



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO.149 OF 2012

JEMIMAH WARUGURU MBUTHIA (suing in her capacity as administrator Ad litem of the
Estate of MBUTHIA MUKURU.....**PLAINTIFF**

VERSUS

JAMES GESACHO.....**1ST DEFENDANT**

ROSEMARY WANJIRU.....**2ND DEFENDANT**

KALENJIN ENTERPRISES.....**3RD DEFENDANT**

LAND REGISTRAR, NAKURU.....**4TH DEFENDANT**

RULING

(Application for amendment of plaint; application seeking to add another party as defendant; suit having commenced for hearing; emerging that one of the proprietors of one of the parcels of land in dispute is not a party to the suit; application seeking to add that person to this suit; application allowed).

1. The application before me is that dated 7 February 2018 filed by the plaintiff pursuant inter alia to the provisions of Order 1 Rule 8 and 10(2) of the Civil Procedure Rules. In the application, the plaintiff seeks leave to amend the plaint.

2. The background to this application is that this suit was commenced through a plaint which was filed on 5 September 2007. In the plaint, the plaintiffs pleaded that the 1st plaintiff is registered as proprietor of the land parcels Nakuru Municipality Block 29/660 and Nakuru Municipality Block 29/1125 measuring approximately 1/2 acre each. On the other hand, the 1st defendant was pleaded to be the registered owner of the land parcel Nakuru Municipality Block 29/660 and the 2nd defendant the registered proprietor of the land parcel Nakuru Municipality Block 29/1182. The 1st plaintiff pleaded that he was wrongly registered as proprietor of the land parcels No. 660 and 1125, instead of the land parcels No. 661 and 1182 due to a mistake, error and/or fraud of the 1st - 4th defendants. It was further pleaded that the 2nd plaintiff is the one who was rightfully entitled to be registered as proprietor of the land parcels No. 660 and 1125. The suit was contested and hearing commenced on 30 September 2013 before my predecessor, Honourable Justice Lucy Waithaka. Upon her transfer to another court station, I continued with the suit and took further evidence of the plaintiffs on 22 January 2018. It emerged at the hearing, that the 2nd defendant claimed to have sold the land parcel No. 1182 to one Job Oyunge, and it was my view that before we proceed any further, the current registration status of the land be ascertained. I directed the Land Registrar to avail a copy of the current search of the property, which was done and it showed that the current proprietor is one Job Oyunge. It is after this realization that the plaintiffs moved to file this application for amendment.

3. I have seen from the draft amended plaint that the core of the amendment is to introduce Mr. Job Oyunge as a party to these proceedings and to further plead that his registration of the land parcel No. 1182 was done fraudulently and needs to be cancelled. I did order all parties to be served with the application including Mr. Job Oyunge and none of the parties opposed the application.

4. I have considered the motion. In my view the provisions of Order 1 Rule 10 apply. The same is drawn as follows :-

10. Substitution and addition of parties [Order 1, rule 10.]

(1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through

a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(3) No person shall be added as a plaintiff suing without a next friend or as the next friend of a plaintiff under any disability without his consent in writing thereto.

(4) Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

5. From the above, it will be seen that pursuant to Order 1 Rule 10 (2) the court, at any stage of the proceedings, can order that the name of a person who ought to be joined as plaintiff or defendant, be added, if the presence of such person is necessary for the court to effectually and completely adjudicate on all issues in the suit. It will further be seen from Rule 10(4) that where a defendant is added, the plaint needs to be amended.

6. That is precisely what the applicant wants to do in this instance. They wish to add Job Oyunge as a defendant, and as a consequence, the plaint needs to be amended. I have seen for myself that Job Oyunge is now the current registered proprietor of the parcel No. 1182 which is a subject of litigation in these proceedings. I am therefore of the view that his presence in the suit is necessary for this court to fully and effectually adjudicate on the substance of the litigation. Although the hearing of the suit has commenced, I do note that an amendment to add a party can be effected at any time of the proceedings. This position is indeed buttressed by the provisions of Order 8 Rule 3(1) which provides as follows :-

Order 8 Rule 3 (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.

7. The fact that the suit has commenced does not therefore bar a party from amending the plaint even if it means adding another party to the proceedings. I will of course need to give some directions, so that the added party is not prejudiced, for he did not participate in the earlier proceedings. But that is a bridge that will be crossed at the opportune time.

8. For now, I do allow this application and do allow the proposed joinder of Job Oyunge as a defendant to this suit and further do allow the amendment of the plaint as proposed by the plaintiffs. I direct that the amended plaint be filed and served within 14 days.

9. I make no orders as to costs.

10. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 20th day of June 2018.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU

In presence of: -

Ms. Kaholo holding brief for Mr. Ngure for the plaintiff/applicant.

Ms. Ogange holding brief for Mr. Nyamwange for the 2nd defendant.

Other parties: Absent.

Court Assistant: Nelima Janepher.

JUSTICE MUNYAO SILA

ENVIRONMENT & LAND COURT AT NAKURU