



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.480 OF 2017

GEORGE MUIRURI.....1ST PLAINTIFF/APPLICANT

JAMES KARANJA NJENGA..... 2ND PLAINTIFF/APPLICANT

VERSUS

PAUL KAGUNDA NJENGA.....1ST DEFENDANT/RESPONDENT

RAHAB NYAMBURA KARANJA.....2ND DEFENDANT/RESPONDENT

DANIEL MUIRURI NJENGA.....3RD DEFENDANT/RESPONDENT

KANUNGA FARMERS CO-OPERATIVE SOCIETY...4TH DEFENDANT/RESPONDENT

RULING

By a **Plaint** dated **18th February 2010**, and filed in court on **23rd February 2010**, the Plaintiff/Applicants herein brought a claim against the 1st – 4th Defendants and sought for Judgment against the Defendants for various prayers; among the prayers sought are:-

i. That the 1st Plaintiff be declared the legal owner of plot No.Tinganga/Cianda Block 1/218 and plot No.Tinganga/ Cianda Block 1/2073.

ii. That the 2nd Plaintiff be declared the legal owner of plot No.Tinganga/Cianda Block 1/214 and Plot No.Tinganga/ Cianda Block 1/2097.

iii. That the court do order the 1st, 2nd & 3rd Defendants to transfer the said plots to the 1st & 2nd Plaintiffs respectively and other prayers.

The Plaintiffs had alleged in the **Plaint** that in the year **1975**, their late father **John Njenga** purchased shares in **Kanunga Farmers Co-operative Society Ltd**, the 4th Defendant and registered 1st & 2nd Plaintiffs as **members No.433 & 434**. That the said **John Njenga Karumbi** died on **12th November 1994**, and left two families. However, in a fraudulent manner, **Jane Wanjiru Njenga** their step-mother reported to the police that the **Share Certificates** for plots **No.432, 433 & 434** were lost and she further falsified documents and altered record/register irregularly with the assistance of officials from **Kanunga Farmers Co-operative Society Ltd**. They also averred that later in a fraudulent transaction, the said **Jane Wanjiru Njenga** obtained titles and transfer of the said plots **Nos.432, 433 & 434** in the name of her sons and herself thus disinheriting the Plaintiffs. That plot **No.433** produced **Tinganga/Cianda Block 2/218** and **Tinganga/Cianda Block 2/2073** which parcels of land were meant for **George Muiruri Njenga**.

That plot **No.434** which was meant for **Karanja John Njenga** was registered as title **No.Tinganga/Cianda Block 1/214** which was registered in favour of **Paul Kagunda Njenga** and also **Tinganga/Cianda Block 1/2079** which was registered in favour of **Muiruri Njenga (minor)** nominee **Rahab Nyambura Karanja**. The Plaintiffs alleged that due to the above fraud, they have been disinherited and have suffered loss and damages. They urged the Court to find in their favour.

Simultaneous to the above **Plaint**, they also filed a **Chamber Summons** application even dated and sought for restraining orders against the Defendants seeking to restrain them and their servants and/or agents from trespassing or entering the suit properties **being Tinganga/Cianda Block 1/218, 2073**, the resultants of membership **No.433** and plot **No.Tinganga/Cianda Block 1/214** and **2097** being resultant of membership **No.434** pending the hearing and determination of the suit, among other prayers.

The said **Chamber Summons** was canvassed by way of written submissions and on **28th September 2010**, the Court delivered its **Ruling** and

dismissed the Plaintiffs/Applicants' *Chamber Summons*.

Several other applications were filed and determined. The matter was finally certified ready for hearing on **10th December 2016**, and was transferred to Thika Environment & Land Court on **20th April 2017**.

On **20th March 2018**, hearing commenced wherein one witness **George Muiruri Njenga**, the 1st Plaintiff testified at length and produced various exhibits.

