



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT ELDORET

ELC NO. 777 OF 2012

KALENJIN AUTO HADWARE LTD.....PLAINTIFF

VERSUS

JOHN SONGOK.....1ST DEFENDANT

CLEMENTINA CHEBET SONGOK...2ND DEFENDANT

RULING

This ruling is in respect of an application dated 3rd July 2018 brought by way of Notice of Motion by the plaintiff /Applicant seeking for the following orders:-

1. Spent.
2. THAT the plaintiff/applicant be allowed to amend its plaint dated 9th November, 2011 in the manner and style of the attached draft amended plaint, to introduce Sosiani Builders Limited.
3. THAT the annexed draft amended plaint be deemed as properly filed and served subject to payment of requisite court fees.
4. THAT upon grant of the prayers sought herein above, the injunctive orders granted ex parte by this Honourable Court on 15th November, 2011 in favour of the plaintiff/applicant do apply to the introduced party (3rd defendant/ respondent) and the said orders be deemed binding to the 3rd defendant/ respondent upon service thereof
5. THAT costs of the application be in the cause.

This matter came up for hearing of the application when Counsel agreed to canvass the same by way of written submissions which were duly filed.

Plaintiffs' Submission

Counsel for the plaintiff gave a background of the case and submitted that this suit was filed on 14th December, 2011 via a plaint dated 9th November, 2011. It was Counsel's further submission that the institution of the suit was premised upon a state of affairs, which was that the Plaintiff/Applicant and the Defendants/Respondents entered into a sale agreement dated 11th September, 1997 where the Defendants agreed to sell their interest in land parcel known as Eldoret Municipality/ Block 12/144 measuring about 1.133 hectares or thereabouts, where the defendants were allottees from the Government and that the plaintiff/applicant was to purchase the said parcel of land at a consideration of Kshs. 2,310,000/=

It was Counsel's further submission that in performance of the said contractual agreement the plaintiff/Applicant paid Kshs. 332,405/= to the Commissioner of Lands which sums were due from the Defendants/Respondents to the Government of Kenya for allotment of the said property. Further that the Plaintiff/Applicant also paid Kshs. 167,595/= to the respondent on 11th September 1997 upon signing of the said agreement, and further payment of Kshs 581,890/ but the Defendant/Respondents failed to procure the title deed in the name of the Plaintiff/Applicant and deliver possession of the property to the Plaintiff/Applicant as per the agreement necessitating the filing of the current suit.

Miss Odwa Counsel for the plaintiff submitted that after institution of this suit, it emerged that the title to the suit land had already been transferred and registered in the name of a third party namely, Sosiani Builders Limited who is a stranger to the present proceedings therefore

necessitating the filing of this application.

Counsel listed two issues for determination as follows:

- a. Whether or not to allow the amendments sought by the Plaintiff/Applicant in this application; and
- b. Whether or not to extend the ex-parte injunctive orders granted by this Honourable Court on 15th November, 2011 to the party intended to be introduced upon enjoinderment.

On the first issue as to whether the court should allow the amendment sought, Counsel relied on the Court of Appeal case of **Central Kenya Limited v Trust Bank Limited & 5 Others [2000] eKLR** and cited with approval in the case of **AAT Holdings Limited v. Diamond Shield International Limited [2014] eKLR** where the Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing the litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits.

Further that the court has inherent powers to make such orders as may be necessary for the ends of justice and in orders to avoid multiplicity of suits. Counsel also submitted that pursuant to Section 100 of the Civil Procedure Act, the Court has the discretion to allow all necessary amendments for the purpose of determining the real question or issue raised or depending on the proceedings.

Miss Odwa , Counsel for the Plaintiff/applicant submitted that the real question in controversy revolves around the ownership of the land parcel known as Eldoret Municipality/Block 12/ 144 which was sold to the Plaintiff/Applicant by the Defendants and which is now allegedly owned by Sosiani Builders Limited which party they seek to enjoin in this suit.

On the second issue as to whether to extend the injunctive orders granted by the court on 15th November 2011 to the proposed defendant, Counsel submitted that the order was against barring them from dealing with the suit land in any way pending the hearing and determination of the main suit but the same did not bind the proposed defendant as they were not party to the suit.

Counsel submitted that a failure to extend the orders to Sosiani Builders Limited will leave the present suit in a precarious situation as further dealings on the land by the said entity may render the final judgement of this Court nugatory, insignificant and inconsequential, leaving the Plaintiff/Applicant with a mere paper judgement and unable to enjoy the fruits of their toiling through litigation. Counsel therefore urged the court to allow the application as prayed.

1ST DEFENDANT'S SUBMISSIONS.

The 1st Defendant filed grounds of opposition and submitted that there are no orders in existence capable of being extended and that the Plaintiff has failed to demonstrate that it is entitled to the said orders as per the principles for grant of injunctions.

Counsel submitted that from perusal of the Court record, it is evident that the injunctive orders granted ex parte on the application dated 9th November 2011 were vacated and the application dismissed on 28th November 2012. Counsel further submitted that even if the application was not dismissed, interim orders have a life span of one year which had lapsed. Additionally Counsel submitted that in the absence of proof of the prevailing status of the suit land, the Court should not grant any injunctive orders which may end up being an eviction order against a party who is yet to be enjoined in the suit. Counsel therefore urged the court to dismiss the application with costs to the defendants.

