



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
OF KISII**

Civil Case 90 of 2007

**BELDINA
MOKAYA.....PLAINTIFF/APPLICANT**

-VERSUS-

ROBERT OMBASO NYARERU)

**GUSII COUNTY CONCIL
).....DEFENDANTS/RESPONDENTS**

R U L I N G

This dispute begun on 9/8/2007 when the plaintiff/respondent filed the case against the defendants/applicants seeking a permanent injunction restraining them, and those claiming under them, from trespassing onto, interfering with and/or any other manner dealing with plot *L.R.No. Kisii Town/Block 111/491* which is registered in her name. It measures about 0.314 Hectares. She further sought that the defendants be evicted from the plot. Her contention was that the 1st defendant, an employer of the 2nd defendant and acting under its instructions, had on or about July, 2007 trespassed upon the plot and thereon erected a structure and begun to rear animals. These acts, it was pleaded, had prevented the plaintiff from occupying and /or developing her plot, and that despite demands to vacate, the defendants continued with the trespass.

The defendants filed a Defence denying the alleged trespass. The 2 nd defendant pleaded that it was the legal owner of the plot which it had authorised the 1st defendant to occupy. They stated that the plaintiff was an intruder on the plot who had grabbed it and got herself registered as owner in a manner that was illegal, dubious and without following the procedures laid down by the 2nd defendant. They continued that the house erected on the plot has been there since the inception of the 2nd defendant as council, and was not erected on or about July, 2007 as alleged.

There have been various applications in the suit, but hearing is yet to commence.

On 22/7/2009 the defendants filed this Chamber Application under *Order VIA rules 3 and 5(1) and Order 8 rule 10(2) of the civil Procedure Rules and sections 3, 3A and 100 of the Civil Procedure Act* to be granted leave to amend their joint defence with a view to, among other things, joining other parties and to bring a counterclaim. I have read the grounds on which the application is brought, the affidavit sworn by ISAAC GITHUI who is the clerk to the 2nd defendant council and the intended Defence and Counter Claim. The parties sought to be joined are Sammy Silas Komen Mwaita who is Member of Parliament but who was Commissioner of Lands when Certificate of Lease in respect of this lease was issued to the plaintiff, and the Municipal Council of Kisii. The defendants will be saying that by virtue of the Constitution, Trust Land Act and Gazette Notice no. 1937 of 21/5/66 title no. Kisii Municipality/Block

3/491 within Kisii township was set a part as Trust Land and vested in the 2nd defendant. The 2nd defendant reserved it for a community health center. However, the said Commissioner of Lands and the Municipal Council of Kisii, and without reference to the 2nd defendant, caused the user of the plot to be changed. They got it subdivided and allocated it to various people who included the plaintiff. This was done in total disregard of the fact that this was reserved public land. It was done in a manner that was dishonest, fraudulent, arbitrary and illegal.

The 2nd defendant states that there was no council resolution to bless those transactions and the plaintiff paid no consideration for the plot. It is claimed the plaintiff participated in these acts. Lastly, it is claimed that the purported transfer and /or issuance of the plot vide the Certificate of Lease was void *ab initio* and incapable of conferring any estate, interest or right in or over the suit plot.

The plaintiff is defended by Mr. Oguttu and the defendants by Mr. Bigogo. When the application came up Mr. Bigogo's contention was that the proposed Defence and Counterclaim are a result of new evidence that was not within the knowledge or possession of the defendants. They submitted that the court is dealing with a land dispute and what is being raised will provide material for the court to determine the real questions in controversy between the parties. He indicated that the former Commissioner of Lands was being sued in his personal, and not official, capacity. Mr. Oguttu's position was that the former Commissioner of Lands issued the Certificate of Lease in his official capacity, and that whatever he did leading to the issuance of the lease was done in that capacity. There is therefore no way, Counsel argued, that he can be sued in his private capacity. He

referred to **section 2(3)** of the *Government Proceedings Act (Cap.40)* to show that these were proceedings intended against the Government as Sammy Silas Komen Mwaita was then a Government official and acting as such. Under *section 13A (1)* of the Act, Counsel went on, Notice to sue was required to be served on the Government and there was no indication of such notice in this case.

