



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

CASE NO. 773 OF 2016

(FORMERLY HCC NO. 100 OF 2012)

KENYA FARMERS ASSOCIATIONPLAINTIFF

VERSUS

KHETIA DRAPERS LIMITED..... 1ST DEFENDANT

THE LAND REGISTRAR, KISII.....2ND DEFENDANT

KISII COUNTY GOVERNMENT.....INTENDED 3RD DEFENDANT

ABDUL SULTAN RAJWANI.....INTENDED 4TH DEFENDANT

THE NATIONAL LAND COMMISSION...INTENDED 5TH DEFENDANT

QUASAR LIMITED.....INTENDED 6TH DEFENDANT

R U L I N G

1. The Plaintiff vide a Notice of Motion dated 10th September, 2018 has moved this court for orders that;

a. Leave be granted to the plaintiff to join the Kisii County Government, Abdul Sultan Rajwani, the National Land Commission and Quasar Limited.

b. The Honourable Court be pleased to grant leave to the Plaintiff/ Applicant to amend its Plaintiff.

c. Summons to enter appearance and the amended Plaintiff be served accordingly.

d. The annexed amended plaintiff be deemed as duly filed upon payment of the requisite court filing fees.

e. The Honourable Court be pleased to order for the withdrawal of Kisii CMCC No. 927 of 2002 between Quasar Limited and Kenya Farmers Association and the Commissioner of Land and transfer of the same to the Environment and Land Court for purposes of consolidation, hearing and disposal with the instant suit.

f. Costs of this application be in the cause.

2. The application is supported by an affidavit sworn by the Plaintiff's managing director Symon Cherogony on 10th September, 2018. He avers that the Plaintiff intends to amend the plaintiff to include more issues in controversy and add the 3rd to 6th intended Respondents who are necessary for a conclusive adjudication of the matters arising in the suit. The deponent has also annexed pleadings and proceedings in Chief Magistrates' Court of Kisii Civil Case No. 927 of 2002 which he contends involve similar questions of fact and law. He urges the court to order a withdrawal of that suit from the Magistrate's Court and order that the same be transferred and consolidated with the current suit for hearing and determination.

3. The 1st Defendant opposes the application in a replying affidavit sworn by one of its directors, Ashok D. Khetia on 23rd October 2018. He avers that the Plaintiff is not keen to prosecute the matter and this application is meant to delay the matter at the expense of the 1st Defendant. The application is also opposed for the reason that the Plaintiff failed to disclose that it had filed Kisii High Court Case No. 94 of 2004

against the Commissioner of Lands, the Chief Land Registrar, Prime Bank limited, Kisii Municipal Council and the 4th and 6th intended Defendants. The 1st Defendant informs the court that that HCCC No. 94 of 2004 was dismissed with costs for want of prosecution and the intended 4th Defendant has since passed away. He urges the court to dismiss the application to pave way for the hearing of the suit.

4. From the sworn affidavits in support and in opposition of the application and the written submissions by the parties the following issues arise for determination:

(i) Whether leave to amend the plaint to include the proposed defendants should be granted; and

(ii) Whether the court should grant orders to withdraw, transfer and consolidate Civil Case No. 927 of 2002 with the current suit.

Whether leave to amend the plaint to include the proposed defendants should be granted; and

5. The Plaintiff by the initial plaint dated 20th March 2012 filed in Court on 21st March 2012 averred that prior to 30th November 2001 it was the registered proprietor of the leasehold interest over **Kisii Municipality/Block III/143** for a term of 33 years. The Plaintiff claimed that even though it had filed Kisii HCCC No. 94 of 2004 asserting its ownership claim, the 1st and 2nd Defendants illegally and/or fraudulently transferred the property out variously without the Plaintiff's consent. The Plaintiff sought orders that the transfer to the 1st Defendant was illegal and null and void, and a permanent injunction restraining the 1st Defendant from trespassing and/or in any manner interfering or dealing with the suit property.

6. The Plaintiff avers that it is necessary to amend the Plaint and to enjoin new parties who are necessary to enable the real issues in contraversion to be adjudicated. The Plaintiff has in this regard annexed a draft amended plaint.

