



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KITALE**

**LAND CASE NO. 174 OF 2016**

**HON. CHRIS MUNGA N. BICHAGE.....PLAINTIFF**

**VERSUS**

**THE REGISTRAR OF TITLES, NAIROBI.....1<sup>ST</sup> DEFENDANT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> DEFENDANT**

**ALFRED M. NYAIRO.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application dated **8/1/2019** is brought by the plaintiff seeking orders of leave to amend the plaint and to join the interested party **Alfred Momanyi Nyairo** as a defendant instead of an interested party. He also prays for costs of the application be costs in the substantive suit.
2. The application is supported by the applicant's sworn affidavit. The grounds upon which the application is made are that the amendment will enable the court to adjudicate and arrive at a just conclusion of the dispute herein; that it is the belief of the applicant that the interested party has been instigating the acts of the 1<sup>st</sup> defendant regarding the suit land; that the interested party has evicted the plaintiff's agent from the suit land and proceeded to lease the same to third parties; that none of the parties would be prejudiced if the orders sought were granted.
3. The application is supported by the affidavit of the applicant which sets out the aforementioned grounds.
4. The application is opposed by the interested party only. In his sworn replying affidavit dated **4/3/2019** the interested party depones that he was made a party to the proceedings vide an order made on the **29/11/2016** which has never been set aside; that the applicant opted at that time to enjoin him as an interested party; that the case as per the pleadings initially filed is complete and can be properly determined without enjoining the interested party as a defendant; that there is no evidence that the joinder of the interested party as a defendant would aid the court in the just determination of the matter but that the proposed amendments will bring confusion; that the applicant is guilty of laches; that it is unclear from the amendments whether the applicant is bringing "...a claim of illegal cancellation of title, trespass, unlawful eviction claim for land or enforcement of a contract." It is further averred that the facts sought to be introduced have all along been within the knowledge of the applicant and the applicant has intention to litigate piecemeal and delay the hearing and determination of the dispute. It is also alleged that the amendments would defeat the interested party's defence if allowed as the applicant intends to alter or bring a totally new cause of action under the aegis of amendment of plaint and the character of the case will be changed. He avers that he is no longer sure of what case he has to meet and that the application is in bad faith.
5. The applicant filed no submissions. The interested party filed his submissions on the **5<sup>th</sup> March 2019**. I have considered those submissions. The interested party cited the cases of **Patrick Vonyoli Kavuli Vs Board of Management KMTC and 2 others 2009 eKLR** in support of his contention that the affidavit in support of the motion is defective.
6. The submission of the interested party is that the issue of joinder and the issue of amendment of plaint have to be determined separately. However the only ground given for this assertion is that it is not automatic that both prayers would succeed. However this sort of reasoning does not raise any concern for this court as the court is able to sift through the amendments and determine which are proper and which ones are not, and of course, if the impression of the court is that the interested party should not be enjoined, then the amendments regarding him may fail. In this regard the power of the court to order certain selected portions of pleadings in the interests of justice should not be gainsaid.
7. Further in respect of the application for joinder, the interested party states that his status as an interested party is sufficient to enable this court effectively determine the matter. He alluded to an order made on **29/11/2016** enjoining him and reiterates his submission that the applicant was grabbed by an afterthought after two years, to enjoin him as a defendant without any reason for the change. He maintains that the main issue for determination is whether the 1<sup>st</sup> respondent's action of cancelling title of the applicant was lawful and this can be done while he is still an interested party.

8. I have looked through the proceedings in this matter and found no proceedings for **29/11/2016** mentioned by the plaintiff as the date on which he was enjoined by order of the court in the matter. What I find is an order of **28/11/2016** that the interested party be served with the application dated **28/11/2016**. Consequently I am satisfied that there though he has been referred to often as an interested party, there is no express order of this court that I would be recanting in ordering that the interested party be enjoined as a defendant. all the arguments of the interested party regarding joinder which are based on this wrongful impression of a court order having been made earlier therefore collapse as he is not properly on the record. I therefore find that this court may without more invoke the provisions of **Order 10 Rule 2 of the Civil Procedure Rules** to grant the application at hand and enjoin him as a defendant. As to his interest that may persuade this court to consider enjoining him, he is said to be in possession of the land, having allegedly taken the same from the agent of the applicant. Where the title was also revoked he is also deemed to be a direct beneficiary of the cancellation of that title and if any adverse orders were made by this court while he is not a party more litigation may ensue, it is the duty of this court in deserving cases to issue orders that may stymie the tide of increased litigation on the same subject matter and this can be done by inter alia an order of joinder of all the parties interested in the same subject matter as parties in one suit.

