



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC. NO.304 OF 2014

- 1. MOHAMEND ABDALLA DAGO**
- 2. OMAR HASSAN DAGO**
- 3. KIBWANA MOHAMED DAGO**
- 4. MWANASHA MWALIMU DAGO.....PLAINTIFFS**

VERSUS

- 1. ABDUL HUSSEIN OMARI KILALO alias
KADIR HUSSEIN OMARI**
- 2. OMAR A. AZANI**
- 3. MOHAMED MWACHIBUGWA**
- 4. SULEIMAN KOI**
- 5. SADIC MWACHAMBO**
- 6. JUMA MWAMBORI**
- 7. BAKARI NASSOR NYUNI**
- 8. BASHIR M. KILALO.....DEFENDANTS**

RULING

1. The Application before court is the Notice of Motion dated 19th March 2019 brought by the Plaintiffs under Section 1A, 3A of the Civil Procedure Act, and Order 1 Rule 10(2), Order 8 Rules 3 and 5 (1) of the Civil Procedure Rules. The Plaintiff is seeking leave to join Mujtaba Amirali Haji as the 5th Plaintiff. The Plaintiff has also sought leave to further amend the Plaintiff in terms of an amended draft Plaintiff and upon joinder of the proposed party, the draft plaintiff be deemed duly filed and served subject to payment of requisite court fees.

2. The Application is premised on the grounds that new matters have arisen since the filing of the Plaintiff. That the proposed 5th Plaintiff was on or about 4th January 2016 issued with a title deed over the suit property and now has a claim for legal proprietorship and rights against the defendants arising from the same ownership claim between the current plaintiffs herein and the defendants. The plaintiffs contend that the defendants have without any colour of right, proprietary interest, legal or any justifiable cause entered upon the suit proprietary and are trespassing on in and attempting to erect illegal structures thereon. The Plaintiffs further contend that common questions of law and fact will arise as to which of the defendants is liable to redress the Plaintiffs and to what extent.

3. The Plaintiffs aver that the defendants' actions are designed to wrestle possession of the suit property from the proposed 5th Plaintiff and the Plaintiffs herein by occupying the suit property. The Plaintiffs contend that the proposed 5th Plaintiff stands to suffer irreparable injury, damage and loss of his private property through illegal actions of the defendants. The Plaintiffs further contend that joining the proposed 5th Plaintiff and further amending the plaintiff accordingly will further the overriding objective of the Act of facilitating a just, expeditious and

affordable resolution of this civil dispute. That unless the amendments are incorporated, it will be impossible for the court to identify and resolve the real questions in controversy in the suit. It is the Plaintiffs contention that the amendments will not occasion any prejudice or injustice.

4. The application is further supported by an affidavit sworn by Mujtaba Amirali Haji the proposed 5th Plaintiff on 19th March 2019 in which he avers that he is the legal and registered owner of all land measuring approximately 0.12 hectares known as KWALE/MSAMBWENI "A"/2189 and has attached copies of the proprietorship section of the title and certificate of official search. He avers that the suit property was initially owned by the Plaintiffs herein. He states that the defendants have without any color of right, proprietary interest, legal or any justifiable cause entered upon the suit property and are trespassing on it and attempting to erect illegal structures thereon. He depones that he stands to suffer irreparable damage and to lose the protection accorded to registered owners of property by the Constitution. He contends that in the event he files a separate suit against the defendants over issues in this suit, common questions of law and fact and would arise in the two suits. That in the circumstances, it is only fair that he be joined to the current suit as 5th Plaintiff to defend his interests in the suit property.

5. Mr. Sitonik learned counsel for the Plaintiffs submitted that the court has jurisdiction under Order 1 Rule 10 of the Civil Procedure Rules to add or subtract parties. He submitted that the proposed plaintiff has been introduced to the case by the Defendants in their counter-claim and urged the court to allow the Application adding that the Defendants have not opposed the Application.

6. The Defendants did not file any response to the Application. However, Mr. Abubakar, learned counsel for the Defendants submitted on points of law. He submitted that this suit was filed in 2014 and the proposed Plaintiff acquired the property on 4th January 2016 during the pendency of this case and that under the *lis pendens* rule, that acquisition is illegal. Counsel submitted that under the circumstances, the court has no jurisdiction to allow the Application.

7. I have considered the Application, the affidavit on record and the submissions made. The court has wide direction to allow any party to amend his pleadings 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 under Order 8 Rule 3 of the Civil Procedure Rules. In the case of **Central Kenya Limited –v- Trust Bank Limited (2000) EA 365** the Court of Appeal stated:

“That 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 the amendment can be allowed without injustice to the other side.”

8. It is clear that the overriding consideration in an application for leave for amendments is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. The court also has jurisdiction under Order 1 Rule 10 of the Civil Procedure to add or subtract parties.

9. The Defendants submitted that the court has no jurisdiction to allow the application because the proposed Plaintiff acquired the suit property during the pendency of this suit. In my view, this objection must fail since the proposed amendments which intend to join the current registered owner of the suit property as the 5th Plaintiff arise out of the similar facts and circumstances as the cause of action herein. The defendants do not indicate what prejudice they are likely to suffer if the Application is allowed. In my view, no prejudice which cannot be compensated by an award of costs will be visited upon the defendants if the Application for amendment is allowed as the Defendants will have the opportunity to respond to the amendment if they so wish. Moreover, the defendants have not disputed the plaintiffs' submission that the proposed 5th Plaintiff has been introduced to the case by the Defendants in their counter-claim. It is only fair and just to join the proposed 5th Plaintiff to avert a situation where adverse orders affecting his title may be issued without him being given an opportunity to be heard. Further, filing of a separate suit over the same subject matter and in which the same issues of law and fact would arise would be contrary to the overriding objective of the Act.

10. The upshot of the foregoing is that the Plaintiffs' Notice of Motion dated 19th March 2019 is allowed on the following terms:

- 1. That the further amended plaint be filed and served within fourteen (14) days from the date of this ruling.**
- 2. That the defendants have leave of fourteen (14) days from the date of service of the further amended Plaint upon them to file their amended statement of defence, if need be.**
- 3. The plaintiffs shall pay the costs of the application to the defendants.**

DATED, SIGNED and DELIVERED at MOMBASA this 29th day of July 2019.

C.K. YANO

JUDGE

IN THE PRESENCE OF:

Sitonik for Plaintiff

Ms. Bakari holding brief for Abubakar for Defendant

Esther Court Assistant

C.K. YANO

JUDGE