However, before the 2nd witness could testify, the Plaintiffs/Applicants filed the instant *Notice of Motion* application dated **26th June 2018** and sought for various orders. The orders sought are:-

- 1) That this Honourable Court be pleased to grant the Plaintiffs/Applicants leave to amend their *Plaint* in terms of the *Draft Amended Plaint* annexed hereto.**
- 2) That the Honourable Court be pleased to direct that the Land Registrar, Kiambu Land Registry, Elias Kamau Kamonderu and Samuel Wangece Kanyi be enjoined as Defendants in this suit.**
- 3) That the Honourable court be pleased to issue Conservatory Orders restraining the Defendants either by themselves, servants, employees and/or authorized agents or whosoever from selling, charging, alienating, disposing, excavating, constructing, interfering with and/or doing anything prejudicial to land title Tinganga/Cianda Block 1/214/218/ 2073/2097 until the application herein is heard inter-parties.**
- 4) That costs of this application be in the suit.**

The application is premised upon the grounds stated on the face of the application and on the *Supporting Affidavit* of **George Muiruri Njenga**, the 1st Plaintiff/Applicant. Among the grounds are; That the court's overriding objective is to allow the hearing the cases on merit and to facilitate the **just, expeditious, proportionate** and **affordable** resolution of issues in controversy and it is therefore necessary to amend the *Plaint* to enable the court to determine the real issues in controversy once and for all. Further, that the amendments will not prejudice the Defendants at all. Again that the **Green Cards** show that the Defendants have transferred the property to 3rd parties during the pendency of this proceedings after the **Land Registrar Kiambu** failed to register cautions on the identified suit properties. That failure by the **Land Registrar Kiambu** to effect caution applied on **13th October 2009, 4th November 2009** and **17th October 2011**, resulted in the transfer of **Tinganga/Cianda Block 1/218** on **15th March 2011**, knowing very well that the matter was pending in court.

Further that the 6th Intended Defendant removed the restrictions effected on **18th April 2012**, and later he transferred the suit property **Tinganga/Cianda Block 1/218** to the intended 7th Defendant on **3rd April 2017**; That the intended 7th Defendant has charged the suit property **Tinganga/Cianda Block 1/218**, to the prejudice of the Plaintiffs; That the Plaintiffs continue to suffer irreparable damage and it is in the best interest that an injunction be issued against the Defendants herein.

In his *Supporting Affidavit*, **George Muiruri Njenga**, averred that his advocate on record has informed him that the Amended *Plaint* will capture the full context and perspective of the question of liability and it is in the interest of justice that the court allows the amendment of *Plaint* to enable it to conclusively determine the issues in controversy. Further that the failure by **Land Registrar Kiambu** to effect or register caution and restrictions on the suit property as applied by the Plaintiffs and their relatives caused the 3rd Defendant to transfer the suit land to intended 6th Defendant who later transferred to intended 7th Defendant and now the intended 7th Defendant has charged **LR.No.Tinganga/Cianda Block 1/218**, to the prejudice of the Plaintiffs/Applicants. The Applicants urged the court to allow the instant application.

The said application is contested. The 1st, 2nd & 3rd Defendants/

Respondents filed their *Grounds of Opposition* on **23rd July 2018** and averred that;

- 1) That the said application is vexatious, misconceived, irregular, bad in law and an abuse of the process of this Honourable Court.**
- 2) That if the intention of the amendment of the *Plaint* is to enjoin the following Elias Kamau Kamonderu and Samuel Wangece Kanyi, the Land Registrar then the Plaintiffs are guilty of indolence and such should not be abetted by this Honourable Court.**
- 3) That the grounds and reasons relied on have always been within the Plaintiff's knowledge, then it follows that the Plaintiffs are guilty of laches.**
- 4) That the application before the court is incompetent since there has been undue delay in making the application as the same is a mere afterthought given that the suit was instituted on 23rd February 2010 under Certificate of Urgency.**
- 5) That it follows then that the Plaintiffs are merely reacting to the circumstance that had already occurred to try and revive its case.**
- 6) That the proposed amendments has been brought in response to the court's refusal to issue interlocutory injunction to the**

Plaintiffs and further, that the amendments sought is in response to the evidence advanced by the 3rd Defendant after closure of pleadings and hearing of the matter.

The 1st – 3rd Respondents prayed for dismissal of the Plaintiffs instant application.

