



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 1229 OF 2016**

**(FORMERLY HCC NO. 47 OF 2003)**

**GEORGE ONCHIRI MBOGA.....PLAINTIFF**

**VERSUS**

**SABINA KEMUNTO ONGENI.....1<sup>ST</sup> DEFENDANT**

**THOMAS ONKWARE ONGENI .....2<sup>ND</sup> DEFENDANT**

**ALEX NYAMWEYA OSIEMBO.....3<sup>RD</sup> DEFENDANT**

**R U L I N G**

1. Before me for determination is the plaintiff/applicant's application by way of Notice of Motion dated 1<sup>st</sup> September 2017. The application is expressed to be brought under sections 3 and 3A of the Civil Procedure Act and Order 1 Rules 3 and 25, and Order 8 Rules 3, 5, 7 and 8 of the Civil Procedure Rules. The application prays for orders:-

- 1) That the plaint dated 7<sup>th</sup> March, 2003 and filed on even date be amended.**
- 2) That the plaintiff be allowed to join other defendants.**
- 3) That summons do issue to the new parties to the case.**
- 4) That the draft defence to be deemed to be duly filed upon payment of requisite charges.**
- 5) That the costs of the application be provided for.**

2. The application is grounded on the grounds set out on the face of the application and on the affidavit sworn in support thereof by the plaintiff. The grounds proffered in support of the application are as follows:-

- (a) The suit land has changed hands though the case was in court.**
- (b) The land registrar Nyamira transferred the land while cautious were in place.**
- (c) The 1<sup>st</sup> and 2<sup>nd</sup> defendants are dead.**

3. In opposition to the plaintiff's application the 3<sup>rd</sup> defendant's advocate, Bernard N. Ogari who has the conduct of the suit on behalf of the 3<sup>rd</sup> defendant swore a replying affidavit on 20<sup>th</sup> January 2018. The advocate deponed that the plaintiff on 9<sup>th</sup> May 2017 abandoned the suit as against the 1<sup>st</sup> and 2<sup>nd</sup> defendants which nonetheless had abated following the deaths of the 1<sup>st</sup> and 2<sup>nd</sup> defendants as no appropriate application for substitution had been made within the prescribed period of 12 months. He further deponed that the 2<sup>nd</sup> defendant passed away in September 2012 and the 1<sup>st</sup> defendant sometime in 2013. The 3<sup>rd</sup> defendant avers that the intended new parties Peter Ongene and Ebisiba Nyaboke Onkware are son and wife to the 1<sup>st</sup> and the 2<sup>nd</sup> defendant respectively. The 3<sup>rd</sup> defendant argues the plaintiff by the application is seeking to substitute the 1<sup>st</sup> and 2<sup>nd</sup> defendants unprocedurally which is not legally tenable. The 3<sup>rd</sup> defendant further avers that he no longer has any interest in land parcel **Mwongori Settlement Scheme/472** as he sold and transferred the same to a third party.

4. The parties argued the application by way of written submissions. The plaintiff/applicant's submissions dated 22<sup>nd</sup> March 2018 were filed

in court on 28<sup>th</sup> March 2018 while the 3<sup>rd</sup> defendant's submissions were filed on 9<sup>th</sup> April 2018. I have considered the submissions and perused the court record and the pleadings together with the intended amended plaint. The plaintiff's suit was commenced by way of plaint dated 7<sup>th</sup> March 2003 and filed on the same date. The plaintiff's claim was predicated on an agreement for sale dated 3<sup>rd</sup> December 1991 entered into between 1<sup>st</sup> defendant (Sabina Kemunto Ongeni) as the seller and both the plaintiff and the 2<sup>nd</sup> defendant (Thomas Onkware Ongeni) as the joint buyers of land parcel **Mwongori/93** (then registered in the name of the 1<sup>st</sup> defendant). The plaintiff concedes that the said agreement never had the sanction of the Land Control Board with the result that the same became null and void after the expiry of 6 months by operation of the law.

5. The plaintiff contends that the subdivision by the 1<sup>st</sup> defendant of land parcel **Mwongori Settlement Scheme/93** to create parcels **470, 471** and **472** was fraudulent since he and the 2<sup>nd</sup> defendant had already purchased the whole of land parcel **93** as per the agreement dated 3<sup>rd</sup> December 1991 and he prayed for the cancellation of the subdivision titles and for him to be granted his rightful portion of land parcel **Mwongori/93**.

6. It appears that even as the plaintiff was entering into a sale agreement to purchase land parcel **Mwongori Settlement Scheme/93** the 1<sup>st</sup> defendant (Sabina Kemunto Ongeni) was fighting a separate battle to be declared the rightful owner of land parcel **Mwongori Settlement Scheme/93** vide Kisii HCCC No. 206 of 1988 where she had sued one Rusalia Nyamoita Ongaki seeking the latter's eviction from the said land. Hon. Justice T. Mbaluto on 1<sup>st</sup> February 2002 decreed the 1<sup>st</sup> defendant as the owner of the suit land and the Court of Appeal vide a judgment delivered at Kisumu in CACA No. 13 of 2003 on 10<sup>th</sup> March 2005 upheld the judgment by Mbaluto, J.

