



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KITALE
LAND CASE NO. 58 OF 2017

GRACE WANGOI KIRWA

(Suing as the Administratrix of the Estate of the late

PAUL KIRWA).....1ST PLAINTIFF

JOSEPH GITAU KIRWA

(Suing as the Administratrix of the Estate of the late

PAUL KIRWA).....2ND PLAINTIFF

VERSUS

JACKSON KIPLAGAT ARAP MELI

(Suing as the Administratrix of the Estate of the late

KEMELI MBOGO SIMEON).....1ST DEFENDANT

ROSELYN CHEMAIYO KENEI

(Suing as the Administratrix of the Estate of the late

ELIJAH KIPTARUS KENEI).....2ND DEFENDANT

ANNA JEPKOECH TENAI

(Suing as the Administratrix of the Estate of the late

MICHAEL MALAKWEN ARAP TENAI).....3RD DEFENDANT

DINA JEPKORIR TENAI

(Suing as the Administratrix of the Estate of the late

MICHAEL MALAKWEN ARAP TENAI).....4TH DEFENDANT

COMMISSIONER FOR LANDS.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. The Notice of Motion dated 3rd October, 2018 seeks the following orders:

- (1) That the draft amended plaint annexed hereto be treated as the plaintiff's amended plaint and that the same be deemed as having been duly filed.
- (2) That the defendants be at liberty to amend their statements of defence within 14 days in they wish.
- (3) That this honourable court issues directions on the service of the plaint and summons on the enjoined parties as well as filing of statements of defence
- (4) Any other order the court deems fit to grant.
- (5) Costs of this application be provided for.

2. The Notice of Motion is founded on the grounds set out at the foot of the application and in the annexed supporting affidavit of the 1st applicant Grace Wangoi Kirwa. Briefly these are that there has been recent changes relating to the land registration and disputes; there has been subsequent changes to the parties to the dispute and that it will be judicious that the amended plaint be allowed in order to introduce all the relevant parties to the claim as well as capture the plaintiffs' prayers appropriately.

3. The 1st, 2nd, 3rd and 4th defendants opposed the application and filed grounds of opposition dated 31/10/2018 in which they aver that the matters sought to be introduced by way of amendments were within the knowledge of the plaintiffs in 2007 when the suit was first filed and in 2009 when they amended the plaint; that the proposed amendment will not be of any aid in this court in determining the real issues in controversy and that the real issue for determination is whether the plaintiff are entitled to an equal share of the 935 acres comprised of in LR. No. 9191 (IR No. 13487). It is averred that if this issue is determined then the interest of the proposed 8th to 195th defendants will stand determined and that the application is a ploy to convolute and protract this matter.

4. The 5th and 6th defendants filed their defence on 10/7/2018 and did not file any response to the instant application.

5. The plaintiffs filed their submissions on 6/12/2018. The plaintiffs cited the case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others 2000 eKLR, Bosire Ogero -vs- Royal Media Service 2015 eKLR, Institute for Social Accountability & another -vs- Parliament of Kenya and 3 Other 2014 eKLR.**

6. It is submitted by the plaintiff's counsel that the **Section 100** of the Civil Procedure Rules and **Order 8 rule 5(1)** of the Civil Procedure Rules grant the court general power to grant leave to amend pleadings citing **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others 2000 eKLR** counsel for the plaintiff set out the principles on an amendment of pleadings as follows; that the amendments are necessary for the determination of the real question and controversy to avoid multiplicity of suit provided there has been no undue delay, provided there is no vested interests or accrued legal rights are affected, provided no new or inconsistency cause of action is introduced and as long as the amendments do not occasion prejudice or injustice to the other side which cannot be compensated for by way of costs. He submits that the discretion of the court to allow amendments of plaint is wide and unfettered except that that power should be exercised judiciously and upon the above principles.

7. Citing **Bosire Ogero -vs- Royal Media Service 2015 eKLR** the plaintiff's counsel submits that the discretionary power of the court is exercised so as to do justice in the case. He submits that it has not become apparent following a report adduced in the case by the Attorney General in April, 2018 that new parties have purportedly acquired interests in the suit property and that that report was submitted pursuant to an application earlier filed by the plaintiff seeking confirmation of the status of the suit property. The plaintiff's plea is that the names and the particulars of the intended defendants were not available to the plaintiff and could not have been obtained as the plaintiffs faced hostility in view of the possibility that the potential findings may cause cancellation of the transmission of interest to the intended defendants. Citing **Bosire Ogero -vs- Royal Media Service 2015 eKLR**, it is averred that failure to include the intended defendants will result in an inconclusive determination of the issues in the matter in the event that a judgment is issued that requires determination of the interest of parties in occupation of the suit property and this may lead to multiplicity of suits which would not lead to judicious or efficacious use of the court's time. It is averred that leave can be granted to amend the statement of defence and costs would follow the cause at the end of this litigation.

