



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 226 OF 2017

WIBESO INVESTMENT LIMITED.....1ST PLAINTIFF

NOVICOME LIMITED.....2ND PLAINTIFF

VERSUS

TAMARIND MEADOWS LIMITED1ST DEFENDANT

CHIEF LAND REGISTRAR2ND DEFENDANT

DIRECTOR, DIRECTORATE

OF CRIMINAL INVESTIGATIONS.....3RD DEFENDANT

DIVISIONAL CRIMINAL INVESTIGATION

OFFICER CENTRAL.....4TH DEFENDANT

DANIEL NJUKI5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

1. This Ruling is in respect to two Applications: The 1st Defendant's Application dated 17th March, 2018 and the 2nd-6th Defendants' Application dated 12th February, 2018.

2. In the Notice of Motion dated 17th March, 2018, the 1st Defendant is seeking for the following orders:

a. That this Honourable Court be pleased to grant the 1st Defendant/Applicant leave to amend the 3rd Party Notice herein issued against the 2nd and 6th Defendants.

b. That if prayer No. 3 above is granted, the proposed amended 3rd Party Notice herein be deemed to have been filed and served upon the 2nd and 6th Defendants.

c. That this Honourable Court be pleased to order that the 1st Defendant's witnesses be recalled for further examination in chief and further cross-examination.

d. That the costs be in the cause.

3. The Application is premised on the grounds that the 3rd Party Notice on record does not reflect the fact that the indemnity sought from the 2nd and 6th Defendants is worth Kshs. 2.5 billion; that the 3rd Party Notice issued against the 2nd and 6th Defendants is to include complete particulars of the quantum claimed and that courts are to freely allow the amendments of pleadings no matter how careless the first mistake was.

4. In his Affidavit in support of the Application, the 1st Defendant's Director deponed that since the suit was adjourned, the 1st Defendant has

obtained advise of the senior counsel on the said proceedings and has been advised to seek the prayers contained in the intended amended 3rd Party Claim; that the mixing of the Land Law concepts with the criminal law concepts the way the 2nd to 5th Defendants have done is not allowed by law and that the limited re-opening of the trial should be allowed to accommodate the needs of all the Defendants.

5. In response, the 2nd Defendant deponed that the Application by the 1st Defendant is an abuse of the court process as it does not demonstrate any exceptional circumstances having arisen; that the 1st Defendant was informed way back in March, 2011 that their purported grant was invalid and that the court does not have authority to prejudice other parties to the suit by re-opening the case in order to allow the 1st Defendant to fill in evidential gaps.

6. The 2nd Defendant deponed that seeking and getting advice of counsel after closing a case is not a ground for re-opening a trial and that the Application is an afterthought; an attempt by the 1st Defendant to play fact and loose with its opponents; made in bad faith and an attempt by the 1st Defendant to approbate and reprobate.

7. It is the 2nd Defendant's case that the 1st Defendant is not entitled to benefit from its own unlawful and illegal activities and that the Application should be dismissed.

8. The 5th Defendant deponed that it is not true that the 2nd to 6th Defendants are mixing Land Law concepts with criminal law concepts; that the evidence in both branches of the law are regulated by the Evidence Act; that the 3rd, 4th and 5th Defendants have no relationship whatsoever with the Plaintiffs and that a forged document remains the same in civil and criminal law.

9. The 5th Defendant finally deponed that if the 1st Defendant had any genuine claim against any party, he should have made such a claim before closing its case and that the 2nd-6th Defendants should be allowed to proceed with their case without any interruption.

10. The Plaintiffs' Director responded to the 1st Defendant's Application as follows: that the 1st Defendant has admitted being on the suit land without the permission of the Plaintiffs; that the 1st Defendant's Application is intended to delay the prosecution of the case and is an abuse of the court process; that the 1st Defendant was informed in the year 2011 that its title document was not valid and that the delay in seeking indemnity is inordinate and unjustifiable.

