REPUBLIC OF KENYA

High Court at Nakuru

Civil Suit 32 of 2010

TIMOI FARMS AND ESTATE LIMITED.......................................PLAINTIFF

VERSUS

KIPNGENO A. NGENY...DEFENDANT

RULING

Before me are two applications: the Defendant's application by way of Notice of Motion dated 5th May 2012 expressed as brought under section 1A, 1B 3 3A, Order 2 Rule 15 sub rule 1(a) and 2, Order 51 rule (1) , (3) and 4 of the Civil Procedure Act and the Plaintiff's application by way of Notice of Motion dated 2nd July 2012, brought under Order 51 Rule 1, Order 8 Rule 3(1) and 5 of the Civil Procedure Rules 2010.

In the first application dated 5th May 2012, the Defendant/Applicant is seeking for the dismissal of the Plaintiff's suit with costs on the following grounds,

1. The subject land parcels number **Olenguruone/Amalo/314, 315,316 and 321** (hereinafter referred to as the suit property) are registered in the name of Florence Chelangat Langat, who is not a party to the suit.

2. The Respondent's pleadings do not disclose a cause of action worth being heard and judgement delivered on merit, therefore dismissing the Respondent's suit will cause the Court to save its own valuable judicial time, and clear the backlog since the current suit is unnecessarily filling the court's diary.

3. It would also save the time of the parties. The Respondent's suit is causing an inconvenience and is prejudicial to the Applicant's day to day work engagements thus impeding the Respondent's contribution to nation building.

This application is not supported by an affidavit.

In the second application dated 2nd July 2012, the Plaintiff is seeking for leave to amend the plaint and bring on board Florence Chelangat Langat as a 2nd Defendant, as well as the costs of the application. The application is supported by the affidavit of Isaya Kiptarus Kimeiyo sworn on 2nd July 2012, the General Manager of the Plaintiff's company.

The application is based on the following grounds: (which are also laid out in the supporting affidavit) that:

During the pendency of the suit, which was ready for hearing on 19th December 2012, the Defendant deliberately and with disregard of the rule of law in May 2012, transferred the suit property, to Florence Chelangat Langat, while the Plaintiff was still in occupation.

Unless the plaint is amended to include Florence as a Defendant, the suit stands compromised to the prejudice of the Plaintiff and will render the Plaintiff's case useless as demonstrated by the Defendant's application dated 5th May 2012 which seeks to dismiss the Plaintiff's suit.

The application dated 2nd July 2012 is contested through the Defendant's grounds of opposition dated 9th July 2012 as follows, that:

1. The application has no cause of action against the Defendant as the same abated upon the transfer of land parcel to the proposed 2nd Defendant, and is therefore bad in law, and should be struck out under Order 2 Rule 15 of the Civil Procedure Rules.

2. The Plaintiff should withdraw the suit against the Defendant and file a fresh suit against the proposed 2nd Defendant in compliance with rules of procedure.

These two motions came up for hearing before me on 29th November 2012. Mr Kimatta appeared for the Plaintiff while Mr Siele appeared for the Defendant.

Mr Siele in his submissions stated that there is no cause of action in this suit because the property had already been transferred to another party and the Defendant no longer had any interest in the suit property. He urged the court to be guided by sections 24, 25, 26 and 28 of the Land Registration Act 2012. He opposed the Plaintiff's application dated 2nd July 2012 and maintained that Plaintiff's application was made to defeat the course of justice, the application lacked a draft amended plaint to consider and would therefore will prejudice the defendant if allowed. He further stated that to avoid multiplicity of suits the plaintiff should pursue **H.C.C Civil Case 231 of 2011**, which had been filed by the plaintiff against the Defendants.

Mr Kimatta opposed the grounds laid out by Mr Siele for having the suit dismissed and stated that the application is bad in Law, ill intended and misconceived. The subject matter in the suit had been deliberately transferred to a third party to defeat the ends of justice and maintained he still had a cause of action making reference to section 1A, 1B of the Civil procedure Act. He also opposed the reference to sections 24, 25, 26 and 28 of the L.R.A 2012 saying the Law does not operate retrospectively since the events over the subject matter arose in 2009.