8. The 1st - 4th defendants file their submissions on 1/2/2019. The defendants cite the cases of **Nairobi HCCC No. 331 of 2002 John Mulwa Kang'aatu -vs- Panafrican Insurance Co. Ltd 2015 eKLR, Nairobi HCCC No. 6301 of 1999 Githurai Ting'ang'a Co. Ltd -vs- Stephen Kimani and Daniel Ngetich & another -vs- K-Rep Bank Ltd 2012 eKLR.**

9. Citing **Nairobi HCCC No. 331 of 2002 John Mulwa Kang'aatu -vs- Panafrican Insurance Co. Ltd 2015 eKLR**, the 1st - 4th defendants' counsel reiterates the principles which counsel for the plaintiff extracted from the case **Central Kenya Ltd -vs- Trust Bank Ltd & 5 others 2000 eKLR**. He adds that the application does not disclose a proper basis to warrant of grant of the orders sought; that it is unnecessary to amend the name of the 5th defendant who in any event is actively represented by the Attorney General and that the issue of such substitution is res judicata in view of the notice of motion dated 6/6/2013 vide which the court ordered the Chief Lands registrar to submit a report on the suit property. Citing **Nairobi HCCC No. 6301 of 1999 Githurai Ting'ang'a Co. Ltd -vs- Stephen Kimani** Counsel submits that the application should have been brought as an application for joinder under **Order 1 rule 10(2) (4)** of the Civil Procedure Rules and not as an application to amend.

10. On whether matters sought to be introduced by way of amendment were within the knowledge of the plaintiff in 2007 and in 2009 the latter date on which amendment was last done, it is submitted that no explanation by way of affidavit has been tendered to show the inclusion of the new defendant or why they were not included in the initial plaint or the amended plaint of 2009. As to whether the 1st - 4th defendants

stand to suffer prejudice if the application is allowed counsel for the defendants no peculiar and new allegation has been levered against the intended defendants in the proposed amendments. It is submitted that the 8th to 63rd defendants are listed in the 5th and 6th defendants' report as persons who purchased land from the plaintiff himself or their agents. It is submitted that the proposed amendments if allowed would put the 1st - 4th defendants at great pains to defend cause of action that they were not privy to all and therefore occasion them irreparable prejudice and great injustice. It is also averred that the proposed amendments will dispatch the 1st - 4th defendants on a mission to collect evidence to prove their case yet the plaintiffs had lain idle since 2007 without filing the claims in time and so accrued defences of the 1st - 4th defendant will be prejudiced. It is also alleged that a new issues for determination including whether some of the intended defendants fraudulently purported to have bought land from the plaintiff (when alive) or his administrators or the 1st - 4th defendants. It is submitted that the 1st - 4th defendants would suffer prejudice in that they are strangers to those new allegations and cannot respond to the same and hence they are accrued defenced would be lost if the amendments is allowed. Citing Order 2 rule 6(1) of the Civil Procedure Rules the defendants counsel submits that new facts that may alter the cause of action in the matter are proposed which should be disallowed. It is submitted that when the plaintiff were granted leave to amend the plaint in 2009 they never utilized that opportunity to include the whole of their claim which they were entitled to make in respect of the cause of action and this application is therefore an abuse of the court process.

11. Citing **Daniel Ngetich & another -vs- K-Rep Bank Ltd 2012 eKLR** counsel for the defendant aver that the court should never grant leave to amend if the court is of the opinion the amendments would cause injustice or irreparable loss to the other side or if it is a device for the abuse of the process of the court. Counsel submits that the proposed amendments would not aid this court in determining the real question in controversy but are aimed at defeating the efficient determination of the suit. He avers that the application is contrary to statutory obligation of a party to the suit to assist the court attain the overriding objectives of the rules. It is further averred going by plaintiff's list of issue filed on 2/7/2018 the main issues to be determined have nothing to do with the intended defendant and this court will be able to determine show issues without resulting to evidence from the proposed defendants. Finally it is alleged that the application is a mere ploy to convolute and protract this old matter.

12. I note that the order by the court that the 5th and 6th respondent do file a report was made in the year **2013**. In my view, if the report had been filed in the same year an application filed in **2018** relying on it for the proposed amendments would be gravely out of time. I have examined the reply of the respondents for any evidence that the applicants knew of all the details of the identities of the intended defendants by the year 2007 or even in the year 2009, and found none. It is not correct for the respondents to aver that the plaintiffs could have in the year 2007 or 2009 pleaded the whole of their claim as they have purported to do in the proposed amended plaint. Consequently I must find that to be fair to them that, though the applicants took five months to act, considering the date of filing of the report their delay in the filing of the instant application was within an acceptable time frame.