11. The Plaintiffs' Director deponed that while filing Third Party Notices and Notices to Co-Defendants, the 1st Defendant knew that it was claiming an indemnity and that the court granted the 1st Defendant ample opportunity to defend rival claims. According to the Plaintiff's Director, allowing the 1st Defendant to re-open its case will be prejudicial to the Plaintiffs and will occasion the Plaintiffs great injustice and that the 2nd-6th Defendants' case cannot be stopped in the middle with a view of re-opening the 1st Defendant's case.

12. In the 2nd-6th Defendants' Application dated 12th February, 2018, the Defendants are seeking for the following orders:

a. That the Honourable Court be pleased to and hereby review its Ruling and order made on 22nd January, 2018 disallowing the production of Witness Statements into evidence and calling of witnesses whose statements were disallowed and do and hereby order that three witnesses that is to say, Hon. Sammy Silas Komen Mwaita, Caleb T. Muhuyi, and Francis Mbogori Mwirigi do appear to produce their statements and testify on oath and be cross-examined by the other parties to the suit.

b. That in the interests of justice and fairness, the Honourable Court be pleased to and hereby issues witness summons to Hon. Sammy Silas Komen Mwaita, Caleb T. Muhuyi, and Francis Mbogori Mwirigi and also to Edwin Wafula Munoko and Joseph Wang'ombe Kamuyu to attend, testify and produce evidence on the hearing date of this matter that is to say 19th March, 2018 and on such further or subsequent dates until their presence and attendance is dispensed with by the Honourable Court.

c. That the Honourable Court be pleased to issue any other orders it deems fit and just to grant to attain the ends of justice.

d. That the costs of this Application be in the cause.

13. According to the Affidavit of the 5th Defendant, the Plaintiffs' Directors lodged a complaint at Central CID Division alleging that the Plaintiffs' title had been used to fraudulently obtain a loan of Kshs. 170 million from KCB; that he was of the view that he would be allowed to produce the original Witness Statements which he recorded from individuals and that his findings are based on those statements.

14. According to the 5th Defendant, the court should review its Ruling by allowing the 2nd to 6th Defendants the right to adduce and produce sufficient evidence that is likely to assist the court to decide the case on merit and that if the stated witnesses are not called, the 2nd to 6th Defendants stand to suffer grave prejudice.

15. The Application by the 2nd to 6th Defendants was opposed by the 1st Defendant on one ground: that the mixing of the Land Law concepts with the Criminal law concepts the way the 2nd to 5th Defendants have done is not allowed by law.

16. The 5th Defendant filed a Further Affidavit in which he deponed that the Application is a civil one; that it does not in any manner seek any criminal relief and that other than being an investigating officer, he is also a party in this suit. According to the 5th Defendant, it would be unfair, unjust and prejudicial to the 2nd to 6th Defendants if the claim against them succeeds merely because they did not call witnesses to produce statements that are on record.

Submissions:

17. In his submissions, the 1st Defendant's counsel submitted that the court lacks jurisdiction to entertain the 2nd -6th Defendants' Application; that the order to be reviewed has not been annexed on the Application; that the Application has confused the civil and criminal jurisdiction and that the Applicants are treating this case as though it were a criminal matter in which investigating officers are to give evidence in support of their case.

18. The 1st Defendant's counsel submitted that the 2nd-6th Defendants' recourse is to file an Appeal in the Court of Appeal against the Ruling of 22nd January, 2018 and that if the hearing is to be re-opened, then the extent of re-opening must either be agreed upon by the parties or be determined by the court. The 1st Defendant's counsel submitted that the 2nd-6th Defendants' Application is analogous to that of leave to amend pleadings and the same cannot be granted if injustice will be caused to the other side.

19. In respect to the 1st Defendant's Application, the 1st Defendant's counsel submitted that Section 146 of the Evidence Act allows the re-opening of a trial to allow the calling of a witness for further evidence in chief and cross-examination.

20. Counsel submitted that according to the provisions of Article 48, 50 and 159(2) of the Constitution, the court has jurisdiction to allow the partial re-opening of the trial sought in appropriate cases. Counsel relied on several authorities which I have considered.

21. In his submissions, counsel for the 2nd -6th Defendants submitted that the issue before the court is the validity of the grants held by the Plaintiffs and the 1st Defendant; that the introduction of the amended 3rd Party Notice is an afterthought and that in any event, no claim for indemnity for an invalid title document can issue.

