



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Environmental & Land Case 3 of 2012

STEPHEN NGATIA.....PLAINTIFF

VERSUS

CLEMENT KAMAU GITAU.....DEFENDANT

RULING

The Notice of Motion before the court for determination is one brought by the Plaintiff dated 22nd October 2012 seeking orders that:

1. Leave be granted to the Plaintiff to amend his plaint as per the draft amended plaint attached thereto.
2. The hearing of the Plaintiff's case to be re-opened for purposes of adducing further evidence and for cross examination of the Plaintiff in relation to the new matters contains in the Amended Plaint.

The Notice of Motion is based on the grounds that the Plaintiff has after the commencement of hearing of this suit obtained a Certificate of Title from the Commissioner of Lands for the suit property namely Land Reference Number 13330/403. Further, that there is therefore need for the Plaint to be amended, to indicate this new development and for the determination of the real question in controversy between the parties in this suit.

The Plaintiff also states that he had already given evidence in this matter and it is now necessary that the hearing of his case be re-opened for him to give evidence on the new matters relating to the title for the property. He avers that if he is not allowed to adduce evidence relating to the title for Land Reference Number 13330/403, he will be seriously and negatively prejudiced and he will be denied justice. Further, that no prejudice will be occasioned to the Defendant if this application is allowed.

The Notice of Motion is supported by the Plaintiff's affidavit sworn on 24th October 2012, wherein he states that he filed the suit herein on the 16th July 1999 seeking orders for general damages, eviction and a permanent injunction against the Defendant in relation to plot No. 491, within Thome Estate off Thika Road. The Plaintiff attests that in the course of the court case, the processing of the titles for the plots has been on-going and the that the plot has now been given a Certificate of Title by the Commissioner of Lands as Land Reference No. 13330/403.

The Plaintiff stated that the Certificate of Title for the property was issued on 22nd November 2011, but that his advocates on record only managed to get an official search with a certified copy of the same on 11th October 2012. He also stated that the hearing of the suit herein commenced on the 1st July 2010 before Muchelule J. and that he gave his evidence and was partly cross- examined on 28th October 2010 by the Defendant's counsel. Further, that the Honourable Judge was thereafter transferred and directions

were later given that the proceedings be typed.

The Notice of Motion is opposed. The Defendant filed a Replying Affidavit sworn on 18th January 2012 wherein he stated that the Plaintiff's application has not been made in good faith, and is intended to introduce new evidence which has been unlawfully and un-procedurally obtained by the Plaintiff to beef up his case.

Further, that at the commencement of the suit filed herein the suit property did not have a title and none had been issued. That the Plaintiff has however, during the pending of this suit and knowing that a dispute over the ownership of the said property is before the court, secretly and behind the Defendant's back and that of the court un-procedurally and unlawfully had the title to the same processed in his own name.

The Defendant further averred that it was the order of the court that the *status quo* as at the time of filing this case be maintained until the hearing and determination of this suit, and that the Plaintiff's action of having the title secretly processed in his own name was a violation of that Court order. The Defendant argued that the Plaintiff's act of obtaining the title to the suit premises is intended to influence the decision of the court in his favour and such evidence should not be entertained at this stage of the suit.

Further, that the new evidence of the certificate of title is not necessary for the court to be able to decide the issue before the court, which is that of the rightful allottee of the suit property by Thome Farmers No. 5 Limited. The Defendant stated that the introduction of the certificate of title will definitely prejudice his case and that the suggested amendment of the plaint to introduce this evidence should be refused in the interest of justice.

The parties filed written submissions in court. The Plaintiff's advocate in submissions dated 31st January 2013 relied on Order 8 Rule 3 (1) of the Civil Procedure Rules, which allows the court to amend pleadings at any stage of the proceedings. He further submitted that amendment should be allowed if it does not cause injustice to the other party and relied on the decision in **Joshua Muema Nyamai-vs- Ann Katunge Lewa (2012) eKLR** in this respect. Counsel further submitted that pleadings may be amended even after the parties have all given evidence and closed their cases, as long as justice is done to all the parties.

On the issue of re-opening of the Plaintiff's case, the counsel submitted that should the amendment of pleadings be allowed, it will be necessary for the Plaintiff to give evidence of the new matters pleaded in the amended plaint. That to do so will allow the court to ascertain the veracity of the matters pleaded in the amended plaint, which is its duty to do. Counsel relied on the decision in **Hassan Hashi Shirwa-vs- Swalahudin Mohamed Ahmed [2011] eKLR** in this respect.

The Defendant's counsel filed submissions dated 18th February 2013 and made oral submissions during the hearing of the application on 13th March 2013. Counsel for the Defendant gave a detailed history of the dispute before the court, and reiterated the arguments that the title to the suit property was unprocedurally and illegally procured by the Plaintiff. He submitted that under section 26 of the Land Registration Act of 2012, a certificate of title is deemed to be *prima facie* evidence of proprietorship of land, unless fraud or misrepresentation is shown.

