



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 668 'A' OF 2017

ELIZABETH KAVINDU MIA.....1ST PLAINTIFF

CHRISTINE PAUL LARI NTHENYA.....2ND PLAINTIFF

VERSUS

JACKSON KINUTHIA (Legal Representative of the Estate of

KOINOSIA PARSAOTI (DECEASED).....1ST DEFENDANT

JOSEPHAT NCHAKO KOINOSIA.....2ND DEFENDANT

AMOS NATIDIE KINUTHIA.....3RD DEFENDANT

RULING

The application before court for determination is the Plaintiffs' Notice of Motion application dated the 19th October, 2017 where they are seeking leave to amend their Plaint and that the Director of Criminal Investigations be ordered to prepare a report on the forgeries alleged by the Defendant. It is premised on the summarized grounds that the Plaintiffs herein entered into a Sale Agreement with the 1st Defendant and the parcels of land would be derived from KAJIADO/ KAPUTIEI CENTRAL/ 2075. During the signing of the sale agreement, the land parcel number was not indicated but the Plaintiffs were shown the land they were purchasing after which they took possession. The Plaintiffs mistakenly believed the parcel of land which was subject to the sale was KAJIADO/ KAPUTIEI CENTRAL/ 2284 based on the letters written to them by the 2nd Defendant demanding they vacate his parcel of land. The Plaintiffs have since discovered that the 1st Defendant fraudulently subdivided land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2075 into a number of parcels resulting into among others the parcel transferred to the 3rd Defendant. The agreement between the Plaintiffs and the 1st Defendant were written by one JACKSON KINUTHIA a son to the 1st Defendant; there is hence need to have a handwriting expert prepare a report as to whether the subject agreements were drawn by him and to include him as Defendant in this suit. The Defendants shall not be prejudiced if the orders sought are granted.

The application is supported by the affidavit of the 1st Plaintiff ELIZABETH KAVINDU MIA where she avers that she got into a Sale Agreement with the 1st Defendant on 5th June, 1997 whereby he agreed to sell five (5) acres of land at a price of Kshs. 13,000 which was paid in full. She contends that the 1st Defendant got into another Sale Agreement with the 2nd Plaintiff whereby he agreed to sell to her five (5) acres of land at Kshs. 20,000 per acre which was fully paid for. She claims to have settled on the land where she has built a house and undertakes farming thereon. She explains that both her Sale Agreement and that of the 2nd Plaintiff does not reflect the parcel number. She insists, it is in the interest of justice to be granted leave to amend their Plaint to include a 4th Defendant as well as set out the correct parcel number.

The application is opposed by the 1st Defendant JACKSON KINUTHIA who filed a replying affidavit where he averred that the said application is incompetent, lacks merit and a blatant abuse of the court process. He insists the Plaintiffs claim over ownership of land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2284 should be proved with supporting documents and the Court should not entertain it. He contends that the Plaintiffs' claim that they were shown the parcels of land they had purchased cannot hold. Further that land parcel number KAJIADO/ KAPUTIEI CENTRAL/ 2075 is non-existent and cannot form a basis of the subject matter in this suit. He reiterates that the Plaintiffs are on a fishing expedition and have not made a claim against the intended 4th Defendant to warrant him being enjoined in this suit. Further, that it is the Defendants who have alleged forgery and it is upon them to prove it and the Plaintiffs' request for a report is uncalled for. He avers that the Defendants have raised other legal flaws in their Defence to prove that the said agreements would be void even if it was to be assumed they were properly drawn. He reaffirms that the application should be dismissed with costs.

The 1st Plaintiff ELIZABETH KAVINDU MIA filed a further affidavit where she stated that together with the 2nd Plaintiff, they purchased their respective parcels of land from KOINOSYA PARSAOTI (deceased) and their agreements did not indicate where the parcels of land would be subdivided from. She explains that KAJIADO/ KAPUTIEI CENTRAL / 2284 is a subdivision from KAJIADO/ KAPUTIEI CENTRAL/ 2075 and the demand letters from the Defendants Advocate made it appear as though they were residing on KAJIADO/ KAPUTIEI CENTRAL/ 2284. She insists that even if KAJIADO/ KAPUTIEI CENTRAL/ 2075 is non-existent, it does not mean that they should not plead it existed at the time they purchased their respective portions of land. She reiterates that the proposed amendments are meant to clarify the parcel from which they purchased their respective five acres of land from. Further, that the 4th Defendant who drew the Sale Agreements is a legal representative to the deceased estate and has already been enjoined herein. She reiterates that the allegations of forgery go to the root of what the Court shall be determining and having been accused of forgery, they have a responsibility to present materials in court.