7. The Plaintiff by the amended plaint seeks the enjoinder of the National Land Commission and County Government of Kisii on the ground that their predecessors, the Commissioner of Lands and the Municipal Council of Kisii, though they were aware that the Plaintiff had obtained approvals for an extension of the lease term, had gone ahead and issued title to the 4th and 6th intended Defendants. The Plaintiff averred that the two had passed title to Oshwal Supermarket Limited who then transferred title to the 1st Defendant. As against the proposed 4th and 6th Defendants, the Plaintiff avers that they acquired title to the land illegally and fraudulently.

8. The 1st Defendant vehemently opposed the enjoinder of the 3rd to 6th intended defendants to this suit for the reason that the Plaintiff has moved the court late in the day considering the matter was filed in 2012. The Defendant also contended that the Plaintiff had not shown any cause of action against the 3rd and 5th intended parties and has not sought any relief against them. It further contends that the 4th defendant passed away on 21st May 2011 and cannot be enjoined to the suit.

9. **Order 8 Rule 3** of the **Civil Procedure Rules** empowers the Court to allow any party to amend his pleadings at any stage of the proceedings.

Order 8 Rule 3 Provides as follows:

(3) Where an amended defence is served on a plaintiff-

(a) If the plaintiff has already served a reply on that defendant, he may amend his reply; and

(b) The period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.

10. The Court of Appeal in the case of **Central Kenya Limited -v- Trust Bank Limited (2000)2 EA 365** outlined some guiding principles for consideration in applications to amend as follows;

"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 injustice to the other side."

11. The enjoinder of parties to a suit is provided for in **Order 1 Rule 3** of the Civil Procedure Rules which provides;

"3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise."

12. After the institution of a suit as in the present matter, a party may be enjoined to the proceedings if the participation of the party in the suit is necessary in order to enable all the issues in dispute or in controversy in the suit to be finally and completely adjudicated by the Court. Under Order 2 Rule 10(2) of the Civil Procedure Rules 2010 the Court may on its own motion or on application by any party order the enjoinder of a party either as a Plaintiff or Defendant where it appears to the Court that the participation of such party is necessary.

13. As a general rule, the court will not bar an application for amendment of pleadings if the proposed amendments will aid in the just finalization of the suit. In this case however, I am inclined to disallow the application for the following reasons. Firstly, the Plaintiff had instituted HCCC No. 94 of 2004 against the 3rd intended Defendant's predecessor, Kisii municipal Council, the 4th intended Defendant and the 6th intended Defendant seeking to protect its interest in **Kisii Municipality/Block III/143** which is the suit property herein. The Plaintiff at the time of instituting the present suit was clearly aware of the roles, if any, that the 3rd intended Defendant and the 4th Intended Defendant and/or their predecessors played in the impugned transactions and chose not to enjoin them.

14. In dismissing an application by the Plaintiff to *inter alia* set aside orders dismissing HCCC No. 94 of 2004, Sitati J. stated as follows;

“Considering all the evidence on record and the circumstance of this case, I do not think that the plaintiff/ applicant acted diligently in this matter. Even if the court were to accept that the lawyer then acting for the plaintiff acted in a sloppy and careless manner, how come that the plaintiff/ applicant slept for such a long time until it was woken up from slumber during execution for costs? I am in agreement with the Respondents herein that the instant application was a reaction by the plaintiff/applicant to the execution process. This court cannot allow itself to be arm twisted by the plaintiff/ applicant in its quest to thwart the course of justice.

... This court is not convinced that the plaintiff/applicant is a vigilant litigant. It continued to sleep even after adverse orders had been made against it.”

15. In my view allowing the Plaintiff's application to enjoin the 3rd, 4th and 6th Defendants would not serve the ends of justice as it would cause them great injustice and amount to allowing them to be vexed a second time yet the Plaintiff was not keen in pursuing its rights against them in the previous suit where they were named as parties.

16. Secondly, the Plaintiff has not shown that the parties it seeks to enjoin to this suit have any interest in the land. The plaintiff would suffer no prejudice if the parties were not enjoined as the 1st defendant is the party in whose name the title to **Kisii Municipality/Block III/143** is registered and the 2nd Defendant is the custodian of the records and the instruments of title and would be obligated to comply with any orders and/or directions the court may make relating to the contested ownership of the suit property. It is my view that the enjoinder of the 3rd, 4th and 6th Defendant is not necessary.

