



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 144 OF 2010

DAVID KASAMU MUSEMBI.....PLAINTIFF

VERSUS

NYAGOTO INVESTMENTS LIMITED.....DEFENDANT

RULING

1. In the Notice of Motion dated 7th March, 2018, the Plaintiff is seeking the leave of the court to amend the Plaint. The Application is premised on the grounds that the original Plaintiff died on 3rd July, 2015 and was substituted by Annah Ng'ondou Kasamu and Lydia Kasamu on 16th October, 2017 and that the new Plaintiffs seek to reflect their character as legal representatives of the original Plaintiff.
2. The Applicant repeated the grounds on the face of the Application in his Affidavit. However, he did not annex the draft amended Plaint on the initial Affidavit. The draft amended Plaint was annexed on the Further Supporting Affidavit that was sworn on 1st April, 2018 (*sic*) and filed on 2nd April, 2019.
3. The Defendant filed Grounds of Opposition and a Replying Affidavit. In the Grounds of Opposition, the Defendant averred that the draft Amended Plaint annexed on the Further Supporting Affidavit goes beyond the scope of the prayer for amendment of the Plaint; that the Amended Plaint was to reflect the substitution of the deceased Plaintiff and that it is trite that a company is separate from its Directors and cannot be held personally liable except in special cases.
4. The Defendant finally averred that there is mala fides on the part of the Applicant as the Application seeks to sneak in an amendment that is not prayed for.
5. In the Replying Affidavit, the Defendant's Director deponed that the Defendant was incorporated as a Limited Liability Company on 21st August, 1997 long before the Letter of Allotment was issued in its name.
6. In another "*Further Affidavit*", the Applicant deponed that the records held by the Registrar of Companies shows that Nyagoto Investments was registered as a Business Name; that on 27th July, 1997, a notice was filed with the Registrar of Companies indicating that the said business name had been converted into a Limited Liability Company and that the purported Letter of Allotment was issued to Nyagoto Investments, a Business Name, on 5th January, 1999.
7. In her submissions, the Plaintiff's/Applicant's advocate submitted that Nyagoto Investments, to which the suit land had been purportedly allocated on 12th March, 1997, long after the land had been allocated to the deceased Plaintiff, was a Business Name whose proprietor was James Elvis Omariba; that the suit land was subsequently registered in the name of the Defendant and that the joinder of the suggested persons will place before the court all the issues in controversy for appropriate adjudication. Counsel relied on numerous authorities which I have considered.
8. The Defendant's advocate submitted that in an Application for amendment, the amendment sought must be set out precisely; that the ground provided by the Plaintiff as the basis of the amendment is to substitute the original Plaintiff who has since died and that the suggested amendments cannot be pleaded in a Further Affidavit.
9. The Defendant's counsel submitted that the Plaintiff has not presented a plausible reason why he seeks to amend the Plaint to introduce the intended 1st Defendant as a Defendant more than twenty (20) years after the alleged cause of action and nine (9) years after filing the suit. Counsel relied on numerous authorities which I have considered.
10. In the Plaint dated 19th July, 2010, the Plaintiff averred that the Defendant is a Limited Liability Company; that the Defendant

fraudulently obtained title in respect of L.R. No. 20507 (*the suit property*) and that he is the bona fide allottee of the suit land. In the ultimate prayer, the Plaintiff is seeking for the cancellation of the title that was issued to the Defendant for L.R. No. 20507.

11. In its Defence and Counter-claim, the Defendant averred that in January, 1999, it was issued with a Letter of Allotment in respect to the suit land and that it was issued with a grant for L.R. No. 20507 on 30th August, 2002.

12. In the Application dated 7th March, 2018, the Applicant is seeking to amend the Plaintiff. The Application is premised on two grounds which are worded as follows:

a. The original Plaintiff (David Kasamu Musembi) died on 3rd July, 2015, and was on 16th October, 2017 substituted with Annah Ng'ondu Kasamu and Lydia Kasamu Musembi, his personal representatives.

b. The said new Plaintiffs wish to amend the Plaintiff to reflect their character as legal representatives of the original Plaintiff and to place before the court all the issues in controversy for appropriate adjudication by this Honourable Court.

13. In the Affidavit in support of the Application dated 7th March, 2018, the Applicant deponed as follows:

“That I and the said 1st Plaintiff are desirous of amending the Plaintiff herein so as to reflect our character as the personal representatives of the original Plaintiff herein, and to place before this Honourable Court all the issues in controversy in the suit herein for appropriate adjudication.”

14. It is therefore obvious that the Application for leave to amend the Plaintiff was based on one ground, that is, to amend the Plaintiff so as to reflect the Applicant's character as the personal representatives of the original Plaintiff.

15. The issue of a new Defendant in the name of “*James Elvis Omariba Ongwae t/a Nyagoto Investments*” was never mentioned in either the grounds on the face of the Application or in the Supporting Affidavit.

16. Indeed, even in the Further Supporting Affidavit in which the Applicant introduced the draft Amended Plaintiff, she did not mention the issue of introducing a new party as a Defendant and the reason for such an introduction. The Applicant mentioned for the first time the issue of joining a new Defendant in the suit when she filed the Further Affidavit of 23rd April, 2019.

17. In the Further Affidavit of 23rd April, 2019, the Applicant also introduced for the first time the issue of a Business Name known as Nyagoto Investments which was registered as such on 12th March, 1997, which name was converted into a Limited Liability Company known as Nyagoto Investments Limited.

18. To the extent that the Plaintiff's Application is based on the grounds that the deceased Plaintiff ought to be substituted, I find the introduction of a new Defendant in the draft Amended Plaintiff to be improper. Indeed, having introduced the joinder of a new Defendant for the first time in a second Further Affidavit, the Applicant's Application dated 7th March, 2018 is incompetent.

19. As was held by Musyoki J. in the case of *H.M. vs. S.K (2015) eKLR*, the prayers in an Application should be comprehensive and should carry sufficient detail. The Judge held as follows:

“The order that the court eventually makes should be based on the prayer sought and not on the contents of the Affidavit. The Affidavit in support merely sets out the factual background to the Application.”

20. In the circumstances, this court cannot consider favourably the amendments sought by the Applicant because the said amendments were introduced outside the ambit of the Application, and were not, by any stretch of imagination, contemplated in the Notice of Motion dated 7th March, 2018.

21. In any event, I have perused the Plaintiff's Further Affidavit and the annexures thereto. The annexures on the Affidavits shows that the suit land was registered in favour of the Defendant on 30th August, 2002. On the other hand, the Letter of Allotment dated 5th January, 1999 was issued to an entity known as Nyagoto Investments. The Applicant has annexed a letter from the Registrar of Companies showing that Nyagoto Investments ceased operating as a Business Name and was converted into a Limited Liability Company on 21st August, 1997.

22. Considering that the Defendant was purportedly registered as the owner of the suit land in the year 2002, the issue of whether the Letter of Allotment was issued to a Business Name or a Limited Liability Company can only be dealt with at trial. Introducing an entity which ceased to exist as a new party, nine (9) years after the filing of the suit, cannot be said to be an issue that will determine the real question in controversy between the parties herein. The identify of the parties herein, including entities like Nyagoto Investments will be apparent at trial even without enjoining them.

23. That being the case, I find the Notice of Motion dated 7th March, 2018 to be unmeritorious. The Application is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 4TH DAY OF OCTOBER, 2019.

O.A. ANGOTE

JUDGE