13. It is an allegation in the proposed amendment of the plaint that though the 8th to the 195th proposed defendants fraudulently purport to have purchased land out of the suit land from the original plaintiff or his administrators as the case may be, no land was sold to them by the plaintiff or the administrators. It is also averred that through the 8th to 195th proposed defendants have purported to have purchased land from the partners of the original plaintiff (who are also now deceased) the original plaintiff (and later, the administrators of his estate) have never had the land surveyed or subdivided nor distinguished their individual interests in the land and they are still tenants in common (I believe this refers to all their estates since they are all deceased). One of the particulars of fraud in the proposed amended plaint is that the 1st - 4th defendants fraudulently purported to sell and/or have sold and/or transferred shares and portions of the suit land to other parties. Particulars of fraud are also alleged as against the 8th - 195th proposed defendants. In my view those are the only crucial parts of the proposed amendments that required analysis by this court upon this application. In my view they rhyme well with the original claim and do not alter the nature of the cause of action. In saying this I must support that statement by stating that allegations of fraud are not new to the plaint; if they had been alleged as against the existing defendants, I am of the view that the plaintiffs can not be barred from also raising them against the proposed parties who are now alleged to have acted in cahoots with the existing defendants.

14. Regarding the submission that they raise new issues for determination, I find that the allegations of sale by the defendants or the administrators of their respective estates to the proposed parties are rooted in the claim that the defendants dealt with the land wrongfully and to the detriment of the original plaintiff and subsequently his estate. I find no merit in that submission.

15. I now turn to the last issue of prejudice.

16. In **High Court (Nairobi) Commercial And Admiralty Division Civil Suit No. 1250 of 1999 Unga Limited Vs Magina Limited eKLR** the court observed as follows:

"I am alive to the notion that amendments to pleadings should be liberally allowed. An application for amendment may be made at any stage before judgment. The key rationale is to allow a court to effectually and finally determine the suit. See Leroka Vs Middle Africa Finance Company Limited [1990] KLR 549, Eastern Bakery Vs Castelino [1958] E.A. 461, Kuloba Vs Oduol [2001] 1 E A 101 as well as the dictum of Madan J A (as he then was) in D.T. Dobie & Company Vs Muchina [1982] KLR 1.

There are exceptions to that general rule. An amendment will be disallowed if it would cause a serious injustice to the other party. It will also be disallowed if it prejudices the rights of the opposite party accrued at the date of the proposed amendment. A good example is an amendment that would deprive the defendant of a defence of limitation that has crystallized since the issue of the writ. See Eastern Bakery Vs Castelino (supra) at page 462, Weldon Vs Neal (1887) 19 QBD 394 and Hilton Vs Sutton Steam Laundry [1946] K.B 65. See also Chimanlal K.N. Shah & others Vs Trust Agencies Limited Nairobi, High Court case 1387 of 2001 [2012] eKLR, Barclays Bank of Kenya Limited Vs Mary Wamaitha and 13 others Nairobi, High Court case 237 of 2007 (unreported), Central Kenya Limited Vs Trust Bank Limited and others Nairobi, Court of Appeal, Civil Appeal 222 of 1998 (unreported), James Ochieng Oduol Vs Richard Kuloba Nairobi, Court of Appeal, Civil Appeal 2 of 2002 [2008] e KLR."

17. In the **Unga case** (supra) the defendant applied for leave to amend the plaint **13 years** after the suit was filed. The court disallowed the

application.

18. The application in this matter has been brought about **11 years** since the lodging of the suit. However I must consider whether there are any extenuating circumstances in this case as the applicants aver and believably so, that the information regarding the identity of the defendants was not known to them until the filing in court of a report by the 5th and 6th defendants.

19. There is no doubt that the inclusion of more parties in this matter will surely entail an element of delay in the conclusion of this matter. However, I have considered that the advantage of granting the application guarantees the possibility that all claims relating to the suit land may be resolved in one suit and outweighs the probability of a subsequent multiplicity of suit that may arise if the application is not granted, and I therefore agree that granting the application will lead to judicious utilization of judicial time. Less prejudice to all parties and the justice system will occur that if that is done.

20. Consequently I allow the Motion dated **3rd October 2018** as prayed in **prayers nos. 1 and 2.**

21. As the difficulties in tracing and service of the intended defendants have been pleaded beforehand, and in order to meet the overriding objectives set out in **Section 1A** of the **Civil Procedure Act**, I also grant **prayer no. 3** to the extent that the applicant is granted leave to serve the 8th - 195th proposed defendants by way of a press advertisement in a newspaper having wide circulation within **21 days** of this order.

22. The costs of this application shall be in the cause.

It is so ordered.

Dated, signed and delivered at Kitale on this 28th day of March, 2019.

MWANGI NJOROGE

JUDGE

28/03/2019

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Karani holding brief for Wachira for the plaintiff

Mr. Kuria for 5th and 6th respondent

Mr. Lelan (absent) for 1st and 2nd defendants

N/A for 4th defendant

COURT

Ruling read in open court.

MWANGI NJOROGE

JUDGE

28/03/2019