The 4th Respondent also filed **Grounds of Opposition** and a **Replying Affidavit** by **Njoroge Gatua Kiarie**, the Chairman of **Kanunga Farmers Co-operative Society Ltd**. In the **Grounds of Opposition**, it was averred:-

- 1) **That the application is misconceived, otherwise frivolous, vexatious and clear abuse of the due process of court.**
- 2) **That the application is an afterthought, bad in law and ought to be struck out.**
- 3) **That the application is contrary to the provisions of law since the same is brought after pleadings has closed and the matter proceeded to hearing.**
- 4) **That the application has been overtaken by events.**
- 5) **That the application is untenable in the eyes of the law and equity.**

In his **Replying Affidavit**, **Njoroge Gatua Kiarie**, the Chairman of the 4th Defendant/Respondent averred that the Applicants have not given reasons which occasioned the delay in filing the intended application which is quite inordinate and intentional. Further that the application has been overtaken by events and is self-serving and an **afterthought, frivolous, vexatious** and otherwise an **abuse** of the due process of the court. He also averred that he has been informed by his advocate that the intended amendments are simply built on issues that were brought up by the Defence during cross-examination. Further that the suit was filed in **2010** and there is delay in bringing this application for amendment since the restrictions were placed on the land before the suit was filed. He also contended that the Amended Plaint further failed to disclose any cause of action against the 4th Defendant and the said amendments are prejudicial to the 4th Defendant since they were only brought up after one Plaintiff had testified.

Again that the affidavit of **George Muiruri Njenga** has introduced issues which are irrelevant to the application herein and hence the same does not support the Applicants' application. He urged the court to dismiss the Applicants **Notice of Motion** with costs.

George Muiruri Njenga filed a reply to the **Grounds of Opposition** and averred that the grounds to amend the **Plaint** are justified and will serve the interests of justice. Further that he has been informed by his advocate that his application is not irregular, bad in law and is not an abuse of the court process as it was done immediately upon realizing that the Defendants have transferred the suit property to third parties. Therefore this application is timely and diligent as it has been brought up realization of the irregular transfer of the suit by the Defendants. That he has also been informed by his advocate on record that the court has discretion to enjoin parties to a suit at any time and also amend pleadings at any time. It was his contention that he has come to court in good faith and with clean hands and he beseeched the court to allow his application for joiner of parties and amendment of the Plaint and dismiss the Respondents opposition.

The application was canvassed by way of written submissions. The **Law Firm of Ondiek & Ondiek Associates** filed their submissions on **13th August 2018** and relied on various decided cases. The **Law Firm of Hayanga & Co. Advocates** for 1st 2nd & 3rd Defendants/Respondents filed their submissions on **8th November 2018**, and urged the court to dismiss the Applicants' application as it was an abuse of the court process.

On the part of the 4th Defendant/Respondent, the **Law Firm of G. K. Gatere & Co. Advocates** filed their submissions on **19th September 2018** and urged the court to dismiss the instant application as there was no legal justification to warrant the grant of the same.

The court has now carefully considered the pleadings in general, the annexures thereto, the written submissions, cited authorities and the relevant provisions of law and makes the following findings;

There is no doubt that the Plaintiffs/Applicants herein are claiming ownership of land parcels **No.Tinganga/Cianda Block 1/214, 218, 2093 & 2097**. There is no doubt that the 1st, 2nd & 3rd Defendants have denied in their defence that the Plaintiffs are entitled to the suit properties. There is therefore a dispute over ownership of the said suit properties. It is also not in doubt that **LR.No.Tinganga/Cianda Block 1/218**, which is one of the parcels of land in dispute was initially registered in the name of **Daniel Muiruri Njenga** on **3rd April 2009**, before the suit herein was filed. However, it is evident that during the pendency of his suit, the said **Daniel Muiruri Njenga** transferred the suit property to **Elias Kamau Kamonderu** on **15th March 2012**. Further the suit property was later transferred to **Samuel Wangece Kanyi** on **3rd April 2017**. This is the same suit property being claimed by the Plaintiffs herein. It is also not in doubt that the Plaintiffs had applied for placing of restrictions on the suit property on various dates.

