



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT EMBU

ELC CASE NO. 60 OF 2016

STEPHEN KITHINJI NYAGA.....1ST PLAINTIFF

BONIFACE KIMATHI NYAGA.....2ND PLAINTIFF

VERSUS

JOSEPH MUCHANGI NTHIGA.....1ST DEFENDANT

DAVID MURIUKI NTHIGA.....2ND DEFENDANT

PHERIS MUTITU NTHIGA.....3RD DEFENDANT

RULING

1. By a plaint dated 30th August 2016, the Plaintiffs sought the following reliefs against the Defendants.

a. A permanent injunction restraining the Defendants themselves, their agents, servants and/or anyone claiming under them from entering, leasing, and/or interfering in any manner with the Plaintiffs occupation and ownership of the land parcel Nos. Gaturi/Nembure/10965 and Gaturi/Nembure/10966.

b. General damages for trespass.

c. Costs of the suit together with interest at court rates.

d. Any other relief that this honourable court may deem fit to grant.

2. The said plaint was amended with leave of court granted on 15th January 2018 in which the Plaintiffs added the 3rd Defendant and sought the following reliefs only;

a. An eviction order

b. General damages

c. Costs of the suit

d. Any other relief the court may deem fit to grant.

3. The basis for seeking the said reliefs was that the Plaintiffs were the registered proprietors of *Title Nos. Gaturi/Nembure/10965 and 10966* (hereinafter known as the suit properties). They were so registered upon transfer by their father, Cyrus Nyaga Njeru, who had acquired the suit property through succession proceedings.

4. It would appear from the various affidavits filed on record that the suit properties initially belonged to the grandfather of the Plaintiffs and the 1st and 2nd Defendants. The parents of both the Plaintiffs and the 1st and 2nd Defendants were to share the suit properties. The latter contended that the Plaintiffs' father had shortchanged their father and fraudulently acquired the suit properties (originally *Title No. Gaturi/Nembure/1382*).

5. It also transpired that there is a pending succession cause being *Embu High Court Succession Cause No. 163 of 2005* (hereinafter Succession Cause No. 163 of 2005) in which the Plaintiffs' father had taken out letters of administration of the estate of the grandfather of the parties herein. There is also a pending application for revocation of the grant and apparently an order for stay of execution thereof.

6. By a notice of motion dated 20th August 2018 the Plaintiffs sought the following orders;

a. That may the honorable court be pleased to fix this matter for directions on the way to proceed with this matter or in the alternative fix this case for formal proof at the earliest date possible on priority basis.

b. That the Defendants have failed to enter their defence on the draft amended complaint within 15 days provided for by the law having been duly served vide attached affidavit of service marked SB 1.

c. The costs of this application be provided for.

7. The said application was based on two grounds only. First, that the Defendants were served with the draft amended complaint on 1st November 2017. Second, that they had failed to file their defence. The said application was supported by an affidavit sworn jointly by the Plaintiffs on 16th August 2018 in which they reiterated and expounded upon the grounds set out in their motion. It was stated that leave of court to amend their complaint was granted on 15th January 2018 by which the 3rd Defendant was joined in the suit. The Plaintiffs contended that since the Defendants had failed to file a defence to the draft amended complaint within 15 days as required by law, then the court should give directions for the suit to proceed for formal proof on priority basis.

8. On the other hand, by a notice of motion dated 6th September 2018 brought under the provisions of **Order 8 Rule 3 of the Civil Procedure Rules and all enabling provisions of the law**, the Plaintiffs sought the following orders;

a. That the honourable court be pleased to allow the Defendants/Applicants leave to amend their defence as per the draft amended defence annexed hereto.

b. That on leave being granted, the defence be deemed filed and served.

c. The costs of the application be provided for.

9. The said application was based upon the several grounds set out on the face of the motion the gist of which was that the original defence filed herein did not cover all the issues hence the Defendants wanted to bring out the real issues in controversy for determination in this suit. The said application was supported by an affidavit sworn by the 1st Defendant on 6th September 2018.

10. When the said applications were listed for hearing on 19th November 2018, the Defendants' advocate requested to be allowed to canvass them through written submissions. The court consequently granted the Plaintiffs 14 days within which to file and serve their written submissions on both applications whereas the Defendants were granted a similar period to file and serve theirs. The time granted to the Plaintiffs and the Defendants was to run concurrently.

