



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC NO. 1958 OF 2007

RIVERBANK PLAZA LIMITED.....PLAINTIFF

VERSUS

CITY COUNCIL OF NAIROBI.....DEFENDANT

RULING

1. This suit was filed in court on 27th July 2006, more than ten (10) years ago. Through a plaint of the same date, the plaintiff sought among others, an order of a permanent injunction to restrain the defendant from trespassing upon, damaging, meddling with, alienating and/or in any other way interfering with or dealing with all that parcel of land known as L.R No. 3734/843 (hereinafter referred to as “the suit property”) and general damages for trespass. The plaintiff averred that it was the registered owner of the suit property and that from the year 2006, some people who claimed that the suit property had been leased to them by the defendant had trespassed on the suit property from time to time sometimes in the company of the defendants *Askaris* and threatened to arrest the plaintiff’s servants and agents on the property. The plaintiff claimed that the defendant has no right over the suit property and that it had suffered loss and damage as a result of the defendant’s acts aforesaid.

2. Together with the plaint, the plaintiff filed an application by way of Chamber Summons dated 27th July 2006 under certificate of urgency seeking a temporary injunction restraining the defendant through itself, its servants, employees, agents or any other person or authority connected with the defendant from entering onto, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with its quiet possession of the suit property pending the hearing and determination of this suit. The application was certified as urgent and interim orders granted *ex parte* on 27th July 2006. The application was served and heard *inter partes* before Aganyanya J. who allowed the same in a ruling delivered on 10th May 2007.

3. From the year 2007 when the plaintiff obtained interlocutory injunction against the defendant, the plaintiff has not taken any step with a view to setting down this suit for hearing. What the plaintiff has engaged itself in for the last ten (10) that this matter has been pending in court is to file one interlocutory application after the other against the successive officials of the defendant for alleged disobedience of the said order of interlocutory injunction. The first of such applications was made on 29th July 2010 against the former town clerk of the defendant, Philip Kisia and the then director of City Planning, Tom Odongo. On 12th March 2015, the plaintiff filed another application dated 12th March 2015 seeking among others, an order to commit Dr. Evans Kidero, Governor, Nairobi County, Tom Odongo, Executive Committee Member in charge of land, Nairobi County, John Barre, Director of City Planning, Nairobi County and Karisa Iha Director Legal Affairs, Nairobi County to civil jail for disobeying the said order that was made

on 10th May 2007. While that application was still pending, the plaintiff brought another application on 24th September 2015 this time round seeking to commit one, Gregory Mwakanongo, the acting County Secretary, Nairobi County to civil jail for disobeying the same order.

4. What is now before me for determination are two applications one of which is the plaintiff's said contempt application dated 12th March 2015 and the defendant's application dated 29th May 2015 seeking leave to amend the plaint to plead a counter-claim and to add more parties to the suit. Directions were given that the two applications be heard together by way of written submissions. I will consider the applications in the order in which they were filed starting with the plaintiff's contempt application dated 12th March 2015. The application was brought on the grounds that, the respondents in the application, Dr. Evans Kidero, Tom Odongo, John Barih and Karisa Iha were duly served with the order that was made herein on 10th May 2007 together with penal notices and that despite service upon them of the said order, they proceeded to disobey the same in that the servants of the Nairobi City County which is the 1st respondent caused to be erected on the suit property on 27th February 2015 a notice claiming that the suit property belongs to Nairobi City County, the 1st respondent and that its sale or lease is prohibited. In his affidavit in support of the application sworn by Simon Ndungu on 12th March 2015, he stated at paragraph 4 that the order of injunction which was issued on 10th May 2007 was served upon the defendant on 6th July 2007 and the same was received by the defendant's then Director of Legal Services, M.N. Ngethe. In paragraph 5 of the said affidavit, Simon Ndungu stated that the said order was also served upon the 2nd to 5th Respondents. Annexed to the said affidavit as evidence of service are copies of the said order, penal notice and affidavits of service. The application was opposed by the defendant through a replying affidavit sworn by the 5th respondent, Karisa Iha on 24th March 2015 on his own behalf and on behalf of the 1st to 4th respondents. In his affidavit, the 5th respondent contended that the court order alleged to have been disobeyed by the respondents lapsed automatically on 11th September 2011, one year after coming to effect of the Civil Procedure Rules 2010. He denied that the respondents disobeyed the said order. The 5th respondent contended that neither he nor the 2nd to 4th respondents were in court when the order of 10th May 2007 was made and that the order was not served upon any of them. The 5th respondent stated that as at the time the 1st respondent came into existence, he and the 2nd to 4th respondents had no notice of the said order.

5. I have considered the plaintiffs' application together with the affidavit filed in support thereof. I have also considered the affidavit in reply and the respective submissions by the advocates for the parties. This is my view on the matter. It is well settled that contempt of court proceedings are quasi criminal in nature because the contemnor is bound to lose his liberty if found guilty of the contempt complained of. In view of this fact, the standard of proof of contempt is higher than proof on a balance of probabilities. See, the holding in the Court of Appeal case of, **Mutitika-vs-Baharini Farm Ltd. (1985) KLR 227**, where the court stated that the standard of proof in contempt proceedings must be higher than proof on a balance of probabilities, and almost but not exactly, beyond reasonable doubt. It follows therefore that for the plaintiff to succeed in the present application, it has to satisfy the court to a degree beyond a balance of probabilities that the respondents indeed disobeyed the order that was made herein on 10th May 2007.

