



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT BUSIA**

**ENVIRONMENT AND LAND COURT**

**CASE NO. 7 OF 2013**

**FREDRICK IDIAMA EMOJONG.....PLAINTIFF**

**= VERSUS =**

**XEPHERIO MANGENI MANYURU**

**DINA ACHIENG NYONGESA**

**LYDIA BENTA TATAH MANGENI.....DEFENDANTS**

**= AND =**

**MARY MUTHONI**

**DANIEL NYAWARA OGENDI.....RESPONDENTS**

**RULING**

1. The Application for determination is the Notice of Motion dated 25<sup>th</sup> January 2018 filed under Section 1A, 1B, 3A and 63 of the Civil Procedure Act, Order 8 rules 3 and 5; Order 40 rules 1, 2 and 3; and Order 51 rules 1,4,6 and 10 of the Civil Procedure Rules. The Applicant – **FREDRICK IDIAMA EMOJONG** – seeks leave to amend his plaint to include the 1<sup>st</sup> Respondent, **MARY MUTHONI** as a Defendant in this suit as well as injunctive orders against the aforementioned party and one **DANIEL NYAWARA OGENDI** from dealing in the suit properties namely **LR Nos SOUTH TESO/ANGOROMO/8424, 8425, 8426 and 8427** pending the determination of this suit. The Court record reflects that a largely identical Application was filed by the Applicant a day earlier.

2. The Applicant states that the Defendants sold the aforesaid suit properties being resultant subdivisions of **LR Nos. SOUTH TESO/ANGOROMO/7331** that was registered in his name, to the Respondents in blatant disregard of interim injunctive orders issued by this Court on 8<sup>th</sup> September 2015 and lastly extended on 12<sup>th</sup> June 2018 meant to preserve the status quo. In the Supporting Affidavit to the Application, the Applicant depones that the Respondents have put up building materials on the said properties with a view to commencing construction and that the 1<sup>st</sup> Respondent continues with her activities thereon despite being sent a demand letter by the Applicant's Advocates to cease and desist her "illegal actions."

3. The Application is opposed vide the Replying Affidavit by the 1<sup>st</sup> Defendant – **XEPHERIO MANGENI MANYURU**. He contends that the Plaintiff is employing delaying tactics by attempting to introduce third parties. He referred to an agreement between the parties to the suit on 8<sup>th</sup> September 2015 whereby they agreed to dispense with applications and a preliminary objection for the expeditious disposal of the main suit. He further asserts that the Applicant has all along been in peaceful and exclusive occupation of the suit land and that he has not demonstrated how the land has been sold and transferred.

4. Parties elected to canvass the Application by way of written submissions. The Applicant's submissions were filed on 8<sup>th</sup> May 2018. Regrettably, the Applicant seems to re-argue the issues raised in the initial Application for injunctive orders dated 28<sup>th</sup> May 2015, his case for the main suit and the Defendant's preliminary objection filed on 18<sup>th</sup> January 2016 whose resultant ruling in the Applicant's favour was delivered by this Court on 15<sup>th</sup> February 2017. The Applicant has simply rehashed his version of events which he contends entitle him to ownership of the suit properties specifically that he bought the suit property pre-subdivision, a succession cause ensued pertaining to the suit property whereby Tuiyott J made pronouncements that his decision did not authorize the Defendants to change the status quo with regard to the properties and that the Defendants proceeded to subdivide and alienate the land without refunding his purchase price.

5. The Defendants filed their submissions on 14<sup>th</sup> May 2018. They correctly pointed out that the Plaintiff has not made out a case for

amendment which essentially was for the joinder of new parties to the suit. They prayed that the suit be dismissed. It is important to note that the Respondents sought to be enjoined in the suit did not file Responses to the Application as well as submissions.

