



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

IN KAJIADO

ELC CASE NO. 609 OF 2017

NELSON AGORO JOSIAH MAHEBO.....PLAINTIFF

VERSUS

JOHN NJOROGE NGUGI.....1ST DEFENDANT

HELLEN NYAWIRA KIMARU.....2ND DEFENDANT

RULING

What is before Court for determination is the Plaintiff's Notice of Motion application dated the 10th April, 2019 and the Defendants' Notice of Preliminary Objection dated the 24th April, 2019. In the application dated 10th April, 2019 which is brought pursuant to section 3 and 3A of the Civil Procedure Act as well as Order 1 Rule 8 of the Civil Procedure Rules, the Applicant seeks to amend the Plaintiff to include FALCON HEIGHTS REAL ESTATE CO. LTD as a third Defendant as well as orders to restrain the said proposed 3rd Defendant from selling, transferring, charging or interfering with plot Nos. KAJIADO/ KAPUTIEI NORTH/ 91459 upto KAJIADO/ KAPUTIEI NORTH/ 91487. The application is premised on the summarized grounds that the Plaintiff contributed 90% of the amount but transferred the aforementioned properties to the proposed 3rd Defendant. Further, the proposed amended Plaintiff is in good faith as the said proposed 3rd Defendant intends to transfer the properties to third parties. The Application is supported by the affidavit of the Plaintiff NELSON AGORO JOSIAH MAHEBO where he reiterates his claim above and explains that he paid a total of Kshs. 9,500,000 for the suit lands.

The Respondents filed a Notice of Preliminary Objection contending that this is a commercial dispute involving the distribution of the assets of FALCON HEIGHTS REAL ESTATE CO. LTD and by dint of section 3(1), 485 and 492 of the Companies Act, the Court lacks jurisdiction to determine it. Further, the Plaintiff being a director to the intended 3rd Defendant is in violation of his duties and responsibilities to the Company as stipulated in sections 142 and 143 of the Companies Act. The Plaintiff being a director of the intended 3rd Defendant seeks to sue himself

Both parties filed their respective submissions

Analysis and Determination

Upon consideration of the application dated 10th April 2019, Notice of Preliminary Objection dated 24th April, 2019 and parties' submissions, the only issue for determination is whether the Plaintiff should be granted leave to amend his Plaintiff to include FALCON HEIGHTS REAL ESTATE CO. LTD as a 3rd Defendant. I note the Plaintiff is a director of the said company with the dispute herein involving its directors.

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

While 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 a company wherein he is a director. He confirms that the properties in dispute now belong to the Company. It is trite law that company issues are managed by its directors. It is interesting to note that the Plaintiff claims the company seeks to transfer the suit land to his detriment yet he is one of the Directors to the said company who has to make a decision before a transfer is effected to a third party. I concur with the Respondents that the Plaintiff seeks to sue himself. I further find that the issues raised in the draft Amended Plaint touching on the intended 3rd Defendant is a fresh cause of action which falls within the ambit of the Companies Act that this Court does not have jurisdiction to deal with by dint of section 13 of the Environment and Land Court Act.

It is against the foregoing and relying on the legal provisions cited above and associating myself with the authorities quoted that I decline to allow the amendment sought.

In the circumstance, I find the instant application unmerited and will disallow it. Costs will be in the cause.

Dated signed and delivered in open court at Kajiado this 27th day of November, 2019

CHRISTINE OCHIENG

JUDGE