



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC SUIT NO. 973 OF 2012

MICHEAL KIRUGO KIBATHI.....PLAINTIFF/APPLICANT

VERSUS

ANTHONY GICHUKI GICHAU.....1ST DEFENDANT

ANNE NJERI GICHUHI.....2ND DEFENDANT

MAHIRA HOUSING COMPANY LIMITED.....3RD DEFENDANT

TERESIAH WANJIKU GITHAIGA.....PROPOSED 4TH DEFENDANT

RULING

What is before me for determination is the plaintiff's Notice of Motion application dated 17th July, 2018 seeking leave to amend the plaint and add one, Teresiah Wanjiru Githaiga in the suit as a 4th defendant. The application is supported by the plaintiff's affidavit sworn on 17th July, 2018 and is premised on grounds that the 1st and 2nd defendants have since the filing of this suit transferred their interest in the suit property to the proposed 4th defendant. The plaintiff has contended that the intended amendment is necessary to enable the court to effectively determine all the issues in controversy between the parties. The plaintiff has contended that no prejudice will be occasioned to the defendants if the application is allowed as they will have an opportunity to amend their defences in response to the amended plaint.

The application is opposed by the 1st and 2nd defendants through a replying affidavit sworn by the 1st defendant on 17th September, 2018. The 1st and 2nd defendants have contended that after the plaintiff's application for temporary injunction was dismissed on 25th September, 2013, they sold the suit property to the proposed 4th defendant. The 1st and 2nd defendants have averred that they will be highly prejudiced if the orders sought are granted since the suit property has already changed hands. The 1st and 2nd defendants' have contended that the plaintiff's remedy lies in seeking monetary compensation from the 3rd defendant.

The application was argued on 18th October, 2018. I have considered the application together with the affidavit filed in support thereof. I have also considered the replying affidavit filed by the 1st and 2nd defendants in opposition to the application. The only issue arising for determination is whether the plaintiff has established sufficient grounds to warrant the joinder of the proposed 4th defendant to the suit.

In the draft amended plaint annexed to the application, the plaintiff has stated that he was the bona fide owner of Plot No. 487 (the suit property) within Land Parcel No. 10901/36 owned by the 3rd defendant. The plaintiff has averred that the 3rd defendant illegally and fraudulently transferred the suit property to the 1st and 2nd defendants without his consent. The plaintiff has stated further that the 1st and 2nd defendants have subsequently transferred the suit property to the proposed 4th defendant.

Order 1 Rule 10(2) of the Civil Procedure Rules which gives the court power to substitute and add parties to a suit provides as follows:

“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”

The underlying principle in amendment of pleadings and joinder of parties was set out by the Court of Appeal in the case of Central Kenya Ltd v Trust Bank & 4 others Civil Appeal No. 222 of 1998 as follows:-

“..all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

I am satisfied that the proposed 4th defendant is a necessary party in these proceedings. It is not disputed that the property in dispute is now registered in her name and as such any order made in the proceedings will affect her. Justice demands that the proposed 4th defendant be given an opportunity to participate in these proceedings. Her joinder is necessary to enable the court to completely adjudicate upon and settle all the questions in dispute in this suit. The 1st and 2nd defendants have not demonstrated the nature of prejudice they stand to suffer if the application is allowed.

The upshot of the foregoing is that the Notice of Motion dated 17th July, 2018 is for granting. The application is allowed in terms of prayers 1, 2 and 4 thereof. The plaintiff shall file the amended plaint within 21 days from the date hereof. The 1st, 2nd and 3rd defendants shall be at liberty to amend their respective defences within 21 days from the date of service of the amended plaint.

Delivered and Dated at Nairobi this 20th day of December 2018

S. OKONG'O

JUDGE

Ruling read in open court in the presence of:

Mr. Wafula for the Plaintiff

N/A for the 1st and 2nd Defendants

N/A for the 3rd Defendant

Catherine-Court Assistant