



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC CASE NO. 482 OF 2017

KIMANJA KAMAU

(Suing as personal representative of

Estate of Gideon Gitundu Kimere).....PLAINTIFF /APPLICANT

VS

FRANCIS MWANGI MWAURA.....1ST DEFENDANT/RESPONDENT

PAUL MBEKE WAITHAKA.....2ND DEFENDANT/RESPONDENT

RULING

1. This ruling relates to the Notice of Motion dated the 19/7/18 filed by the Plaintiff /Applicant under Order 1 rule 3, order 10 rule 4, Order 8 rule 3, 5, & 8 of Civil Procedure Rules and all other enabling provisions of the law seeking leave to amend the plaint set out in the draft annexed thereto. The amendments have been occasioned by the need to enjoin the 3rd to 5th Defendants. It is averred that the 3rd and 4th Defendants sold the suit land to the 1st and 2nd Defendants (Respondents) while the 5th Defendant, being the Land Registrar Muranga authorized the registration of the transfer of the disputed lands. It is the Plaintiff's view that this would effectively bring the Plaintiff's whole suit before the Honourable Court for effectual and effective determination of the issues in controversy. As regards the 3rd and 4th Defendants, the Plaintiff argues that there are reliefs that he will be seeking against them. Finally that amendments will not prejudice the Defendants in any way

2. In opposing the application the 1st and 2nd Defendants filed a preliminary objection that the suit is resjudicata it having been determined in Succession cause No 1895 of 1993 and as such this Court lacks discretion to interfere with the judgment of the succession Court.

3. Parties elected to file legal authorities and argued their application orally on 18/9/2018 in respect to the Preliminary Objection and the application, which submissions I have read and considered in this ruling.

4. There are two issues for determination are; is the Preliminary Objection meritorious; whether amendments should be allowed

5. Firstly, on the Preliminary Objection, the Applicant argued that the succession case did not determine any land ownership dispute as such the suit is not resjudicata. The parties in the family Court are not the same as the parties herein. That the suit lands are different. The Defendant on the other hand argued that the titles are as listed in the certificate of confirmation of grant issued in Succession Cause No 1895/93. That the suit lands are resultant subdivisions arising from LOC2/GACHARAGE/162. That the Court cannot annul a judgement of the succession Court as it lacks jurisdiction. It urged the Court to strike out the suit.

6. I have looked at the pleadings in this case as well as the cited certificate of confirmation of grant and it is clear that the succession Court determined the estate of the late Gideon Gitundu Kimere by ascertaining the beneficiaries and the assets of the estate. According to the pleadings of the Plaintiff on record this suit relates to ownership of land between the parties. This Court is cloth under Article 162 (2) of the constitution and section 13 of the Environment and Land Court Act to determine matters in respect to title such as this. I therefore hold that the suit is not Resjudicata for the reasons that the suit before this Court is different in all parameters of the principle of Resjudicata. The Preliminary objection therefore fails on this limb.

7. Coming to the application on amendment of plaint, the Civil Procedure Rules Order 8 Rule 3 gives the Court discretion to allow the amendments of pleadings 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.

8. Under Order 8 Rule 5(1) the Court could on its own motion Order or on application of a party Order any document to be amended in such manner as to such terms as to costs or otherwise as are just. This may be done for purposes of determining the real question in controversy

between the parties.

9. In the case of **Eastern Bakery vs Castellino 1958 EA 461** the Court held;

“amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated by costs. But there is no power to enable one distinct cause of action to be substituted for another....”

Further the Court of Appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** said;

“a party would be allowed to make such amendments of pleadings as was necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side”.

10. The claim of the Plaintiff /Applicant in the amended plaint is fraud against the 3rd -5th Defendants whose particulars thereof have been pleaded. The Defendant has not shown how he stands to be prejudiced by the enjoinder of the 3rd – 5th Defendants. I see no injustice that can be visited on the Defendants. Guided by the decision in the Court of appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** aforesaid and based on the grounds adduced above the application is meritorious and is allowed.

11. The Plaintiff is directed to serve the amended plaint within the next 7 days from the date hereof. 14 days leave is granted to the Defendants to file their response and the parties to list the matter for pretrial within the next 30 days from this ruling.

12. Costs of the application shall be met by the Plaintiff.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 15TH DAY OF NOVEMBER, 2018.

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mbuthia HB for Amutallah for the Plaintiff /Applicant

Mwangi Ben for the Defendants/Respondents

Irene and Njeri, Court Assistants