A restriction was placed on **LR.No.Tinganga/Cianda Block 1/218** on **18th April 2012** and later removed on **17th January 2013** and the suit property was **charged** to **Co-operative Bank of Kenya** on **2nd April 2013** and later to **Unaitas SACCO Society Ltd** on **3rd April 2017**. All the above transactions have taken place during the pendency of this suit. The court would therefore not be faulted for stating that the Defendants have gone against the doctrine of **Lis Pendens** when they did transact and allowed change of ownership during the pendency of this suit which is a dispute over ownership of the disputed parcels of land. The doctrine of **Lis Pendens** has been described as follows in the case of **In Re Estate Of Solomon Muchiri Macharia [2016] eKLR,.....**

“The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in general interest of public

policy and good and effective administrative of justice. It therefore overrides a title obtained during the pendency of proceedings touching on the property and prohibits a party from transferring property to others pending determination of the litigation on the parties rights on the property. Lis pendens is therefore the jurisdiction or control that courts obtain over property in a suit awaiting determination of the suit.

However, it is not in doubt that the Plaintiffs'/Applicants' earlier application for injunction was dismissed by the court on **28th September 2010**. Therefore the suit properties herein have not been preserved. The Applicants have now come to court seeking enjoinder of the new registered owners of the suit property and also for conservatory orders.

Having considered the pleadings and the written submissions, the court finds that the issues for determination are as follows:-

- a) Whether the court should exercise its discretion in favour of the Plaintiffs/Applicants and grant the prayers sought for joinder and amendments.**
- b) Whether the Plaintiffs/Applicants are entitled to the conservatory orders sought.**
- c) Who should bear costs of the application.**

The application is anchored under **Section 1A & 1B** of the **Civil Procedure Act** which enjoin the court to facilitate the overriding objective of the Civil Procedure Act. Further the application is anchored under **Section 3A** of the same Act which donates inherent power to the court to issue orders that are necessary for ensuring that end of justice is met and also prevent abuse of the court process. Of course the guiding legal provisions for the orders sought are found in **Order 1** which deals with parties to the suit and **Order 8** which deals with amendment of pleadings. In deciding the above framed issues, the court will be guided by the above provisions of law.

The court will first deal with the issue of whether it should allow joinder of the **Land Registrar Kiambu, Elias Kamau Kamonderu** and **Samuel Wangece Kanyi** as Defendants in this suit. The said prayer is opposed vehemently by the Defendants herein.

The guiding principles herein are found in **Order 1 Rule 10(2)** which provides:-

“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.”

It is therefore evident from the above order that the court has discretion at any stage of the proceedings to add a party to a suit if the said party is necessary and his presence will enable the court to effectually and completely adjudicate upon and settle all questions involved in the suit or to enable the court to determine the real issues in dispute. The above principles were well captured in the case of **Andy Forwardes Services Ltd & Another...Vs...PricewaterhouseCoopers Ltd & Another(2012) eKLR**, where the court held that:-

“..A person may be joined in a suit not because there is a cause of action against him but because that person is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the matter”.

Further in the case of **Departed Asians Property Custodian Board...Vs...Jaffer Brothers Ltd (1999) 1EA 55 (SCU)**, the Court held that:-

“For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit would legally affect the interests of that person and that it is desirable for avoidance of multiplicity of suits to have such a person joined so that he is bound by the decision of the court in that suit...”.

So have the Applicants herein satisfied the above criteria?

As the Court stated herein, the dispute herein is over ownership of the four parcels of land mentioned in the Plaint. However, it is evident from the Green Card that the 3rd Defendant transferred the suit property **No.Tinganga/Cianda Block 1/218** to **Elias Kamau Kamonderu** on **15th March 2012**, who later transferred the said property to **Samuel Wangece Kanyi**. The two parties are necessary parties herein since the outcome of the case might affect their ownership of the suit property. Further it is necessary to enjoin them because the orders that the Plaintiffs seek might legally affect their interest and their presence is necessary for avoidance of multiplicity of suits. However the above position should not be taken to mean that the court has already made up its mind, but it is a precaution in the event the suit is decided in favour of the Plaintiffs.

