



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KERUGOYA

ELC CASE NO. 208 OF 2014

JAMES MIGWI KARINGI.....PLAINTIFF

VERSUS

ROBERT GACHU MIGWI

(Sued as the Administrator of the

Estate of the late MIGWI KARINGI.....1ST DEFENDANT

BERTHA WAKERA MIGWI.....2ND DEFENDANT

JOSEPH WANJOHI MIGWI.....3RD DEFENDANT

JULIUS KARIMI MIGWI.....4TH DEFENDANT

PETER MIANO MURIITHI.....5TH DEFENDANT

PETER KARIMI NJUIRI.....6TH DEFENDANT

STANLEY KINYUA MIGWI.....7TH DEFENDANT

GEORGE MWAI GITURA.....8TH DEFENDANT

JUSTUS NJIRAINI GITHAIGA.....9TH DEFENDANT

RULING

JAMES MIGWI KARINGI the Applicant herein initially filed this suit on 7th July 2014 against **ROBERT GACHU MIGWI** as administrator of the Estate of the late **MIGWI KARINGI** and sought the main relief that the late **MIGWI KARINGI** held land parcel No. INOI/THAITA/49 in trust and that the said trust be determined and he do transfer two and three quarters thereof to the plaintiff who also sought a declaration that he is entitled to a share of a portion of one acre in land parcel No. INOI/THAITA/233 which his father had paid for.

On 10th June 2015, the Applicant filed an application to amend the plaint to enjoin eight (8) other parties as defendants on the ground that he had discovered that land parcels No. INOI/THAITA/49 and INOI/THAITA/233 had since been sub-divided and registered in the names of those other parties. That application was not opposed and was allowed by consent on 6th October 2015.

The Applicant has filed yet another application dated 14th July 2016 and which is the subject of this ruling seeking leave to further re-amend the plaint in terms of the draft amended plaint dated 14th July 2016. That application is supported by his affidavit in which he has deponed, inter alia, that land parcel No. INOI/THAITA/233 had been bought by his father **KARINGI GACHANJA** from one **KABIRU MURIITHI** but died before completing payment and **MIGWI KARINGI** completed the payment after which he (**MIGWI KARINGI**) obtained the title which he registered in his own names instead of the plaintiff's father's names and since his father is now deceased, the plaintiff wishes to pursue the claim as administrator of his father's Estate. Annexed to the application is a limited grant ad litem dated 28th June 2016 appointing him as administrator for purposes of filing this suit. Although the death certificate of the plaintiff's late father **KARINGI GACHANJA** was not annexed to the application, it is clear from the copy of limited grant that he died in 1960 long before this suit was

filed.

The application is opposed and by a replying affidavit dated 6th September 2016, the 1st Respondent **ROBERT GACHU MIGWI** denied that the late **KARINGA GACHANJA** had bought land parcel No. INOI/THAITA/233 adding that the said land parcel was bought by his late father **MIGWI KARINGI**. The 1st Respondent deponed further that the Applicant has no capacity to sue on behalf of the Estate of the late **KARINGI GACHANJA** since by **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE No. 285 of 1994**, the grant in respect to that Estate was issued to the 1st Respondent's father **MIGWI KARINGI**. An application by the Applicant to annul that grant was filed by the applicant at the High Court in Nyeri but was later withdrawn. The Applicant thereafter filed another application being **NYERI HIGH COURT MISC APPLICATION No. 294 of 1995** which was dismissed. The Applicant filed yet another application this time at the **HIGH COURT EMBU** being **APPLICATION No. 42 of 2012** seeking to annul the grant issued by the **KERUGOYA SENIOR RESIDENT MAGISTRATE'S COURT SUCCESSION CAUSE No. 285 of 1994** which he however abandoned and filed another application being **KERUGOYA HIGH COURT MISC APPLICATION No. 37 of 2012**. That this is therefore an abuse of the Court process as the Applicant cannot purport to file this suit as the representative of the Estate of his late father while there is a legitimate administrator to that Estate who is the 1st Respondent's late father as substituted by the 1st Respondent. That the land parcels No. INOI/THAITA/233 have never formed part of the Estate of the late **KARINGI GACHANJA** and the limited grant ad litem obtained by the Applicant was obtained un-procedurally and through deceit and cannot be used for purposes of this suit. That this application is meant to circumvent the cause of justice and should be dismissed with costs.

The application has been canvassed by way of written submissions which have been filed both by **MR. P.M. MUCHIRA ADVOCATE** for the 1st Respondent and **MS A. THUNGU ADVOCATE** for the Applicant.

I have considered the application, the rival affidavits and annexures as well as the submissions by counsel.

I must start by observing that in their respective affidavits, the parties have delved into the merits or otherwise of the claim herein which is really not necessary at this point because those are issues that will be determined at the trial.