A question was raised during submissions whether sections 24, 25, 26 and 28 of the Land Registration Act (2012), should apply in this case. In **Samuel Kamau Macharia & Another v Kenya Commercial Bank Ltd and 2 others [2012] eKLR,** the Supreme Court observed that the general rule is that all statutes other than those that are merely declaratory or which relate only to matters of procedure or evidence are *prima facie* prospective; and retrospective effect is not to be given to them unless by express words or necessary implication. I agree with the view expressed in the above case and hold that the operating Acts in the instant case should be the Land Acts in used when transactions took place.

In considering the question as to whether there ought to be a draft plaint attached to the application I am guided by the trite principles as observed by **Hon. Justice Odunga** in **Abdirahman Mohamed Abdile Vs Ahmed Rashid Haji Mohamed (2012)eKLR** , which can be summarized as follows:

(a) The practice has always been to give leave unless the court is satisfied that the party applying was acting *mala fide*, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See **Tidelsay vs. Harpic [1878] 10 Ch.D. 393 at 396**.

(b) The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong

material or a wrong principle. See **Eastern Bakery vs. Castellino [1958] EA 461**.

(c) The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See **British India General Insurance Co. Ltd vs. G.M. Parmar [1966] EA 172**

(d) The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs. See **British India General Insurance Case** (Supra).

Attaching a draft amendment to an application is now considered a general rule of practice. However as stated above, the court will refuse leave to amend where the amendment would prejudice the rights, or if it causes injustice to the other side. The purpose of this application is to seek leave of the court to bring on board a third party who is now the registered owner of the suit property and this to me, would not occasion any injustice to the Defendant.

In considering such applications the court should always be guided by the overriding objective of the Courts as outlined in Section 1A of the Civil procedure Act which states:-

"1A. (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.

(2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).

(3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.

Section 1B of the same Act, on the other hand provides for the duty of court and states:

"(1). For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims—

(a) the just determination of the proceedings;

(b) the efficient disposal of the business of the Court;

(c) the efficient use of the available judicial and administrative resources;

(d) the timely disposal of the proceedings, and all other Proceedings in the Court a cost affordable by the respective parties; and

(e) the use of suitable technology.

It is therefore clear that in the exercise of the powers conferred upon the court under the Civil Procedure Act and the Rules there under, the Court is under a statutory duty to ensure that the overriding objective of the Act is attained. In so doing, there is a statutory duty imposed on the Court by section 1B aforesaid

to ensure the just determination of the proceedings and the efficient disposal of the business of the Court. In my view these provisions require the court to adopt a more pragmatic approach in dealing with matters that come before it. More than ever before the justice of the case plays a central role in the interpretation of the Civil Procedure Rules including the discretion whether or not to allow amendments of pleadings.

This principle has been anchored in the Constitution in Article 159 (2) (d) which states: "**justice shall be administered without undue regard to procedural technicalities**".

It is clear from the conduct of the Defendant that he is using technicalities and loopholes in the law to ensure that this matter is not successfully litigated, and as stated in **Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR,** quoting the dicta of Nyamu JA, "we wish to observe that the "*O2 principle*" which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the "right side". In the circumstances of this matter, the applicant is clearly on the "wrong side" and for this reason the principle must work against him." The overriding objective of the Act is that the court must do justice, and to do so, it must get to the root of the matter, and technicalities cannot be used to derail the process of the court.

Section 3A of the Act grants the court inherent power to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court. I consequently allow the Plaintiff's application dated 2nd July 2012 for leave to amend the plaint and enjoin the third party, and hereby dismiss the Defendant's application dated 5th May 2012 without costs to either party.

Dated and delivered at Nakuru this 1st day of February 2013

L N WAITHAKA

JUDGE

Present

Mr Kuyoni holding brief Mr Kimatta

N/A for defendant

CC: Stephen Mwangi

L N WAITHAKA
JUDGE