Further, the Plaintiffs/Applicants have alleged that they had severally sought for placing of cautions and restrictions on the suit property but the **Land Registrar Kiambu** declined to do so. It would be unfair to take that kind of evidence in the absence of the Land Registrar as it would mean that he is not given an opportunity to express his side of evidence. The Court therefore finds that the three Intended Defendants are necessary parties herein for effectual and complete adjudication of the issues in dispute. It is therefore prudent to join the intended Defendants as 5th, 6th & 7th Defendants herein.

On the issue of amendment, it is trite that a court may at any stage of proceedings, allow a party to amend his pleadings but on such terms as

to costs. See Order 8 Rule 3(1) which provides:-

“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”.

The threshold to be considered in whether to allow or not to allow amendments of pleadings were set out in the case of Central Kenya Ltd... Vs...Trust Bank Ltd & 4 Others, Civil Appeal No.222 of 1998,

“All amendments should be freely allowed and at any stage of the proceedings , provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

Further Section 100 of the Civil Procedure Act provides that:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

From the above provisions of law and the cited authorities, it is clear that amendments can be allowed if:-

- a) **It is necessary for determining the real question in controversy.**
- b) **To avoid multiplicity of suits.**
- c) **No new or inconsistent cause of action is introduced.**
- d) **No vested interest or accrued legal rights are affected.**
- e) **So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for.**

It is evident that the court has allowed joinder of three Defendants whom the court has found to be necessary parties. The first criteria has therefore been met.

It is also evident that one of the suit property has changed hands and in the event the court finds in favour of the Plaintiffs then if the amendments are not allowed, then there would be scenario of Plaintiffs filing another suit against the now registered owner of the suit property and thus multiplicity of suits. Further the now registered owner’s rights would be catered for in the Amended Plaintiff as he would be given an opportunity to be heard.

The Court has considered the Draft Amended Plaintiff and has noted that no new cause of action has been introduced. All the prayers sought are aimed at eventually arriving at the same thing – who are the legal owners of the named suit properties?

The Court finds that Defendants/Respondents opposition to the application not justified and further finds that the amendments sought are necessary and this Court would not haste to allow the said order as sought.

On whether the Applicants are entitled to Conservatory Orders to restrain the Defendants from dealing with the suit property in any manner prejudicial to the land titles named in the Plaintiff, the Court finds that it is very clear that the Plaintiffs are seeking to be declared the legal owners of the disputed parcels of land. It is also very clear that one of the suit property has changed hands twice and has even been charged to a bank during the pendency of this suit.

Though the Court declined to grant injunctive orders in the year 2010, the circumstances have now changed as it is clear the Defendants went against the **doctrine of Lis Pendens**. It has now become necessary to preserve the suit property. This is so because if the suit properties are not preserved, it might be possible by the time the suit herein is concluded, then the suit properties would have been alienated and transferred to other parties who are not parties to this suit. It would also be untidy to keep on amending the pleadings once the said alienation or transfer has occurred. The Court finds that for the interest of justice and in an effort to facilitate the overriding objective of the Civil Procedure Act, the necessary order in ensuring that end of justice is met and in prevention of abuse of the court process, is the grant of prayer **No.5** of the instant **Notice of Motion**.

On who should bear costs of the application, it is evident that the Defendants brought about the necessity to file this application by allowing transfer of one of the suit property before the suit is heard and determined. The Plaintiffs/Applicants are the successful litigants and therefore the Defendants should bear costs of this application.

Having now carefully considered the **Notice of Motion** application dated **26th June 2018**, the **Court finds it merited and it is allowed entirely in terms of prayers No.2, 3 & 5. Cost of the application to be borne by the Defendants/Respondents.**

It is so ordered.

Dated, Signed and Delivered at Thika this 4th day of October, 2019.

L. GACHERU

JUDGE

4/10/2019

In the presence of

Mr. Okumu holding brief for Mr. Ondiek for Plaintiffs/Applicants

No appearance for 1st Defendant/Respondent

No appearance for 2nd Defendant/Respondent

No appearance for 3rd Defendant/Respondent

No appearance for 4th Defendant/Respondent

Lucy - Court Assistant

Court – Ruling read in open court.

L. GACHERU

JUDGE

4/10/2019