9. Regarding amendments it should be noted that this suit has never proceeded to hearing and that the pending interlocutory applications were only resolved recently by consent of the parties.

10. A party is entitled to make an application for amendment at any time before judgement. One of the amendments herein obviously is to enjoin the interested party as a defendant. The other is to affect the body of the plaint to reflect that amendment and show the exact claim against the present interested party after he is made a defendant.

11. The doctrine of laches, I suppose, is pleaded both in regard to the proposed joinder of the interested party as a defendant and the proposed amendment of the plaint. In my view the two are quite inextricably intertwined as an order of joinder would lead to an order of amendment.

12. In support of the application of the doctrine of *laches* in the instant application interested party cited the case of **John Nahashon Mwangi vs Kenya Finance Bank Ltd (In Liquidation) 2015 eKLR** , the case of **Anne Njoki Murani Vs Kenya Commercial Bank Ltd And 2 Others 2013 eKLR** and the case of **Unga Ltd Vs Magina Ltd 2014 eKLR**.

13. I do not find any reference to **Unga Ltd Vs Magina Ltd 2014 eKLR** in **Nahashon Mwangi vs Kenya Finance Bank Ltd (In Liquidation) 2015 eKLR**.

14. Nevertheless the decision is about delay. The suit in that case (Nahashon) was dismissed on **13<sup>th</sup> December, 2011** by Justice Mabeya for want of prosecution. The Plaintiff vide an application dated **13<sup>th</sup> June, 2014** sought for its reinstatement, and that upon such reinstatement he be granted leave to amend the plaint dated **17<sup>th</sup> December, 1987**. The application was expressed to be brought under **Section 1A, 1B, 3A of the Civil Procedure Act, Order 9 rule 9 and 10, Order 8 rule 3, order 12 rule 7, order 51 Rule 1 of the Civil Procedure Rules** and other enabling provisions of the law.

15. In that decision the court stated as follows:

**“All these things only lead to the conclusion that there was a lapse of some sort on the part of counsels for the Plaintiff; and as such this case may be considered as one of a mistake of counsel. In making the inference, I have considered the possibility of the argument that the Plaintiff could have done more or be more vigilant about the fate of his case especially given the amount of time which had passed by. But this is not a disciplinary cause against counsels because I believe the error herein is not one which can found a disciplinary cause at all. The lapse is only useful in this case to the extent that it may have been one of the possible sources of confusion in the matter.”**

16. The court proceeded to consider whether the reinstatement of the suit would prejudice the defendant in any way. It stated as follows:

**“Will reinstatement of this suit prejudice the Defendant? Intuitive reaction may suggest prejudice will be suffered especially in view of the many years this litigation has been pending in court. They have been over 27 long years of waiting and have been made bitterer by the fact that the plaintiff was enjoying an injunction at some time and the defendant now has embarked on realizing its statutory power of sale of the charged property. The Defendant claims that they have been denied of their property in the money they advanced to the Plaintiff and their remedy to realize security herein due to the prolonged pendency of this case. These arguments are valid and I have considered them. But when I place on scale the concerns by the Defendant against those of the Plaintiff, I am inclined to reinstating the suit rather than interring its remains upon a permanent legal death. A legal resurrection of the suit as enabled by equity is in order. Accordingly, I set aside the order of dismissal made by the court on 13<sup>th</sup> December, 2011 and reinstate the suit for hearing and disposal expeditiously.”**

17. In the case of **Unga Ltd Vs Magina Ltd 2014 eKLR** the plaintiff sought leave to amend its plaint originally filed in **1999** by a notice of motion dated **7<sup>th</sup> February 2012**. He proposed to amend its claim for unpaid consignment of *grain flour* to read *assorted goods*. The court dismissed the motion stating as follows:

**“The remedy sought by the plaintiff is also discretionary. This suit was presented to Court nearly *thirteen years* ago: on **8<sup>th</sup> September 1999** to be specific. The pleadings closed many years ago. An earlier application for judgment on admission was dismissed way back on **26<sup>th</sup> February 2004**. The plaintiff’s learned counsel, who is the deponent to the supporting affidavit, concedes his inadvertence and errors that found their way into the plaint. No *explanation* for the *inordinate* delay in presenting the motion has been tendered. That is taking the Court for granted.**

**When delay is established, unless a plausible explanation is forthcoming, it is deemed to be inexcusable. See *Allen Vs McAlpine & Sons Ltd* [1968] 1 ALL ER 543. I find that the delay of nearly *thirteen years* is so inordinate as to prejudice the**

defendant beyond monetary compensation. *Central Kenya Limited Vs Trust Bank Limited and others* (supra). It will re-open the pleadings and lead to further delay of the determination of the suit. That is anathema to the overriding objective found in article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. I am thus *disinclined* to exercise my discretion in favour of the plaintiff.”

18. In contrast to the above cited decisions the delay in bringing the application for joinder and amendment made herein is two years. It is also my opinion that the extreme scenarios that are portrayed by the cited cases should not apply herein. In my view, there has been activity in this matter in that the applications that have been pending were being dealt, and as long as the suit has not proceeded to hearing in a manner that would prejudice any party or prospective party, the application should not be held to have been guilty of laches.

19. Now I turn to whether the interested party would be prejudiced by the proposed amendments.

20. I have already stated that the joinder of the interested party as a defendant would lead to automatic amendment of the plaint to suit the new joinder.

21. I have also stated that a beneficiary of the cancellation of the applicant’s title would be the interested party. The amendments proposed read that the interested party was the registered owner of **LR Number 3818/3** before the subdivision that created **LR No 3818/4** and **3818/5** and that he commissioned the survey himself to excise 50 acres for the plaintiff out of the original parcel number 3818/3. He is also alleged to have signed the transfer in favour of the plaintiff of the 50 acres and acknowledged receipt of the full purchase price for the same vide that transfer. Elsewhere in the court documents he is said to have retaken possession of the 50 acres alleging that the transfer was conducted fraudulently. The land is said to have been put into the applicant’s possession in 1987. The interested party is included in the prayers that seek an injunction and mesne profits. An order declaring the legal notice cancelling the applicant’s title null and void and an order seeking the restoration of the **title number 3818/4** to its previous state was sought. Orders seeking nullification of the certificate of title issued pursuant that cancellation to the interested party, and eviction, are also sought.

22. In my view these are ordinarily the orders that may have been sought against the interested party were the suit commenced against him as a co-defendant at its inception as he appears to have substantial interest in the subject matter of the suit. The greater surprise for an onlooker would be if the interested party was not sought to be enjoined. They do not become unsuitable by virtue of the fact that they are sought in an amendment per se.

23. In the case of **Unga Ltd Vs Magina Ltd 2014 eKLR** the court stated 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.”**

24. Is there a defence, at least going by the submissions of the interested party that he would be denied if the amendments were allowed? I have scoured through the submission and the replying affidavit of the interested party and found no evidence or submission of the possibility of such prejudice.

25. Consequently in the instant application, this court will abide by the established general rule that amendments of pleadings should be liberally allowed as no exceptions have been proved by the interested party.

26. In the final analysis I find that the application dated **8/1/2019** has merit. I grant the same in terms of prayers **(a)** and **(b)** thereof. The costs of the application shall be in the cause.

27. The amended plaint and shall be filed and served within **14 days** of this order.

28. It is so ordered.

**Dated, signed and delivered at Kitale on this 11<sup>th</sup> day of March, 2019.**

**MWANGI NJOROGE**

**JUDGE**

**11/03/2019**

Coram:

Before - Hon. Mwangi Njoroge, Judge

Court Assistant - Collins

Mr. Bisonga holding brief for Samba for the plaintiff

Mr. Kipruto holding brief for Mutiso for respondent

**COURT**

Ruling read in open court.

**MWANGI NJOROGE**

**JUDGE**

**11/03/2019**