



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT ELDORET

ELC NO. 803 OF 2012

JOHN SERGON.....PLAINTIFF

VERSUS

RICHARD NAGGGY AENGWO.....1ST DEFENDANT

ESTHER CHEBII KIPROP.....2ND DEFENDANT

RULING

This ruling is in respect of an application dated 7th July 2017 brought by way of notice of motion by the plaintiff/applicant for orders that the plaintiff be allowed to assign this suit to Daniel Kiprono who is a purchaser of the suit land.

Counsel argued the application and submitted that the plaintiff is the registered owner of the suit land but seeks to assign the suit to one Daniel Kiprono who is a purchaser. He stated that the said Daniel Kiprono has a Power of Attorney.

Mr. Momanyi further submitted that the defendants will not be prejudiced in any way as their defence will remain intact. He prayed that the application be allowed as presented.

DEFENDANT / RESPONDENTS' WRITTEN SUBMISSIONS

Counsel for the defendant/respondents opposed the application by filing grounds of opposition dated 18 /12/17 and a replying affidavit sworn on 2/2/2018 which he relied on.

Counsel submitted that the application is a gross abuse of court process and that the plaintiff did not have locus / capacity to bring this suit from the onset and the suit if heard could be struck out. It was his submission that the substitution is an attempt to cure a fatal defect as the plaintiff's proprietary rights were extinguished after sale and execution of transfer forms to the proposed plaintiff. He also stated that at the time the plaintiff filed this suit his rights had been extinguished and that the rightful party ought to file a fresh suit and /or the instant suit be withdrawn.

Mr Nyikwei submitted that the plaintiff does not dispute the annexures and the bundle of documents which confirm that transfer forms were executed pursuant to an agreement of sale of the suit land to the proposed plaintiff. Counsel urged the court to peruse the facts of the case and documents of sale in this suit before a new plaintiff can be assigned / substituted.

It was Counsel's submission that the application is an afterthought and the purported assignment has been brought in bad faith as a party bringing a suit and having executed verifying affidavits ought to have capacity Secondly, such party has a duty to reveal material facts regarding the case. It was Counsel's submission that the plaintiff did not disclose the fact that the suit land had been bought by the purchaser and further reasons why he filed suit despite the new changes.

Mr. Nyekwei submitted that substitution of parties to a suit ought to be done within the limits of the law and for a reasonable cause. In this case, the plaintiff has not come to court with clean hands. He urged the court to allow the suit to proceed as it is and determine facts of the suit as presented by parties.

Finally Counsel submitted that introducing the said plaintiff would alter the substratum of the suit including the defence case which will cause prejudice to the defendants. Further that no reason has been given for executing a power of attorney to assign his capacity to the proposed plaintiff. Powers of attorney are only executed when parties are strained and cannot appear before court, are not within the jurisdiction of the court or when such parties are incapacitated and are unable to bring suit .Counsel prayed that the application be dismissed with costs to the defendants.

Analysis and determination

This is an application brought under order 24 Rule 8 of the Civil Procedure Rules seeking for assignment of the suit to one Daniel Kiprono a purchaser. The issue for determination is whether the plaintiff has satisfied the court that he has a good reason to assign the suit to the proposed plaintiff.

It is evident from the pleadings and the documents on record that at the time of filing this suit the plaintiff had already sold the suit land to one Daniel Kiprono. In the plaint the plaintiff describes himself as the registered owner of the suit land. There is nowhere in the body of the plaint that states that the proposed plaintiff had bought the suit land. The plaintiff also prays for declaratory orders that he is entitled to exclusive enjoyment and use of the land reference No. Kabarnet Municipality/ 228 and a removal of a caution on the suit land.

Plaintiff also filed an application for injunction which was issued against the defendants on 8th February 2012. The defendants filed statement of defence together with witness statements whereby they procured some documents from the said Daniel Kiprono.

Counsel for the plaintiff has made this application and relied on Order 24 rule 8 of the Civil Procedure Rules. Order 24 deals with procedures in case of death or bankruptcy, however rule 8 deals with general procedure of assignment before final order in the suit. It provides thus:

8(1) In other cases of an assignment, creation, or devolution of any interest during the pendency of a suit, the suit may, by leave of the court, be continued by or against the person to or upon whom such interest has come or devolved.

The court can grant leave for assignment of a suit if it is satisfied that the order may not cause any prejudice to the parties and that the said assignment may not change the substratum of the case.

In the current case the plaintiff has donated a general power of Attorney to one Daniel Kiprono to deal with the suit land. He has not stated why he is assigning the suit to him. The fact that he is a purchaser is not enough to explain why the plaintiff wants to assign the suit to him. The plaintiff is still the registered owner of the suit land and the bringing in of one Daniel Kiprono might cause confusion in the case as the defendants may be thrown off balance on how to proceed with the case.

Ordinarily courts would allow applications for assignment of suits but only on good reasons. Parties must explain their difficulty in proceeding with the case and why they want to assign the suits. The power of attorney gives a person powers to do certain activities that are authorized by the document. This is an old matter and bringing new parties will delay the case further. The plaintiff can proceed with the case and later transfer the interest in the suit property as per their agreement of purchase.

From the above I find that the application lacks merit and is therefore dismissed with costs to the defendants. This matter being an old case should be fixed for hearing on priority basis.

Dated and delivered at Eldoret this 21st day of March, 2018.

M.A ODENY

JUDGE

Ruling read in open court in the presence of Mr. Momanyi for Plaintiff and in the absence of Mr. Kipnyekwei for defendants.

Mr. Koech : Court Assistant.