Further, that the introduction of the title would prejudice the Defendant as he has now to prove that it was obtained by fraud or misrepresentation and would be litigating from the position of an underdog. Counsel also submitted that the Plaintiff had an obligation under section 52 of the Indian Transfer of Property Act (since repealed) not to obtain title while the suit was pending in court, and that the Defendant's rights in this respect have been saved by section 107 of the Land Registration Act of 2012.

I have carefully considered the parties pleadings, evidence and submissions. The issues before the court are whether the Plaintiff can amend his Plaint after the close of its case, and if so, if he can be allowed to reopen his case to adduce new evidence. The law on the court's discretion to allow amendment of pleadings is found in Order 8 Rule 3(1) and Rule 5 of the Civil Procedure Rules which provide as follows:

“3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 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....

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

The Constitution in Article 159(2) in addition also now enjoins this court to dispense substantive justice without undue regard to technicalities.

The principles governing the amendments of pleadings are well settled. The granting or refusal of leave to amend any pleading is a matter that is within the discretion of the court but such discretion should be exercised judiciously. Further, amendments should be liberally allowed, unless it is demonstrated that a party will suffer prejudice that cannot be compensated by way of costs. These principles were explained in the Court of Appeal decision in **Central Kenya Limited –v- Trust Bank Limited (2000) EALR 365** in which the following passage from **AIR Commentaries on Indian Civil Procedure Code, Vol.2, 6th Edition at 2245** was cited:

“...a party is allowed to make such amendments as may be necessary for determining the real issues in controversy or to avoid a multiplicity of suits provided there has been no delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected, and that the amendment can be allowed without injustice to the other side....”

The Defendant has argued that he will be prejudiced by the proposed amendment as it will introduce new evidence that will increase its burden of proof. It is my opinion that the fact that the Defendant’s burden of proof may be a notch higher will only be prejudicial if the Defendant is not given an opportunity to respond to the proposed amendments or rebut the new evidence. The Defendant has the opportunity to amend his pleadings if he finds this to be necessary, so as to raise any new defences or claims as a result of the Plaintiff’s amendments. I also note from the proceedings in the court record that the Defendant was in the process of cross-examining the Plaintiff, and the opportunity still exists for the Defendant to further cross-examine the Plaintiff on any new evidence he adduces.

On the argument that the Defendant’s vested rights protected by section 52 of the Indian Transfer of Property Act (since repealed) will be affected, I agree with the Defendant that his rights in this respect were saved by section 107(1) of the Land Registration Act of 2012 which repealed the Indian Transfer of Property Act of 1882. The said section provides as follows:

“ Unless the contrary is specifically provided for in this Act, any right, interest, title, power, or obligation acquired, accrued, established, coming into force or exercisable before the commencement of this Act shall continue to be governed by the law applicable to it immediately prior to the commencement of this Act.”

I also note from the certified copy of title produced in evidence by the Plaintiff that it was issued on 22nd November 2011, during the pendency of the suit filed herein. The Defendant gave an account of the process of issuing of titles to the Thome plots, but did not present any evidence of the Plaintiff’s actions leading to the said issue of title during the pendency of the suit herein or of the *status quo* orders granted by this court. This court cannot therefore make a finding that the Plaintiff has contravened section 52 of the Indian Transfer of Property Act (since repealed) or that he is in contempt of court in the absence of such evidence. The Defendant is however at liberty to bring contempt of court proceedings against the Plaintiff which would be the appropriate remedy in the circumstances.

It is thus my finding that this court is obligated to consider the amendments and evidence sought to be

introduced, so as to determine the real issues in controversy and dispense justice to the parties, and any prejudice caused to the Defendant in this regard can be cured by such further orders as may be necessary.

The Plaintiffs' Notice of Motion dated 22nd October 2012 is accordingly allowed and I hereby make the following orders:

1. The Plaintiff is hereby granted leave to amend his Plaint on the terms of the draft attached to his Notice of Motion dated 22nd October 2012.
2. The Amended Plaint to be filed and served within 15 days of the date of this ruling.
3. The Defendant is at liberty to file and serve amended pleadings within 15 days of service of the Amended Plaint.
4. The hearing of the Plaintiff's case shall be re-opened for purposes of adducing further evidence on the certificate of title to Land Reference Number 13330/403 and for cross- examination of the Plaintiff with regard to the said title and any new matters contained in the Amended Plaint.
5. The costs of the application shall be in the cause.

Dated, signed and delivered in open court at Nairobi this ___6th___ day of ___May___, 2013.

P. NYAMWEYA
JUDGE