6. I have considered the Application, submissions in support and opposition and the Applicable law. The Application seeks injunctive orders and leave for amendment so as to introduce new parties to the suit. The principles on amendment are well settled. In the case of **Philomena Ingosi Lumula Vs Jackton Mwanzi (2006) eKLR**, the Court succinctly stipulated them as follows:

**“Rule 3(1) of Order VIA of the Civil Procedure Rules gives the court unfettered discretion to allow amendment of pleadings 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. Under Rule 5(1) of Order VIA, 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) for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings. In Eastern Bakery v. Castelino (1958) EA 461, the former Court of Appeal for East Africa held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. This court did also hold in 1968 that amendments may be allowed at a very late stage where it is necessitated solely by a drafting error and where there is no element of surprise, see General Manager E.A.R & H.A. versus Thierstein [1968] EA 354. It is important to point out that amendments timeously made before the hearing of a suit should be readily allowed if no prejudice is caused to the other party and if they are designed to help place before the court all the relevant matters for determination of the real issue in dispute between the parties. Bullen and Leake & Jacob’s Precedents of Pleadings, 12th Edition shows that the power of the court in allowing amendments is intended to help in determination of the true, substantive merits of the case. It also shows that amendments should be timeously applied for. The power of the court to grant amendment can be exercised at any stage of the proceedings including the appeal stage.**

It is salient from authorities including Beoco Ltd. v. Alfa Laval Co. Ltd. [1994] 4 ALL ER 464 that in considering leave to amend pleadings, the guiding principle is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. In volume 2, 6th Edition of the AIR commentaries on the Indian Civil Procedure Code by Chittaley and Rao at page 2245 the rule with regard to amendment of pleadings has been stated thus, **“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 prejudice to the other side.”** (emphasis mine)

7. It appears to me that the Applicant intends to enjoin parties in a roundabout manner. The Application, supporting affidavit and annexures do not in any way demonstrate the manner in which “pertinent information” is being brought before the Court to bring clarity and aid in determination of issues in question pertaining to the suit property. It therefore fails on this limb. The proper Application should have been one for joinder with sufficient grounds and evidence upon which the intended parties are to be enjoined.

8. The Application for Amendment also fails for want of form in contravention of Order 8 rule 7 of the Civil Procedure Rules, 2010. A draft Plaint showing the introduced amendments underlined in red should be annexed to the Application. The prayer that the draft be deemed duly filed upon the payment of requisite court fees should also have been made. Both of these aspects are missing in the Application which in itself is a fundamental flaw that goes to the root of the Application for amendment.

9. The second limb of the Application that seeks injunctive orders is fatally misplaced. Firstly, injunctive orders are sought against intended Respondents who have not yet been made parties to the suit. Secondly, in prayer 2 of the Application the Applicant seeks to enjoin only one party namely **MARY MUTHONI**. In prayers 3 and 4 the Applicant seeks restraining orders against both **MARY MUTHONI** and one **DANIEL NYAWARA MUGENDI**. There is no prayer seeking to enjoin the latter party to the suit. It appears to me that the Applicant is seeking to enjoin a party and contemporaneously have the said party as well as a stranger to the suit slapped with restraining orders. One cannot seek restraining orders against strangers to a suit who shall by no means have been accorded a chance to respond and an opportunity to be heard. The Application is bad in law and therefore fails on this aspect.

10. Lastly, the conditions for interlocutory injunctions were laid out in the celebrated case of ***Giella –v- Cassman Brown & Company Ltd (1973) EA 358***. The Plaintiff must show that he has a prima facie case with a probability of success and that he stands to suffer irreparable damage. If the court is however in doubt on the foregoing, it will decide the matter on the balance of convenience. The Applicant has not presented an iota of evidence to this Court demonstrating the need for interim injunctive relief. There is no sale agreement, transfer or certificate of official search showing that the suit properties have changed ownership. There are no photographs of the site with building materials and no shred of evidence linking the Respondents. Moreover, there are orders already in force pertaining to the suit property. If breached, counsel for the Applicant should move the Court appropriately instead of bogging it down with myriad applications.

11. Without further ado, the Application dated and filed on 25<sup>th</sup> January 2018 is hereby dismissed with costs to the Respondents.

**Dated, signed and delivered at Busia this 28<sup>th</sup> day of February, 2019.**

**A. K. KANIARU**

**JUDGE**

**In the Presence of:**

Plaintiff: Absent

Defendants: Absent

Counsel of the Plaintiff: Present

Counsel of the Defendants: Present

Court Assistant: Nelson Odame