Both the Plaintiffs and the Defendant filed their respective submissions that I have considered.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 19th October, 2017 including the supporting and replying affidavits as well as submissions from the Plaintiff and Defendants, the following are the issues for determination:

- Whether the Plaintiffs should be granted leave to amend the Plaintiff.
- Whether the Director of Criminal Investigations should be ordered to prepare a report on forgeries alleged by the 1st Defendant.

As to whether the Plaintiffs should be granted leave to amend the Plaintiff. The Plaintiffs seek leave to amend the Plaintiff to include the 4th Defendant who they allege drafted the Sale Agreements on behalf of the 1st Defendant as well as to demonstrate that the land they purchased had already been subdivided. They explain that they filed this suit indicating suit land was KAJIADO/ KAPUTIEI CENTRAL/ 2284 because of the demand letter they had received from the Defendants' lawyers that stated so. I note the intended 4th Defendant is already a party to the suit as he is the legal representative to the estate of the 1st Defendant. The Plaintiffs relied on the case of **Nairobi Environment and Land Division ELC No. 1405 of 2014 Francis Githoge & 21 others V City Council of Nairobi and Kajiado ELC Case No. 624 of 2017 John Karumo Macharia & 5 others V The County Government of Kajiado** to support their arguments. The Defendants have opposed the said application and relied on the cases of **Lucy Nungari Ngigi & 128 others V National Bank of Kenya Limited & Another (2015) eKLR and Prishar Wambui Kaguura V Peter Waithank Kaguura & 2 others (2018) eKLR** to buttress their arguments.

Order 8 Rule 3 (1) of the Civil Procedure Rules provide that: **'(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **'(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, 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.'**

While Order 1 Rule 10 of the Civil Procedure Rules provide that **'(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit. (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added. (3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto. (4) Where a defendant is added or substituted, the plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaintiff shall be served on the new defendant and, if the court thinks fit, on the original defendants.**

In the case of **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR**, the Court of Appeal in dealing with issues of amendment held as follows: **'The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; '

In relying on the facts as presented, including the abovementioned legal provisions as well as the authority cited above, I opine that the amendments sought are necessary for the determination of the substantive merits of the case. From the Defendants' averments, I do not foresee any prejudice they will suffer if the amendments sought are granted. In the circumstances, I will allow prayer No. (1) of the instant

application.

As to whether the Director of Criminal Investigations should be ordered to prepare a report on forgeries alleged by the 1st Defendant. I note the 1st Defendant has alleged fraud on the part of the Plaintiffs' in terms of the Sale Agreement which they intend to rely on. In referring to the case of **UCB Vs Mukoome Agencies (1982) HCB22** it was held as follows '**that where fraud is alleged, the party alleging it must be given an opportunity to prove it and that substantial allegation of fraud raises a triable issue entitling the defendant leave to defend the suit**'.

I note that since the Defendants are the one who have alleged fraud, the burden of proof is upon them to prove the same. I note the Plaintiffs' seek for the Director of Criminal Investigation (DCI) to be compelled to investigate and prepare a report on the alleged forgeries. I opine that if the Plaintiffs' intend to involve the DCI, it is incumbent upon them to lodge a complaint to the said office first, let the DCI investigate and present as report in Court. I deem this prayer premature at this juncture as they have not indicated if they lodged a complaint to the DCI. In the circumstances, I am unable to grant this prayer.

It is against the foregoing that I proceed to allow prayer No. 1 in the instant motion and direct the plaintiff to file and serve an amendment Plaintiff within 7 days from the date hereof. Upon service, I grant the 4th Defendant leave of 14 days to file and serve his Defence, while the 1st to 3rd Defendants' are granted leave of 14 days to file an amended Defence if need be.

Costs of the application will be in the cause.

Dated signed and delivered in open court at Kajiado this 15th day of May, 2019.

CHRISTINE OCHIENG

JUDGE