



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

MALINDI ELC CASE NO. 12 OF 2018

KIFALU KARISA KITSAO.....PLAINTIFF

VERSUS

1. MWALIMU KALUME

2. FRANCIS TSALWA.....DEFENDANTS

RULING

1. I have before me two applications both dated 1st October 2019 for determination. The first is a Notice of Motion filed by Kifalu Karisa Kitsao (the Plaintiff) praying for orders that the Plaintiff be granted leave to amend his Plaint and that the Amended Plaint be duly filed upon payment of the requisite Court fees.

2. The Plaintiff's application which is supported by an Affidavit sworn by his Advocate on record Nyange Sharia is premised on the grounds: -

a) That the original title for the suit property was previously registered as Kilifi/Mtondia 116 at the filing of this suit;

b) That the property has since been sub-divided giving rise to new titles among them Kilifi/Mtondia/3919 wherein the portion under dispute falls;

c) That the Plaintiff requires to amend the Plaint to have the details of the land in dispute correctly reflected as they appear at the Land Registry; and

d) That the amendment sought seeks to crystallize the issue in dispute and the same will not prejudice the Defendants in any manner.

3. The second application has been brought by Mwalimu Kalume and Francis Tsalwa (the Defendants) seeking orders: -

1. That the Court be pleased to grant an order barring the Plaintiff from sub-dividing, lodging the subdivision documents, transferring or issuing fresh titles either to himself or third parties from the original title Kilifi/Mtondia/116 pending the hearing of (the) application or this suit.

2. That in (the) alternative the Court directs that status quo in the matter as to title documents for Kilifi/Mtondia/116 be maintained pending the hearing and determination of the application and or suit.

4. The Defendants' application which is supported by an affidavit sworn by the 1st Defendant Mwalimu Kalume Charo is premised on the grounds: -

a) That the Plaintiff has taken upon himself, absents any formal order stopping him, to commence mutations and move a Surveyor to re-survey and sub-divide Kilifi/Mtondia/116 into three subdivisions being 3916, 3917 and 3918;

b) That the Plaintiff is likely to proceed and lodge the sub-divisions with the lands office and obtain the title deeds thereby completely changing the scope of the suit as the description and dimensions shall change drastically; and

c) That the Defendants fear that unless the Plaintiff is so barred, the subject matter of this suit shall dissipate or be lost completely.

5. In a Replying Affidavit sworn by the same 1st Defendant and filed herein on 16th October 2019 in response to the Plaintiff's application he opposes the grant of leave to amend the Plaint on the basis that the Plaintiff is trying to shift goal posts and to defeat their claim based on the length of time the Defendants have resided on the suit property as well as the claim on res judicata. He further accuses the Plaintiff of being intent on disposing portions of the suit property.

6. The Plaintiff is equally opposed to the Defendants' application. In a Replying Affidavit sworn and filed herein on 16th October 2016, he avers that the Defendants' application cannot be granted as it has since been overtaken by events. The Plaintiff denies that the Defendants shall be prejudiced in any manner.

7. I have carefully considered the two applications and the respective responses thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates for the parties.

8. As a general rule Courts should grant leave to amend pleadings and a party is allowed to make such amendments as may be necessary for the determination of the real question in controversy provided there is no delay and that no new cause of action is introduced which does not arise from the same set of facts. The Court will however refuse to allow an amendment where vested interests or accrued legal rights are affected and where the amendment will cause an injustice to the other party or there is likelihood of deprivation of the defence of limitation.

9. In the instant matter before me, the Plaintiff wants to amend the Plaint on the ground that when he filed the suit, the portion of land in dispute was comprised in one large parcel of land known as Kilifi/Mtondia/116. It is his case that the said parcel has since been sub-divided and the portion of land now in dispute is comprised in the sub-division now known as Kilifi/Mtondia/3919. It is this parcel number that he seeks to introduce in his Plaint and he avers that the same shall not prejudice the Defendants in any way.

10. The Defendants are opposed to the Plaintiff's application and by their own application sought to have the Plaintiff barred from any further sub-division of the suit property and from registering the new sub-divisions.

11. A perusal of the Plaint filed herein on 22nd January 2018 reveals that the Plaintiff is claiming to be the owner of the parcel of land known as Kilifi/Mtondia/116 measuring approximately 13 acres. He accuses the Defendants of being in occupation and constructing semi-permanent houses thereon. It is further his case that the 2nd Defendant claims to have purchased five acres of the suit property from the 1st Defendant.

12. In their Statement of Defence filed on 12th February 2018, the Defendants claim the entire parcel of land and it is evident that there have been other suits notably *Kilifi SRMCC No. 211 of 2009* involving the very same parties herein in which Judgment was delivered in regard to the suit property in 2014.

13. The Plaintiff has not stated why he chose to unilaterally sub-divide the land which is clearly claimed by both parties in the dispute before this Court. The Defendants claim to be living on 12 of the 13 acres of the suit property and it is evident that the Plaintiff by asking for this amendment intends to limit the portion of land purportedly in dispute.

14. Arising from the foregoing, I did not find any merit in the Plaintiff's application and I dismiss the same. I was however satisfied that there is merit in the Defendants' application and I allow the same in terms of the alternative Prayer No. 2 thereof pending the determination of this suit.

15. The Defendants shall have the costs of the two applications.

Dated, signed and delivered at Malindi this 2nd day of October, 2020.

J.O. OLOLA

JUDGE