



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KAJIADO

ELC CASE NO. 69 OF 2018

MUNGAI NGARUIYA.....PLAINTIFF

VERSUS

LAND REGISTRAR, KAJIADO.....1ST DEFENDANT

ATTORNEY GENERAL.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 4th October, 2018 brought pursuant to Order 1 Rule 10; Order 8 Rule 3; Order 5 Rule 17 of the Civil Procedure Rules and Section 1A of Civil Procedure Act. The Plaintiff seeks leave to amend the Plaintiff and to serve the proposed Third Party by substituted service. The application is premised on the summarized grounds that the Plaintiff wishes to enjoin BENJAMIN GACHAGUA NYAGA as the 3rd Defendant to ensure there is no multiplicity of suits. Further, the Defendants shall suffer no prejudice if the sought leave is granted.

The application is supported by the affidavit of the Plaintiff MUNGAI NGARUIYA where he avers that he seeks to enjoin his wife ELIZABETH WANJIKU NGARUIYA as the 2nd Plaintiff as the suit property is jointly owned. He seeks to enjoin BENJAMIN GACHAGUA NYAGA as the 3rd Defendant since the title to the suit property is currently registered in his name. Further, that the proposed 3rd Defendant should provide evidence on how he acquired the suit property. He requests the Court to grant him orders to serve the proposed 3rd Defendant through an advertisement in the local dailies as he was last traced to Kerugoya but has no fixed place of abode having gotten wind that the Criminal Investigations Department were looking for him.

The application is not opposed by the Defendants. The Plaintiff filed his submission which I have considered.

Analysis and Determination

Upon perusal of the instant application including the supporting affidavit and submissions, the issues for determination are whether the Plaintiff should be granted leave to amend his Plaintiff and to issue third party notice to BENJAMIN GACHAGUA NYAGA.

Section 100 of the Civil Procedure Act makes provisions on the General Power to Amend. It gives the Court to decide on whether it will allow an amendment or not.

Order 8 Rule 3 (1) and (2) 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. (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.'**

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.'**

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 a 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; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

In the current case, the Plaintiff seeks to amend the Plaint to include certain parties as well as facts which are pertinent in determining the dispute herein. In relying on the legal provisions cited above as well as associating with this judicial authority, I find that the amendment sought by the Plaintiff is necessary for the determination of the real question in controversy and will proceed to grant him leave to do so. In respect to the issue of service, based on the Plaintiff’s averments that the proposed 3rd Defendant has no fixed place of abode, which fact is not controverted, I will allow the Plaintiff to serve him through the Daily Nation Newspaper.

It is against the foregoing that I find the application dated the 4th October, 2018 merited and will allow it. I direct the Plaintiff to file and serve the amended Plaint within 14 days from the date hereof. I direct the Plaintiff to issue Third Party Notice to Benjamin Gachagua Nyaga within 15 days from the date hereof.

Dated signed and delivered in open court at Kajiado this 31st day of October, 2019

CHRISTINE OCHIENG

JUDGE

IN THE PRESENCE OF:

Nyawira holding brief for Fatma for 2nd defendant

No appearance for the plaintiff

Court Assistant- Mpoye