Whether the court should grant orders to withdraw, transfer and consolidate Civil Case No. 927 of 2002 with the current suit;

17. The Court has discretion to order withdrawal and transfer of any suit pending before a subordinate court and direct that the same be heard before the superior court. In determining whether to withdraw, transfer CMCC No. 927 of 2002 and consolidate the same with the current suit, the court has to consider whether such action would be in the interest of justice. If it would not be expedient or convenient to withdraw and transfer a matter particularly where consolidation is sought as in the present matter, then the suit ought not to be withdrawn and transferred.

18. *The transfer of a suit will only be made where it is expedient and in the interest of justice to do so.* Odunga J. in the case of **Hangzhou Agrochemicals Industries Ltd -vs- Panda Flowers Ltd Civil Suit 97 of 2009 (2012)eKLR** held as follows;

“..In my view, which view I gather from authorities and from the law, the court should consider such factors as the motive and the character of the proceedings, the nature of the relief or remedy sought, the interests of the litigants and the more convenient administration of justice, the expense which the parties in the case are likely to incur in transporting and marinating witnesses, balance of convenience, questions of expense, interest of justice and possibilities of undue hardship. If the court is left in doubt as to whether under all the circumstances it is proper to order transfer, the application must be refused. Being a discretionary power, the decision whether or not to exercise it depends largely on the facts and circumstances of a particular case”.

19. In the present case, I am not persuaded it would be expedient and/or in the interest of justice to order the withdrawal and transfer of Kisii CMCC No. 927 of 2002 to this Court and to be tried together with the present suit. I consider that such an action would only serve to breed confusion and to obscure the real issues. As for the factors to be taken into account in consolidation, the Supreme Court in the case of the **Law Society of Kenya -vs- Centre for Human Rights & Democracy & 12 Others Petition No. 14 of 2013 [2014]eKLR** held;

“[39] The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties. Consolidation was never meant to confer any undue advantage upon the party that seeks it, nor was it intended to occasion any disadvantage towards the party that opposes it. In the matter at hand, this Court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues. In addition, the Court must be satisfied that no injustice would be occasioned to the respondents if consolidation is ordered as prayed.”

20. The consolidation of suits as succinctly put in the cited authorities, is meant to enable the expeditious disposal of suits. The plaintiff argues that CMCC 927 of 2002 involves the same subject matter and raises similar questions of fact and law and it would be proper that the matters be disposed of at the same time. The defendant complains that the plaintiff seeks to consolidate the present matter with a suit that was filed 17 years ago. In the present matter, the interest of justice clearly militates against an order of consolidation and I will decline to grant it.

21. In CMCC 927 of 2002, the 6th intended defendant sued the plaintiff and the commissioner of lands primarily seeking orders for removal of a restriction placed on title to **Kisii Municipality/Block III/143** by plaintiff and the Commissioner of Lands. The 6th intended party also

claimed ownership of the land, which is the subject matter in this suit. The record shows that CMCC 927 of 2002 was last prosecuted on 3rd April 2006 more than a decade ago. No reasons have been given by the plaintiff for its failure to prosecute that matter. Having transferred its title to the suit property, the 6th respondent appears to have lost interest in the case. A resuscitation of a matter in which it is apparent that both parties lack interest would be a travesty of the overriding principles as set out under Section 3 of the Environment and Land Court Act. I therefore find no justifiable reason to grant orders for the withdrawal, transfer and consolidation of CMCC 927 of 2002 with the present matter.

22. Having declined to allow the enjoinder of the 3rd to 6th intended Defendants, there would be no basis to grant leave to amend the plaint. I have perused the intended amended plaint and it is apparent the proposed amendments were propelled by the intended joinder of the new parties. I do not think the amendments in the absence of the 3rd - 6th intended Defendants would be meaningful. I accordingly find no merit in the Plaintiff's Notice of Motion dated 10th September 2018. The same is ordered dismissed with costs to the 1st Defendant.

23. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KISII THIS 14TH DAY OF JUNE 2019.

J. M. MUTUNGI

JUDGE