22. The 2nd-6th Defendant's counsel submitted that the 1st Defendant intends to submit the other Defendants to an unfair trial and that in any event, evidence supporting the claim of Kshs. 2.5 billion should have been placed before the court to assist the court in exercising its discretion.

23. The Plaintiffs' advocate submitted that the justice system does not allow the 1st Defendant to play hot and cold by claiming validity of title on one hand and indemnity on the other hand; that the trial is at a very advanced stage and that re-opening the case will cause the Plaintiffs grave injustice.

Analysis and findings:

24. A brief background of this matter will suffice. In their Plaint dated 15th May, 2017, the Plaintiffs alleged that the 1st Plaintiff is the registered proprietor of a parcel of land grant number I.R. 72481, L.R. No. 18469 and which was registered in its name on 13th March, 1997. However, in the year 2009, the Plaintiffs became aware that the 1st Defendant had commenced construction of houses on the same land without the 1st Plaintiff's permission. The Plaintiffs have sought for several prayers in the Plaint including a declaration that the grant for L.R. No. 18469 issued to the 1st Plaintiff is the only valid and genuine title and that the title that the 1st Defendant is holding is fraudulent, invalid, non-existent, null and void.

25. In the Defence, the 1st Defendant averred that it is holding a grant in respect to L.R. No. 18469 lawfully having purchased the same from Volta Insurance Consultancy Limited for Kshs. 51 million. The 2nd-6th Defendants filed a Defence in which they admitted the validity of the Plaintiffs' title. In the Defence, the 2nd-6th Defendants averred that the grant that was registered in favour of the 1st Defendant on 18th June, 2008 was not genuine.

26. The record shows that on 29th September, 2017, the 1st Defendant filed a "Notice of Claim against Co-Defendants" which was addressed to the 2nd and 6th Defendants. In the said Notice, the 1st Defendant stated as follows:

"The 1st Defendant herein claims against you indemnity and/or contributory for any loss that may be suffered by it due to the negligent acts and omissions on your part or your agent."

27. Other than the said Notice of Indemnity, the 1st Defendant also filed copies of the Witness Statements that they intended to rely on, together with a bundle of documents.

28. Having filed a "Notice of Claim against Co-Defendants" on 29th September, 2017 together with Witness Statements and documents, the 1st Defendant filed an Application dated 29th September, 2017 and filed on the same day. In the said Application, the 1st Defendant prayed for leave to issue a Third Party Notice upon Volta Insurance Limited, and for the said Third Party to be directed to file its Defence within fourteen (14) days.

29. In the Application dated 29th September, 2017, the 1st Defendant averred that it will be seeking indemnity and/or contribution from the Third Party for any liability that may be found accruing from the 1st Defendant to the Plaintiffs. When the matter came up for hearing on 4th October, 2017, the court, despite objections from the Plaintiffs and the 2nd-6th Defendants' advocates allowed the 1st Defendant to serve the Third Party Notice on the Third Party by way of advertisement. The court further directed that the said Third Party should file its Defence within fourteen (14) days from the date of service.

30. It is not clear to this court if the Third Party was ever served with the Third Party Notice. However, the trial of this matter began on 8th

November, 2017 when PW1 and PW2 testified. The Plaintiffs closed their case on that day. The 1st Defendant's case began on 20th November, 2017. Although the 1st Defendant's advocate closed the 1st Defendant's case on 20th November 2017 after calling one witness, he applied for the re-opening of the case when the matter came up for the hearing of the 2nd-6th Defendants' case on 22nd January, 2018. The Application by the 1st Defendant's advocate for re-opening of its case was allowed by the court on the said date and DW2 was allowed to testify. On the same day, the 1st Defendant's advocate closed its case and the court took the evidence of the witnesses for the 2nd-6th Defendants.

