



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MILIMANI

MILIMANI LAW COURTS

ELC NO.307 OF 2016

PLANET FOODS LIMITED & 3 OTHERS.....PLAINTIFFS

VERSUS

JAMES DAVID ABILLA.....1ST DEFENDANT

JAPHETH AWINO AGUMBI.....2ND DEFENDANT

AMENKHIENAN ONA PETER.....3RD DEFENDANT

BABATUNDE JOSEPH.....4TH DEFENDANT

MOSES KANIARU KAMAU.....5TH DEFENDANT

(All sued in both their personal capacities and also in their capacities

as the Trustees and representatives of

CHRIST THE REDEEMER'S MINISTRY.....6TH DEFENDANT

STEPEHN O.AMBANI.....7TH DEFENDANT

PETER WAMBUGU.....8TH DEFENDANT

JANE NJERI GICHARA.....9TH DEFENDANT

RULING

1. This is a Ruling in respect of a Notice of Motion dated 22nd June 2018 brought by the 1st, 2nd, 3rd, 4th and 5th Defendants/Applicants. The application seeks the following orders:-

a. Spent

b. That this Honourable Court be pleased to extend time for compliance with the order of honourable Justice Okong'o issued on 4th April 2016 by another 30 days or such time as this Honourable Court will deem fit.

c. That further and/or in the alternative and without prejudice to prayer(B) above , this Honourable Court be pleased to grant leave to the Defendant/Applicant join;

i. The Chief land Registrar as the 10th Defendant

ii. The Director of Surveys of Kenya as the 11th Defendant

iii. The Honourable Attorney General on behalf of the government of Kenya as the 12th Defendant.

d. That this Honourable Court be pleased to grant the Defendant/Applicants leave to amend its defence and to also include a counter-claim as per the annexed draft defence herein.

e. That this honourable Court be pleased to grant any other order that it may deem fit for the ends of justice.

f. That costs be in cause.

2. The applicants are all trustees and representatives of the 6th defendant which is the registered owner of LR No.209/20529/3 measuring 1.200 hectares. This property was a subdivision of LR No.209/20529 which is registered in the name of the 1st Plaintiff/Respondent. The suit herein was filed by the plaintiffs/Respondents who contend that LR No.209/20529 was illegally subdivided by a fake company with a name which is the same as that of the 1st respondent whose purported directors are the 8th and 9th defendants.

3. The hearing of the main suit had commenced. One witness had testified in favour of the Plaintiffs/Respondents case and a second witness had just started testifying but was stood down to enable him avail certain documents to the other parties. It is after this that the applicants filed the present application.

4. The applicants contend that it is necessary for the court to allow the three proposed defendants into the suit and allow the applicants to amend their defence to include a counter claim. The applicants argue that as officials and trustees of the 6th defendant, they spent a lot of money which runs into millions in purchasing the land which is now in contention. They contend that they purchased the land on behalf of the 6th defendant after carrying out due diligence from the offices of the 10th proposed defendant, necessary deed plans received from the office of Director of Survey including assessment and payment of stamp duty to the Government. The applicants therefore argue that as the purchase was done after assurance that all documents were genuine, the applicants are entitled to claim indemnity from among others the proposed defendants who may have been complicit in the whole transaction which led to the purchase of the property in issue.

5. The applicants contend that the present application has been necessitated by the kind of evidence adduced by some witnesses who had not recorded statements and the fact that though the respondents had been granted an order to enjoin any parties who were necessary into this suit, they never did so and that the existence of the order which was made on 4th April 2016, by Justice Okongo was not brought to their attention.

6. The 6th defendant has sworn an affidavit through *Adewunmi Oluwamayowa Babatunde Joseph* in which the 6th defendant has supported the applicants' application. The 6th defendant contends that it spent over Kshs.140,000,000/= in purchasing the suit property. The money was obtained through fundraising by its members and that the purchase was carried through due to assurance by the officers from lands Office and Director of Survey who assured the applicants that the documents held by the vendor were genuine.

7. The respondents have opposed the applicants' application based on grounds of opposition dated 18th July 2018 and filed in court on 20th July 2018 as well as a replying affidavit sworn by the respondent on 18th July 2018. The respondents contend that the applicants' application is frivolous, misconceived, bad in law and is an abuse of the process of the court; that the application to enjoin third parties has been made out of time; that the application is contrary to the provisions of *Order 1 Rule 15, Order 8 Rule 7 of the Civil Procedure Rules* and that the application has been brought late in the day when the respondents have partially given their evidence and finally that the application is meant to tailor the applicants' evidence to counter that of the respondents.

