



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT KERUGOYA
ELC CASE NO. 57 OF 2016

MILLICENT WAIRIMU.....1ST PLAINTIFF

WILSON NJERU NJOKA.....2ND PLAINTIFF

VERSUS

JOHNSON NYAGA MAINA.....1ST DEFENDANT

GICHUGU LAND CONTROL BOARD.....2ND DEFENDANT

MAPZONE COMPANY.....3RD DEFENDANT

RULING

This is in respect to the plaintiffs' Notice of Motion dated 3rd July 2017 and premised under the provisions of *Section 100 of the Civil Procedure Act, Order 8 Rule 3 and 5 of the Civil Procedure Rules* and *Sections 1A, 2A and 3A of the Civil Procedure Act* in which they seek the following orders:

- 1. That this Honourable Court be pleased to grant leave to the plaintiffs to amend their plaint herein.***
- 2. That the draft amended plaint annexed hereto be treated as the plaintiffs' amended plaint and that the same be deemed as having been duly filed and served.***
- 3. That the defendants be at liberty to amend their defence within 14 days thereafter if they so wish.***
- 4. That the costs of this application be in the cause.***

The application is based on the grounds set out therein and supported by the affidavit of **MILICENT WAIRIMU** the 1st plaintiff. The gravamen of the application is that the plaintiffs have now discovered new material facts since the filing of the suit including the fact that the 1st defendant fraudulently obtained the title to the suit property and the same should therefore be cancelled. Annexed to the application is an amended plaint which now seeks to enjoin the Chief Land Registrar as a 2nd defendant instead of the Gichugu Land Control Board. Particulars of fraud by the 1st defendant have also been pleaded with respect to the acquisition and sub-division of land parcel No. NGARIAMA/NGIRIAMBU/1313.

The application is opposed and **JOHNSON MAINA NYAGA** the 1st defendant has sworn a replying affidavit dated **18TH JULY 2017** in which he has deponed, inter alia, as follows:

- *That the application is bad in law and an abuse of the Court process and does not accord with the original plaint.*
- *That the plaintiffs made a similar application on 31ST OCTOBER 2016 which is pending and the plaintiffs seem not to be sure who should be the defendants in this case.*
- *That although this Court has the discretion to allow amendments, that discretion should be exercised judicially.*

In a supplementary affidavit dated **12TH SEPTEMBER 2017**, the 1st plaintiff confirmed that the application dated **31ST OCTOBER 2016** had been withdrawn.

The application was canvassed by way of written submissions which have been filed both by **NDEGWA & NDEGWA ADVOCATES** for the plaintiff and **R. MAKWORO & CO. ADVOCATES** for the defendants.

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

Section 100 of the Civil Procedure Act provides as follows:

“The Court may at any time, and in 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”

Order 8 Rule 3 (1) of the Civil Procedure Rules provides that:

“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”

Finally, Order 8 Rule 5 (1) of the Civil Procedure Rules is in the following terms:

“For the 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 in such terms as to costs or otherwise as are just”.

It is now well settled that the Court has wide discretion to allow amendment of pleadings at any stage so long as there is no prejudice caused to the other party that cannot be atoned for in costs. In **EASTERN BAKERY VS CASTELINO 1958 E.A 461**, the then Court of Appeal for East Africa held that:

“..... amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs..... But there is no power to enable one distinct cause of action to be substituted for another nor to change by means of amendment, the subject matter of the suit”.

And in **CENTRAL KENYA LTD VS TRUST BANK LTD & OTHERS C.A CIVIL APPEAL No. 222 of 1998 (2000 e K.L.R)**, the Court of Appeal stated thus:

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the

opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”.

Guided by the above principles, it is clear that this suit is yet to commence trial. Indeed other than a ruling delivered on 21st April 2017 in an application seeking the committal to civil jail of some parties herein, no pre-trial directions have been taken in the suit which is therefore at the early stages. I have not heard the defendants allege that the proposed amendment will prejudice them in any manner. The 1st defendant in his replying affidavit concedes that the Court has a discretion to allow amendments but adds, correctly, that such discretion must be exercised judicially. Looking at the proposed amendments, they seek to enjoin the Chief Land Registrar as a party and also particularize the allegations of fraud against the 1st defendant. In my view, those amendments are necessary for purposes of determining the real question in dispute between the parties. I therefore find merit in the plaintiff's Notice of Motion dated 3RD JULY 2017 which I hereby allow in the following terms:

- 1. The draft amended plaint annexed to the application be treated as the amended plaint and the same be deemed as having been duly filed and served upon the 1st defendant.***
- 2. The 1st defendant is at liberty to amend his defence within 14 days of this ruling.***
- 3. The 2nd and 3rd defendant be served with the amended plaint within 14 days from the date of this ruling and to file their defences within 14 days of service upon them of the amended plaint.***
- 4. The plaintiffs will meet the 1st defendant's costs occasioned by this application.***

Finally, it is clear from the record that by a ruling dated 21ST APRIL 2017, this Court found **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA** who are defendants in **GICHUGU SENIOR RESIDENT MAGISTRATE'S COURT CIVIL CASE No. 5 of 2016** and which has since been consolidated with this suit, to have been in contempt of orders issued on 5th and 19th April 2016 and directed that they appear before this Court on 28th APRIL 2017 for further orders. That appears not to have happened. There is however a notice of appeal filed herein on 21ST APRIL 2017 against that ruling although there is no evidence if any appeal was subsequently filed and with what results. It is clear however that there is no order from the Superior Court staying the execution of this Court's orders and in the circumstances, there is no reason why the said contemnors should not appear before this Court for appropriate orders.

I accordingly direct that **DOROTHY NJOKI NJOKA, EMILY WANJA NJOKA** and **PHILIS WANGUI NJOKA** be served by the process server of this Court to appear here on 1ST FEBRUARY 2018 for appropriate orders.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

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

Mr. Mwangi Ndegwa for Plaintiffs present

Ms Kiragu for Ms Makworo for Defendants present

Defendants present.

B.N. OLAO

JUDGE

26TH JANUARY, 2018

MR. MWANGI NDEGWA: We had obtained orders of stay on the contempt.

COURT: I have not seen any such orders in the file.

MR. MWANGI NDEGWA: It was an oversight on our part. It was an order by consent.

COURT: In the circumstances, let that order be filed before 1st February 2018 when this matter will be mentioned for further orders.

B.N. OLAO

JUDGE

26TH JANUARY, 2018