



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND AT ELDORET**

**ENVIRONMENT AND LAND NO. 18 OF 2019**

**GOOD NEWS CHURCH OF AFRICA.....PLAINTIFF/RESPONDENT**

**VERSUS**

**BOARD OF MANAGEMENT**

**ELDORET SECONDARY SCHOOL.....DEFENDANT/APPLICANT**

**RULING**

This ruling is in respect of an application dated 12<sup>th</sup> February 2020 by the defendant/applicant seeking for the following orders:

- a. That there be stay of proceedings pending the hearing and determination of this application.
- b. That leave be granted to the Defendant /applicant herein
  - i. To amend its defence in accordance with the draft annexed further amended defence herein
  - ii. To file further witness statement and list of documents to be relied upon during the hearing herein.
- c. That upon such leave being granted, the draft further amended defence and the additional documents filed herewith be deemed properly filed and served subject to payment of court fees.
- d. That the Plaintiff/Respondent be at liberty to file a reply to the further amended amended defence.
- e. Costs be in the cause.

Counsel agreed to canvas the application vide written submissions which were duly filed.

**DEFENDANT/APPLICANT'S CASE**

Counsel for the defendant/applicant submitted that they were served with the Plaintiff' s Supplementary List of Documents on 29<sup>th</sup> January, 2020 hence necessitating the Defendant/Applicant's counsel to seek instructions. That the applicant upon perusing the documents instructed the counsel to further amend the defence and to introduce **THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and COUNTY LAND REGISTRAR ELDORET** as parties.

Counsel submitted that **THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEES** were the registered proprietors of the suit property from the year 1960 until 23<sup>rd</sup> March, 2018 when the plaintiff fraudulently acquired title deed. It was counsel's further submission that the issues in controversy can only be determined if **THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and THE COUNTY LAND REGISTRAR ELDORET** are enjoined in this case.

The documents that were filed by the plaintiff/respondent in the supplementary affidavit includes a letter from GOSPEL FURTHERING FELLOWSHIP dated 28<sup>th</sup> April, 2014, Transfer of Lease from the GOSPEL FURTHERING FELLOWSHIP and a letter dated 14<sup>th</sup> October, 1987 from the GOSPEL FURTHERING FELLOWSHIP. Counsel submitted that there is a need for GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE to be enjoined in this proceedings to enable this Honourable Court to determine this case on merit.

It was counsel's further submission that both the Plaintiff and the Defendant allege that they were given the suit land by the GOSPEL FURTHERING FELLOWSHIP on diverse dates but the respondent at paragraph 8 of its replying affidavit states that it does not have a claim

against the GOSPEL FURTHERING FELLOWSHIP CHURCH. That the defendant has a counter-claim against the Plaintiff and the intended 2<sup>nd</sup> and 3<sup>rd</sup> Defendant.

Counsel submitted that the Defendant also alleges that the Plaintiff was fraudulently registered as the proprietor of the suit land, hence the claim against County Land Registrar, the intended 3<sup>rd</sup> Defendant.

Counsel relied on the provisions of Order 8 rule 5(1) of the Civil Procedure Rules which Provides;

**"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 cost or otherwise as are just. "**

Counsel further cited the provisions of Order 8 Rule 3(1) and (5) of the Civil Procedure Rules which provides as follows;

**1. subject to Order I, 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 as it may direct, allow any party to amend his pleadings.**

**5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....**

Ms Odwa therefore submitted that from the provisions it is evident that:

- a. A party may amend his pleadings at any stage of the proceedings;
- b. The application for amendment may be allowed on such terms as the court would deem fit to impose;
- c. An application for amendment may be allowed even if the effect is to substitute a new party;
- d. The application can be allowed irrespective of whether its effect will be to add or substitute the cause of action if the cause of action arises substantially from the same facts as a cause of action in respect of which the relief had already been claimed in the filed suit.

Further that it is trite law that any amendment should ordinarily and/or freely be allowed if it is necessary for the determination of the real matter in dispute and if the opposing party can be compensated by way of costs or on such terms as court would deem fit to impose.

Ms Odwa submitted that the Plaintiff has not demonstrated any prejudice it would suffer if the parties sought to be enjoined are enjoined. Counsel cited the case of **J.C Patel vs. B.A. Joshi (1952) 19 EACA 42** where it was held;

*"The rule of conduct of the court in such a case as this is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs; but if the amendment will put them into such a position that they must be injured, it ought not to be made."*

Counsel therefore urged the court to allow the application as prayed.

#### **PLAINTIFF/RESPONDENT'S SUBMISSIONS.**

Counsel relied on the replying affidavit sworn by Mr. Isaac Bett the Chairperson of the Plaintiff/ Respondent on 13<sup>th</sup> March 2020 and listed two issues for determination by the court as follows:

- a. Whether THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and THE COUNTY LAND REGISTRAR ELDORET are necessary parties to the suit.
- b. Whether a defendant can introduce other parties as co-defendants in a suit.

On the first issue as to whether THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and THE COUNTY LAND REGISTRAR ELDORET are necessary parties to the suit, counsel submitted that the plaintiff/respondent does not have a claim against the said parties but only against the Defendant/ Applicant.

Counsel cited the case of **Amon V Raphael Tuck & Sons 1956 1 All ER 273, Devlin J at p. 286287** where the court held that:

*"What makes a person a necessary party" It is not of course, merely that he has relevant evidence to give on some of the questions involved: that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them*

*adequately... the court might often think it convenient or desirable that some of such persons be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore must be a question in the action which cannot be effectually and completely settled unless he is a party"*

Mr Yego counsel for the plaintiff/respondent submitted that it is true that the entire parcel of the suit land previously belonged to THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE prior to transfer to the Plaintiff and at no time did THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE transfer or intend to transfer the suit property to the Defendant.