2ND DEFENDANT'S SUBMISSIONS

The 2nd defendant filed grounds of opposition and issues for determination by the court. Counsel raised issues as to whether the applicant's claim is within the limitation period as contemplated by Section 4 of the Limitation of Actions Act, whether the amendment sought by the plaintiff can be allowed at this stage and whether the court can extend injunction orders which have lapsed.

On the first issue Counsel submitted that it is common knowledge that the cause of action in this matter was based on contract and that section 4 of the Limitation of Actions Act prohibits suits filed after the end of six years from the date on which the cause of action accrued. Counsel cited the case of **Gathoni vs Kenya Cooperative Creameries Limited** (Civil Application No. 122 of 1981); where Porter JA observed thus:

"The law on limitation is intended to protect defendants against unreasonable delay in bringing of suits against them. The statute expects the intending plaintiff to exercise reasonable diligence and to take reasonable steps in his own interest. "

Counsel also submitted that it is trite law that the period of limitation cannot be extended. He cited the authority of **Divecon vs Samani** (1995-1998) EÅ 48 which stated as follows:-

to us, the meaning of the wording of section 4 (1) is clear beyond any doubt. It means that no one shall have the right or power to bring after the end of six years from the date on which a cause of action accrued, an action founded on contract. The corollary to this is that no court may or shall have the right or power to entertain what cannot be done namely, an action that is brought in contract six years after the cause of action arose or any application to extend such time for the bringing of the action. A perusal of Part III shows that its provisions do not apply to actions based on contract. In light of these clear statutory provisions, it would be unacceptable to imply as the learned Judge of the Superior Court did, that the wording of section 4 (1) of the Limitation of Actions Act (Chapter 22) suggests a discretion that can be invoked....'

It was Counsel's submission that in the instant case the cause of action arose on 11/9/1997 which is more than 20 years.

On the second issue as to whether the amendment sought by the plaintiff should be allowed, Counsel submitted that the applicant has not demonstrated in his application and supporting affidavit the grounds and reasons to enable the court grant the orders sought. On the third issue Counsel submitted that the orders for injunction are non-existent therefore cannot be extended. Apart from that an applicant must establish a prima facie case with a probability of success. He therefore urged the court to dismiss the application with costs to the defendants.

Analysis and Determination

This is an application by the plaintiff for amendment of the plaint to bring in another defendant who is the registered owner of the suit land. The plaintiff gave a brief background to the suit and stated that the application was necessitated by the fact that it came to the knowledge of the applicant that the suit land is registered in the name of the proposed additional defendant which was not within their knowledge when filing the suit.

The applicant also prayed for extension of the orders of injunction to bind the proposed defendant. The application was opposed by both defendants who submitted that the application is not tenable due to limitation of time and that the interim orders having lapsed after a period of one year. There was a contention that the application for injunction was heard inter partes and the same was dismissed by the court on 28th November 2012.

The issue for determination is as to whether the court has powers to grant the orders as sought by the applicant. The other issue is whether the application is time barred under *section 4 (1) (a)* of the *Limitation of Actions Act Cap 22, Laws of Kenya*.

Amendment of pleadings in general is governed by order *8 rule 1 (1)* of the *Civil Procedure Rules* which stipulates that;

“The court may 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, allow any party to amend his pleadings.”

Under *order 8 rule 5* it is stipulated that;

“An amendment shall 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 a 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”.

It should be noted that the court should freely allow amendments made before the hearing of the suit if it will not cause any injustice to the other side as was observed by Sir Kenneth O'Conner, in the case of *Eastern Bakery vs Castelino (1958) EA 461*. It was further stated that there would be no injustice if the other side can be compensated by costs.

In this case I am guided by the provisions of Order 8 Rule 5 on the issue of a new cause of action which arises from the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed. The plaintiff is desirous of adding an additional defendant who is the registered owner of the suit land to assist the court to adjudicate on all the issues and avoid multiplicity of suits. This does not amount to a new cause of action but it is in respect of the same facts.

I find that the amendment is merited as the court is empowered to allow such so long as no prejudice is caused to the other side. This is further buttressed by the case of *Central Kenya Ltd vs Trust Bank & 4 others Civil Appeal No. 222 of 1998*, which addressed the underlying principle in amendment of pleadings and joinder of parties that;

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

On the second limb of the application on the issue of extension of the order of injunction to bind the proposed defendant, I find that the same is not tenable as the interim injunction that had been granted had since lapsed. An injunction cannot be granted against a party who has not yet been joined to a suit. The plaintiff applicant has also not established a prima facie case against the proposed defendant and further the court is not aware of the type of case or defence that the proposed defendant has. This prayer is therefore denied.

This is a very old matter which should have been out of the court system a long time ago. From the court record the plaintiff has never been ready to proceed with the case as they were enjoying the interim orders of injunction which have since lapsed. The best that the plaintiff can benefit from is to fast track the case for hearing.

I therefore allow the application for amendment of the plaint within 15 days and the same be served within the same period. The proposed defendant to file a defence if need be within 15 days upon service. The matter to be fixed for hearing within 30 days failure of compliance with any of the above, the order to lapse. The costs of this application are in the cause.

DATED and delivered at Eldoret this 26th day of March, 2019

M.A. ODENY

JUDGE

Read in open court in the presence of Mr. Aseo for the 2nd Defendant and Miss. Chesu holding brief for Miss Odwa for the Plaintiff and in absence of Mr. Nyachiro for the 1st Defendant.

Mr. Koech – Court Assistant.