31. Indeed, the witnesses of the 2nd-6th Defendants (DW3 and DW4) testified on 22nd January, 2018 before the matter was adjourned to 19th March, 2018. The 1st Defendant now wants to amend the "Notice of Claim against Co-Defendants" and include "complete particulars of the elements of the indemnity claimed and the quantum of the said indemnity which is over Kshs. 2.5 billion." Concomitant with the Application is the request by the 1st Defendant for leave to re-open its case with a view of proving the contents of the amended Notice to Co-Defendants.

32. The law relating to amendments was stated in the case of *J.C. Patel vs. B.D. Joshi (1952) 19 EACA 12* as follows:

"The rule of conduct of the court in such a case as this is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side."

33. The facts that the court ought to consider while considering an Application for amendment was stated in the English case of *Brown & Others vs. Innovatorone PLC & Others (2011) EWHC 322 (Comm)* as follows:

i. The history as regards to amendment and the explanation why it is being made late,

ii. The prejudice which would be caused to the Applicant if the amendment is refused.

iii. The prejudice which would be caused to the resisting party if amendment is allowed.

iv. Whether the text of the amendment is satisfactory in terms of clarity and particularity.

34. While applying the above principles, the court in the case of *Samuel Kiti Lewa vs. Housing Finance Co. of Kenya Limited & Anor. (2015) eKLR* held as follows:

"The Plaintiff when he testified in chief had an opportunity to submit evidence in support of his pleading... He did not take up that opportunity when he testified... The Plaintiff is seeking to re-open his case... In exercising that discretion the court should ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard, re-opening of a case should not be allowed where it is intended to fill gaps in evidence."

35. The 1st Defendant in this matter filed a Notice of Indemnity against the Co-Defendants. When its witnesses testified, they were well aware that they had a claim against the other Co-Defendants. Having testified and closed their case, they can seek to re-open their case with a view of filling gaps in their evidence. Indeed, the claim by the 1st Defendant that it is seeking for the amendments to its Notice of Indemnity because it has received a second opinion from another advocate is an admission that all it intends to do is to fill the gaps that were left when its two witnesses testified. That in my view is unacceptable.

36. Having testified while aware that it was seeking for indemnity against the 2nd-6th Defendants, the 1st Defendant cannot engage the court in another round of trial when it should have availed all the evidence that was needed to prove its claim. Indeed, if the Application by the 1st Defendant is allowed, the whole trial will have to begin *de novo*, thus defeating the constitutional requirement that justice should not be delayed. Beginning the trial *de novo*, and in the middle of the 2nd-6th Defendants' case will also prejudice the Plaintiffs' case because of the tedious process that a trial brings to parties and the costs involved.

37. Considering that the 1st Defendant was represented all along by an advocate and indeed filed a Notice of Claim against Co-Defendants and a Third Party Notice, I find that no good reasons have been given as to why the proposed amendments to the Notice of Claim against Co-Defendants should be allowed at this stage. The 1st Defendant's Application is therefore dismissed.

38. In regard to the 2nd-6th Defendant's Application dated 12th February, 2018, the court gave its reasons in the Ruling of 22nd January, 2018 why DW4 could not produce as exhibits the Witness Statements that he recorded while conducting investigations. The court also declined to have the makers of the statements that DW4 recorded appear in court and testify because the people who recorded those statements were not lined up by the 2nd-6th Defendants as their witnesses.

39. It is trite that an Application for review of an order of the court can only be allowed if the Applicant discovers new and important matter or evidence which, after the exercise of due diligence was not within his knowledge, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason.

40. I have perused the 1st and 5th Defendants' Affidavit and all I can see are the arguments that were raised in this court on 22nd January, 2018 on why they should be allowed to call the makers of the statements that were recorded by or before DW4 during his investigations. Having not shown that there is an error apparent on the face of the record, or that they have come across new and important matter or evidence which, after the exercise of due diligence was not within their knowledge, or any other sufficient reason, I decline to review or set

aside my orders of 22nd January, 2018.

41. For the reasons I have given above, I dismiss the Application by the 1st Defendant dated 17th March, 2018 and the 2nd-6th Defendants' Application dated 12th February, 2018. Both Applications are dismissed with no order as to costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 26TH DAY OF OCTOBER, 2018.

O.A. ANGOTE

JUDGE