This application is premised under the provisions of **Order 8 Rule 3 of the Civil Procedure Rules**. The general power to amend is donated by the provision of **Order 8 Rule 5 of the Civil Procedure Rules** which read as follows:

“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”.

Section 100 of the Civil Procedure Act is in similar terms. The purpose of amendments is to facilitate the determination of the real issues in controversy between the parties to the proceedings and that is why the Court may at any stage allow the amendment of any document either on its own motion or upon the application by a party. That is in furtherance of the overriding objectives of the **Civil Procedure Act and Rules** which aim at promoting the just, expeditious proportionate and accessible resolution of disputes and is also provided for under **Section 3 of the Environment and Land Court Act**. In **COFFEE BOARD OF KENYA VS THIKA COFFEE MILLS LTD & TWO OTHERS C.A CIVIL APPEAL No. 94 of 2003 (2014 e K.L.R)**, the Court of Appeal cited the following passage from **MULLA, THE CODE OF CIVIL PROCEDURE 18TH EDITION VOL. 2 PAGES 1751-1752** as a useful guide when dealing with an application to amend pleadings:

- 1. All amendments should be allowed which are necessary for determination of the real controversies in the suit.***
- 2. The proposed amendment should not alter and be a substitute of cause of action on the basis of which the original list was raised.***
- 3. Inconsistent and contradictory allegations in negation to the admitted position of fact or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment.***
- 4. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs.***
- 5. Amendment of a claim or relief barred by time should not be allowed.***
- 6. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time.***
- 7. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties.***
- 8. The delay in filing the petition for amendment of the pleadings should be properly compensated by costs.***
- 9. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.***

Thus the overriding consideration in an application for leave to amend pleadings is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application is likely to prejudice the opposite party beyond compensation for costs. In **CENTRAL KENYA LTD VS TRUST BANK LTD 2000 2 E.A 365**, the Court of Appeal said:

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

Guided by the above principles, it is clear that the Applicant, having obtained limited grant ad litem to file this suit, now wishes to claim land parcel No. INOI/THAITA/233 which he says his late father **KARINGI GACHANJA** purchased from one **KABIRU MURIITHI** but that the 1st Respondent's late father **MIGWI KARINGI** had the same registered in his names. That allegation has of course been denied by the 1st Respondent who also takes issue with the many applications that the Applicant has filed in this suit. The law does not limit the number of applications that a party can make to amend pleadings so long as they are necessary and do not prejudice the other party. It is clear that land parcel No. INOI/THAITA/233 is a subject in this suit. What is not clear is why the Applicant has waited till 14th July 2016 to file this application and yet even as far back as 7th July 2014 when he filed the original plaint, that land parcel was the subject matter and his father had of course died way back in 1960. Having said so, however, this suit is yet to commence trial and infact there is no compliance yet with the provisions of **Order II Civil Procedure Rules**. The 1st Respondent has raised concerns about the propensity of the Applicant to file several applications and taken issue with whether the Applicant could infact obtain a limited grant ad litem with respect to the Estate of his late father when there is infact already a grant issued in favour of the 1st Respondent as far back as 23rd March 2010 in respect of the same Estate. That is a serious issue which will no doubt be canvassed during the full trial but as I have said earlier, those issues are not for consideration at this stage. Mere delay, however, is not a ground upon which to reject an application for amendment – **CENTRAL KENYA LTD** (supra). In any event, the 1st Respondent has not indicated what prejudice, if any, it will suffer that cannot be compensated with costs. In my view therefore, since the Applicant's case is that land parcel No. INOI/THAITA/233 was purchased by his late father but the 1st Respondent's father had it registered in his names, the amendment sought is necessary to allow the parties ventilate the real issues in controversy in relation to that parcel of land.

Ultimately therefore and having considered all the issues herein, I allow the application dated 14th July 2016 and make the following orders:

- 1. Leave is granted to the Plaintiff/Applicant to further re-amend his plaint in terms of the annexed draft- re-amended plaint.**
- 2. The further re-amended plaint be filed and served within 14 days from the date of this ruling.**
- 3. The defendants have 14 days from the date of service upon them of the further re-amended plaint to file and serve their amended statements of defence, if any.**
- 4. The Plaintiff/Applicant shall meet the costs of this application to the 1st defendant/Respondent.**

B.N. OLAO

JUDGE

26TH JANUARY, 2018

Ruling dated, delivered and signed in open Court at Kerugoya this 26th day of January 2018

Ms Kiragu for Mr. Rurige for 1st Defendant

Also holding brief for Ms Wanjiru for 2nd to 8th Defendants present

Mr. Mwangi for Ms Thungu for Plaintiff present.

B.N. OLAO

JUDGE

26TH JANUARY, 2018