lot of discrepancies. He has also deposed that the alleged report does not mention dates of determination of the boundary dispute hence should not be relied upon to grant the amendments.

6. Directions were given that the application be canvassed by way of written submissions. By the time of writing this ruling, only the

Applicant's submissions were on record.

7. Relying on Order 42 Rule 6 of the Civil Procedure Rules, the Applicant submitted that an appeal does not operate as a stay of proceedings. He contends that the Respondents were directed to file an application for stay together with their reply but they chose not to.

8. He submitted that document SMM-1 is a mere boundary dispute summons which cited the provisions of the repealed Registered Land Act as saved under section 24 of the Interpretation and General Provisions Act. Accordingly, he contended that reference to the repealed statute in the amended plaint was a mere oversight. Further, he submitted that the resultant report conforms with the law as it does not make reference to the repealed statute. It was also his submission that the amendment sought will not in any way prejudice the Defendants as they will have an opportunity to file an amended defence.

9. In the dismissed Preliminary Objection, the Respondents' claimed that the suit is a non-starter for being based on a repealed statute. They also attached two documents which the Applicant intends to adduce as evidence. Indeed, the Respondents did not file an application for stay of proceedings as directed and as correctly submitted by the Applicant, **Order 42 Rule 6 of the Civil Procedure Rules** provides that;

*"No appeal or second appeal shall operate as a stay of execution or proceedings except in so far as the court appealed from may order...."*

10. From the exhibited memorandum of appeal, it is clear that the Respondents want their Preliminary Objection to be upheld and if the Court of Appeal agrees with them, any proceedings conducted by this Court will be rendered futile. In the interests of saving precious judicial time and for good order, it is my considered view that determination of the orders sought herein should be deferred to await the outcome of the appeal.

Signed, dated and delivered at Makueni via email this **19<sup>th</sup>** day of **October, 2020**.

**MBOGO C.G.,**

**JUDGE.**

**Court Assistant:** Ms. C. Nzioka