11. The court has considered the Plaintiffs' notice of motion dated 20th August 2018. The court finds it to be totally misconceived and lacking in merit for the following reasons. First, the suit cannot be fixed for formal proof when there is no interlocutory judgment against the Defendants or any one of them. Such interlocutory judgment could not be entered because there is no provision under **Order 10 of the Civil Procedure Rules** for entry of such judgment. The only option the Plaintiffs have is to fix the suit for hearing in the normal manner under **Order 10 Rule 9 of the Civil Procedure Rules**.

12. The second reason why the said application is untenable is because the 1st and 2nd Defendants, in fact, filed a statement of defence dated 10th October 2016. At the material time, the 3rd Defendant had not been joined in the suit. In those circumstances, it could not be said that the failure by the Defendants to respond to the draft amended complaint meant that the Defendants had no defence to the action. At the very least, the 1st and 2nd Defendants would be deemed to have relied upon the original defence dated 10th October 2016.

13. The third reason is that according to the record, and as admitted by the Plaintiffs, the court granted the Plaintiffs leave on 15th January 2018 to amend the complaint. In those circumstances, they cannot validly contend that the draft amended complaint they served on 1st November 2017 more than two months before leave was granted was valid service of the amended complaint. Moreover, the court order made on 15th January 2018 specifically required the Plaintiffs to file and serve their amended complaint within 21 days from that date. The Defendants were then granted corresponding leave to amend their defence within 14 days upon service. There is no evidence on record that the Plaintiffs ever filed their amended defence. There is no evidence of payment of court fees on record. The court, therefore, considers that there is no valid amended complaint on record and none was ever served.

14. The court also finds no urgency in the hearing of the Plaintiffs' suit. The suit was filed in 2016 and no good reason has been demonstrated why the court should allow the Plaintiffs to jump the queue to be heard before the litigants who filed their suits before 2016. This court does not allow litigants to jump the queue and for recent suits to be heard before the older ones. The only exception is where the court has certified a matter as being fit for priority hearing due to special circumstances which have clearly been demonstrated by the parties.

15. The court has considered the Defendants' application for leave to amend their defence. The principles to be considered in an application for leave to amend a pleading were summarized in the case of **Eastern Bakery Vs Castelino [1958] EA 461 at p. 462** as follows;

“It will be sufficient, for purposes of the present case, to say that 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...”

16. Similarly, in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 Others [2000]eKLR** it was held by the Court of Appeal of Kenya, *inter alia*, that;

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

17. Bearing in mind the above principles, the court is satisfied that the Defendants’ said application has merit and should be allowed. It has not been demonstrated by the Plaintiffs that they shall suffer any prejudice which cannot be remedied by an award of costs. It should also be borne in mind that the Plaintiffs’ earlier application for leave to amend their plaint was granted on 15th January 2018. They failed to file their amended plaint within the stipulated period of time with the consequence that the leave lapsed after 21 days. They shall in all probability require an extension of time within which to file the amended plaint.

18. The upshot of the foregoing is that the court finds no merit in the Plaintiffs’ notice of motion dated 20th August 2018 hence the same is for dismissal. The court, however, finds merit in the Defendants’ notice of motion dated 6th September 2018 which shall be allowed. The court consequently makes the following orders;

- a. The Plaintiffs’ notice of motion dated 20th August 2018 be and is hereby dismissed in its entirety.
- b. The time granted to the Plaintiffs to file and serve their amended plaint on 15th January 2018 is hereby extended by a further 21 days with effect from the date of the ruling.
- c. The Defendants’ notice of motion dated 6th September 2018 be and is hereby allowed. The Defendants shall, however, file and serve their amended defence within 14 days after service of the amended plaint by the Plaintiffs.
- d. Costs of both applications shall be in the cause.
- e. The Plaintiffs shall follow the queue in the hearing of this suit since there is no urgency in the matter to justify a hearing on priority basis.

19. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **20th** day of **DECEMBER, 2018**.

In the presence of the 1st and 2nd Plaintiffs and in the absence of the Defendants.

Court clerk Mr Muinde.

Y.M. ANGIMA

JUDGE

20.12.18