7. The suit was part heard before Makhandia, J. (as he then was) in 2011 and was mentioned before me for directions on 13<sup>th</sup> April 2016 when I directed that the hearing proceeds from where the previous judge had reached. On 13<sup>th</sup> October 2016 when the matter came for mention for directions, the parties affirmed that the 1<sup>st</sup> and 2<sup>nd</sup> defendants had died. On 9<sup>th</sup> March 2017 the plaintiff informed the court that he wished to abandon and discontinue the suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The suit against the 1<sup>st</sup> and 2<sup>nd</sup> defendants was ordered discontinued and the costs were awarded to the 1<sup>st</sup> and 2<sup>nd</sup> defendants. The plaintiff stated he wished to proceed with the suit against the 3<sup>rd</sup> defendant and on 12<sup>th</sup> September 2017 filed the instant application the subject of this ruling.

8. I have in outline set out the background and history of this matter to contextualize the circumstances under which the instant application is being made.

9. The plaintiff's application essentially is one seeking the leave of the court to amend the plaint. Generally the court will freely grant leave for a party to amend his/her pleadings particularly where the hearing of the suit has not commenced. The court will however refuse to grant leave to amend if injustice will be occasioned to the opposite party. The Court of Appeal for East Africa in the case of **Eastern Bakery -vs- Castelino [1958] EA 461** as per O'Connor P. laid the principles that should guide a court when considering an application for amendment. The learned President of the court stated thus:-

**“It will be sufficient, for purposes of the present case, to say 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. Tildesley -vs- Harper (1) [1878], 10 ch. D. 393; Clarapede -vs- Commercial Union Association (2) [1883], 32 W.R.262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding -vs- Murdoch (3) [1875], 1 ch. C. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of an amendment, the subject matter of the suit: Mashwa Mya -vs- Maung Po Hnaung (4) [1921], 48 I.A. 214 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of substantially different character: Raleigh -vs- Geschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g by depriving him of a defence of limitation accrued since the issue of the writ; Weldon -vs- Neal (6) [1887], 19 Q.B.D 394; Hilton -vs- Sutton Steam Laundry (7), [1946] K. B 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitale P. 1313.”**

10. What emerges from the foregoing consideration of the principles in regard to amendment of pleadings is that the court should be liberal in granting leave to amend a pleading. The court however should refuse to grant leave for amendment if it is of the opinion that the amendment would cause injustice and/or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice to the parties before the court. The amendment should also be necessary for the purposes of bringing out the real issues and/or questions in controversy between the parties for the determination of the court.

11. The amendment sought by plaintiff as per the draft amended plaint annexed seeks to enjoin other parties who were not parties when the suit was instituted. Notably by the amended plaint the plaintiff seeks the enjoinder of 1A Nyangaresi Ongeni 2A. Peter Ongeni who are the children of the 1<sup>st</sup> defendant, Sabina Kemunto Ongeni (deceased). In the proposed paragraph 11A of the draft plaint it is pleaded:-

**11A. The 1<sup>st</sup> and 2<sup>nd</sup> defendants are using the land of Sabina Kemunto Ongeni who is their late mother.**

The plaintiff also wishes to enjoin one Ebisiba Nyaboke Onkware wife to the 2<sup>nd</sup> defendant as the 4<sup>th</sup> defendant. Paragraph 12A of the draft plaint is in the following terms:-

**12A. The 4<sup>th</sup> defendant is staying in the land Thomas Onkware Ongeni was allocated and she is the wife of the late Thomas Onkware Ongeni.**

12. The net effect of the enjoinder of the 1<sup>st</sup> defendant's children and the 2<sup>nd</sup> defendant's wife as parties to the suit is to substitute both the

1<sup>st</sup> and 2<sup>nd</sup> defendants who are now deceased without following due process. The plaintiff wishes that they take the place of the deceased defendants, yet they are not the legal representatives of the deceased defendants and have not been substituted in accordance with the law. Paragraphs 7A, 9A and 10A and 13A which form the substratum of the plaintiff's claim constitute of acts and/or actions which were done and/or are attributable to the 1<sup>st</sup> defendant (now deceased). The suit against the 1<sup>st</sup> defendant having been abandoned and in any event there having been no substitution of the 1<sup>st</sup> defendant, the plaintiff's suit has no legs to stand on and in my view is unsustainable against the 3<sup>rd</sup> defendant who was not privy to any transaction the plaintiff may have had with the deceased 1<sup>st</sup> defendant.

13. The fact that the plaintiff seeks to substitute the 1<sup>st</sup> and 2<sup>nd</sup> defendant unprocedurally ostensibly through an application for joinder and amendment of the pleadings, it is my view that the instant application constitutes an abuse of the court process. The Notice of Motion dated 1<sup>st</sup> September 2017 lacks any merit and the same is hereby dismissed with costs to the 3<sup>rd</sup> defendant.

**RULING DATED, SIGNED and DELIVERED at KISII this 13<sup>TH</sup> DAY of JULY 2018.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Nyawencha for the plaintiff

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Mr. Kimaiyo for Ogari for the 3<sup>rd</sup> defendants

Ruth court assistant

**J. M. MUTUNGI**

**JUDGE**