Counsel therefore submitted that they are not necessary parties in this suit as the Plaintiff/ Respondent has no claim against them. That the Defendant has not produced any documents of ownership or sale linking them to the proposed Co- Defendants that is the GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and THE COUNTY LAND REGISTRAR ELDORET.

It was Mr Yego's submission that in enjoining a party to a suit, certain guiding principles should be considered as was espoused in the case of **Technomatic Limited TIA Promopack Company v Kenya Wine Agencies Limited & another [2014] eKLR** where the court was of the view that;

*"it is clear that the guiding principles when an intending party is to be joined are as follows: he must be a necessary party, he must be a proper party, in the case of a defendant there must be a relief flowing from that defendant to the plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter, his presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit"*

Counsel submitted that the intended co-defendants do not fit in the above principles applicant deems GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and the COUNTY LAND REGISTRAR necessary parties, joinder through an amendment is not the way to go when Order 1 Rule 15 of the Civil Procedure Rules 2010 clearly dictates the issue of third party proceedings. The Defendant/ Applicant is therefore at liberty to make an application for joinder of THE GOSPEL FURTHERING FELLOWSHIP REGISTERED TRUSTEE and THE COUNTY LAND REGISTRAR ELDORET as third parties in the main suit.

On the second issue as to whether the defendant can introduce parties as a co- defendant, counsel submitted that the Plaintiff/ Respondent filed a suit against the Defendant/ Applicant vide a Plaint filed in court on 12<sup>th</sup> November 2018 wherein it prays for judgment to be entered against the Defendant/ Applicant for a declaration that the Plaintiff is the sole registered owner of all that parcel of land measuring approximately 2.428 Hectares known as ELDORET MUNICIPALITY BLOCK 11/20; an order of eviction against the defendants to vacate the Plaintiff's parcel of land known as ELDORET MUNICIPALITY BLOCK 11/20, an order of permanent injunction restraining the defendant, her servants or agents from encroaching, disposing, alienating and/or trespassing onto the said plaintiff's parcel of land, mesne profits and costs of the suit.

That the claim against the defendants is based on the fact that the Plaintiff/ Respondent is the sole registered owner of the said parcel of land measuring approximately 2.428 Hectares and that the Defendant/ Applicant has encroached onto the Plaintiff/ Respondent's portion of land and is now running a school in the old buildings standing on the Plaintiff's land, denying and interfering with the Plaintiff's quiet possession of the property.

Counsel reiterated the provisions of Order 1 Rule 3 of the Civil Procedure Rules, 2010 which provides in part that "all persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist"

Counsel also cited the case of **Carol Construction Engineers Ltd v Naomi Chepkorir Langat [2019] eKLR** where Justice Munyao Sila in dismissing the Defendants application to enjoin other persons as co-defendants stated that

*"it will be wrong for this court to impose upon the plaintiff some persons as defendants when in fact the plaintiff has no issue with such persons."*

Counsel therefore urged the court to dismiss the application with costs to the respondent.

#### **ANALYSIS AND DETERMINATION**

This application seeks for many orders which are couched in amendment of defence but it also seeks to enjoin other parties to the suit. It also seeks for stay of these proceedings pending the hearing and determination of this suit. Amendment of pleadings are anchored on the provisions of Order 8 rule 5(1) of the Civil Procedure Rules which Provides;

**"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 cost or otherwise as are just. "**

Further Order 8 Rule 3(1) and (5) of the Civil Procedure Rules which provides as follows;

**1.subject to Order I, 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 as it may direct, allow any**

party to amend his pleadings.

**5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....**

This Order gives the court the mandate to allow amendment of pleadings at any stage of the proceedings on such terms that may be just.

The defendant had already amended its defence and counterclaim on 15<sup>th</sup> August 2019 which is on record. The amendment sought in this case is for enjoinder of a co-defendant. Parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a plaintiff to sue persons that they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.

That is a reason why before a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the defendant you want to sue.

In this case the applicant states that the party whom they intend to enjoin was the original registered Trustee of the suit land but has not produced any documentation to ascertain the same. The plaintiff states that they do not have a claim against the proposed party.

From the pleadings and the supporting affidavit these are parties that can be called as witnesses and not as parties to the suit. Including them in the suit will complicate the matter as they will not give evidence that is neutral but to support their position or the position of the a party that has dragged them to court.

I agree with Judge Munyao in the case of **Carol Construction Engineers Ltd v Naomi Chepkorir Langat [2019] eKLR** where in dismissing the Defendants application to enjoin other persons as co-defendants stated that:

*"it will be wrong for this court to impose upon the plaintiff some persons as defendants when in fact the plaintiff has no issue with such persons."*

The plaintiff is clear on this that he does not want other parties to be imposed on them. If the applicant had established that the party to be enjoined is a necessary party, then the court could have considered.

In the case of **Rubina Ahmed & 3 others v Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR** the Court of Appeal while dismissing an appeal relied on **Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at paragraph 76**, which stated the following about amendments of pleadings:-

*"...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...". [Emphasis added].*

Courts should freely allow amendments but this discretion should be exercised judiciously. I come to the conclusion that the application lacks merit and is therefore dismissed with costs to the respondent.

**DATED and DELIVERED at ELDORET this 17<sup>TH</sup> DAY OF NOVEMBER, 2020**

**M. A. ODENY**

**JUDGE**