8. The respondents further argue that the order of 4th April 2016 was neither at the instance of the applicants nor was it directed at them and therefore they cannot seek to extend the time for its compliance. The respondent also contend that the applicants have not demonstrated that there are grounds for joinder of the proposed defendants or that the amendments sought are for purposes of raising the real issues in controversy. The respondents further argue that this court has already issued summons to the Chief Land Registrar and that an officer from the companies registry has already testified. They therefore argue that to allow them to come into the suit will be tantamount to suing a person who has already testified against himself.

9. The respondents also argue that to allow the applicants' application would force the court to start the hearing de novo and that it will lead the respondents to change the character of their claim and thus greatly prejudice the respondents' case.

10. I have carefully considered the applicants' application as well as the opposition to the same by the respondents. I have also considered the oral submissions given during the hearing of this application as well as the written submission which were filed by the applicants' counsel. In the written submissions by the applicants, the applicants' counsel seems to have abandoned the prayer for extension of time to comply with the order of 4th April 2016. This is so because the counsel has indicated that he would pursue the prayer for joinder of three new defendants. Therefore the only issues for determination in this application are firstly whether the three proposed defendants should be enjoined in this suit and secondly whether the applicants should be allowed to amend their defence to include a counter-claim.

11. On the issue of joinder of parties, the main consideration is whether the joinder of parties, will enable the court to effectually and completely adjudicate on the issues in controversy. In the instant case, the issue in contention is that a false company purported to sell land which did not belong to it. As a result of the activities of the said fake company, the 6th defendant through its officials purchased a portion of the property belonging to the 1st Respondent. The purchase was facilitated by the office of the Ministry of Lands where the Chief Land Registrar is the Key Person. There was also the office of the director of survey and other Key Government Institutions which were involved. Government Institutions are represented in any litigation by the Attorney General.

12. There is no doubt that the 6th defendant has spent over one hundred million in the purchase of the property in contention. There is a title which has been issued in favour of the 6th defendant. The applicants are apprehensive that if it turns out that they purchased the property in issue on behalf of the 6th defendant from a company which was not genuine, they will want to be indemnified and that issue of indemnity will not be adjudicated if the three proposed defendants are not brought on board. In the instant case, the issue of third party notice or notice

of claim against co – defendant would not have been an appropriate remedy. The applicants are contending that they were put in the situation in which they are by the assurance from the institutions under the Government and the two major players that is the proposed 10th and 11th defendants . It is therefore necessary that they be enjoined so that the claim by the applicants will be addressed at the same time.

13. Among the prayers the respondents are seeking is cancellation of the titles which were illegally issued. If it turn out that the titles in issue were illegally obtained as the respondents contend, it will be prudent that the Chief Land Registrar is enjoined so that he can implement the order once given. Besides this, the applicants may want to be indemnified if it is found that the Government officers acted negligently as a result of which the applicants lost money. Such indemnity if any cannot be addressed if the proposed defendants are not brought on board. The court will not pass an effective decree if the proposed defendants are not enjoined in these proceedings. I therefore find that joinder of the three proposed defendants is necessary.

14. On the issue of amendment of the defence to include a counter-claim, the law on amendment of pleadings is that amendments should be given freely at any stage as long as the amendments do not prejudice the other party. The applicants have given an explanation as to why the amendments were not made in good time. The amendments have been necessitated by the kind of evidence which has emerged. The evidence so far is from the Companies Registry and the police investigations which has given a glimpse of what happened. The applicants had not been given prior notice of what the investigations contained. The applicants cannot therefore be blamed for seeking to make amendments after hearing the evidence of the respondents.

15. A party is at liberty to raise a counter-claim. Allowing a counter-claim is one way of ensuring that there is no filing of multiple cases. There is only one witness who had testified in this case to conclusion. The second witness was stood down. This case will therefore not necessarily start de novo and even if the case were to start afresh, the process of amendment and service upon the proceedings have not gone far new defendants will not delay as to cause prejudice to the respondent. There will be no prejudice suffered by the respondent. I therefore find that the application for amendment is well merited. I allow the prayer for amendment.

16. In conclusion thereof, I allow the applicants' application in terms of prayer (c) and (d). The pleadings shall be amended within 14 days from the date hereof. Summons to enter appearance shall be served upon the new defendants only. The costs of this application shall be paid by the applicants to the respondents.

It is so ordered.

Dated, Signed and Delivered at *Nairobi* on this 27th day of **November 2018**.

E.O.OBAGA

JUDGE

In the presence of:-

Mr Muriuki for 1st to 5th defendants and for Mr Mwaura for 6th defendant

Mr Mugendi for Mr Kuria for 8th & 9th defendants

Court Clerk : Hilda

E.O.OBAGA

JUDGE