Regarding the Municipal Council of Kisii, Mr. Oguttu's position was that under *section 3(1)* of the *Public Authorities Limitation Act (Cap 39)* no proceedings can be brought against it after the end of one year. The acts complained of in this case were between 1998 and 2003, according to the defendant's pleadings. Counsel submitted that limitation has caught up with the defendants, if their intention is to bring proceedings against the two entities. He relied on the decision in *Shah.V.Aperit Investments S.A. & Another [2002] 1KLR 130* to state that the defendants should not be allowed to amend their pleadings so as to introduce or revive a cause of action which is barred by statute at the time of attempted amendment. Lastly, Counsel submitted that it had not been shown that material facts were not in the knowledge of the defendants when they filed the Defence.

Both counsel agree that amendments to pleadings sought before the hearing of the case should be freely allowed if they can be made without injustice to the other side and there is no injustice to the other side if the other party can be compensated by costs. (See Shah's case (above)). Mr. Bigogo referred the court to the Court of Appeal decision in *Central Kenya LTD.v.Trust Bank Ltd and Others Civil Appeal o 222 of 1998 at Nairobi*. In the case, the court observed as follows:-

"The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2 6th Edition at Page 2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue 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"."

It has been indicated in the foregoing that the application is being brought two years after the suit was filed. Considering there have been a number of inter locutory applications, one may not say that there has been undue delay in bringing the application at hand. It is also noted that hearing has not begun.

However, it cannot be true that the defendants have just come by material facts relating to this dispute. The Plaintiff pleaded in the plaint that she was the registered owner of the plot. With the suit she filed an application for injunction in whose affidavit in support was annexed a copy of the Certificate of Lease for the plot. It showed the lessor to be the 2nd defendant. Assuming that was the first time the 2nd defendant was seeing that document, they should have been on notice. A little inquiry would have revealed the history of the allocation. The 2nd defendant filed a replying affidavit to say it had not leased the plot to the plaintiff, and that the Certificate of Lease was a forgery. The 2nd defendant certainly knows this lease was issued on 9/1/2003 by Sammy Silas Komen Mwaita as the Commissioner of Lands on behalf of the Council. The other way of looking at this issue is that the affidavit sworn to support present application does not show how the defendant came by this new material information or from whom they obtained it.

Mr. Bigogo emphasized the point that the court was dealing with land. Land is a valuable asset, but it is no longer a “sacred cow”. (See *Lalchand Fulchand Shah And Another .V. Investments and Mortgages Bank Ltd,Civil Application no.165 of 2000* at Nairobi).

In the proposed Defence and Counter claim, Sammy Mwaita is described as a

“male adult of sound mind who is a member of parliament and by 9th January, 2003 he was a Commissioner of Lands in the Republic of Kenya.....”

9th January, 2003 is the date the lease was signed by the official. It is acknowledged he did sign while serving as

“Commissioner of Lands in the Republic of Kenya.”

There is nowhere in the proposed proceedings that he was acting in his personal capacity. The law is clear that the defendants can still sue the Commissioner of Lands or the Attorney General for acts done by previous holders of the office. The Commissioner of Lands in his personal capacity cannot issue a lease under the Registered Land Act (Cap 300).

The municipal council of Kisii is described as a

“Local Authority”

Under the Local Government Act, Cap 265 of the Laws of Kenya.

Legally, the time of bringing a suit against either of these entities has long passed. The 2nd defendants, as a local authority, would surely know this. Any request to amend pleadings to join the two entities or to sue them would be a futile exercise. With that knowledge, I find, the application is brought to vex the plaintiff and is an abuse of the process of the court.

The result is that the application is dismissed with costs.

Dated, signed and delivered at Kisii this 2nd day of November, 2009.

A.O.MUCHELULE

JUDGE

2/11/2009

2/11/2009

Before A.O.Muchelule-Judge

Court clerk-Mongare

Mr. Oguttu –present

Mr. Okemwa-present

COURT: Ruling in open court.

A.O.MUCHELULE

JUDGE

2/11/2009