6. For one to be punished for contempt of a court order, it must be proved that he was aware of the court order either through service or any other means and proceeded to disobey the same. The onus of proof rested on the plaintiff. The court order that was made on 10th May 2007 restrained the defendant through itself, its servants, employees, agents or any other person or authority connected with the defendant from entering onto, alienating, trespassing, surveying, allocating, dealing in or in any other way interfering with the quiet possession of the suit property pending the hearing and determination of this suit. It is common ground that as at 10th May 2007, Nairobi City County, the 1st respondent was not in existence and the 2nd to 5th Respondents were not holding the positions which they now hold in the 1st respondent. None of the respondents could therefore have been aware of the said order neither could any of them have been served as at the time the same was issued. In fact, there is no allegation that any of the respondents was served with the order soon after it was made. According to the affidavit of Paul Githinji Wanjohi a

process server of this court sworn on 5th March 2015, the said order was served upon the 2nd to 5th respondents on 5th March 2015. According to the affidavit filed in support of the present application for contempt, the said court order is said to have been breached on 27th February 2015. This was before the said order was served upon the respondents personally as indicated above. It follows that as at the time the said order is alleged to have been breached, the same had not been served upon the respondents who are the alleged contemnors. I am not persuaded that the respondents had knowledge of the order before 5th March 2015 when the same was served upon them. Without knowledge of the order, the respondents cannot be said to have breached the same. It is my finding therefore that the plaintiff has failed to prove the acts of contempt alleged against the respondents.

7. The disposal of the plaintiff's application takes me to the defendant's Notice of Motion dated 29th May 2015 which seeks leave to amend the defence to include a counter-claim against the plaintiff and two new parties. The principles upon which this court exercises its discretion on applications for amendment of pleadings are now well settled. In Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition which was cited in the case of Joseph Ochieng & 2 Others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 which was relied on by the plaintiff in its submissions, the authors stated as follows;

"...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided the costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action..."

8. What I deduce from the foregoing is that, applications for leave to amend should freely be 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 be properly compensated for in costs. See also, the Court of Appeal cases of, Central Kenya Ltd. vs. Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998(unreported) and Robert Ombaso Nyareru & another vs. Beldina Mokaya, Court of Appeal at Kisumu, Civil Appeal No.200 of 2011(unreported). The position of the law as set out in these cases is that, parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits, provided, no inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.

9. From the foregoing, it can be said that what is expected of an applicant for leave to amend a pleading is to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties or that it would avoid multiplicity of suits. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him. As I have mentioned herein above, the defendant has sought to amend its defence to plead a counter-claim and to join two other parties to the suit as defendants to the said counter-claim together with the plaintiff. The defendant has contended that amendments sought are necessary for the purposes of determining the real questions in controversy between the parties.

10. I have perused the affidavit in support of the defendant's application together with the draft amended defence and counter-claim. I am satisfied that the amendment sought would prevent multiplicity of suits and would also enable this court to effectually and completely adjudicate upon and settle all questions in controversy in this suit. The application was opposed by the plaintiff through a replying affidavit sworn by Simon Ndungu on 6th July 2015 and Notice of Preliminary Objection dated 15th July 2015. The plaintiff has contended that the amendment sought should not be allowed because it would introduce a cause of action which is time barred under section 4(2) of the Limitation of Actions Act, Cap. 22 Laws of

Kenya which provides that a claim over land should be brought within 12 years. The plaintiff has also contended that the proposed amendment would change the character and nature of the suit.

11. I am not in agreement with the contention by the plaintiff that the proposed amendment would change the character and nature of the suit. The plaintiff has sued the defendant contending that the defendant had trespassed on the suit property which is registered in its name. In the proposed amended defence, the defendant has contended that the plaintiff and the proposed additional defendants acquired the suit property illegally through acts of fraud and misrepresentation. In the counter-claim, the defendant seeks; a declaration that the title held by the plaintiff over the suit property is void, revocation and cancellation of the said title and delivery of the original title of the suit property to the defendant. It is clear from the foregoing that the case sought to be introduced by the defendant through the proposed amendments is in no way out of character with the plaintiff's suit. On the issue of time bar, again, I am not in agreement with the plaintiff that the proposed counter-claim by the defendant is time barred. I am in agreement with the defendant that in actions for recovery of public property, the provisions of the Limitation of Actions Act, Cap. 22 Laws of Kenya is excluded. In any event, I am of the view that in the circumstances, the issue as to whether or not the intended counter-claim is time barred can only be determined at the trial. For the foregoing reasons, I am not satisfied that the plaintiff has put forward valid grounds to warrant the refusal of the leave sought by the defendant to amend the defence.

12. In conclusion, I find no merit in the plaintiff's Notice of Motion dated 12th March 2015. The defendant's Notice of Motion dated 29th May 2015 however succeeds wholly. The same is allowed in terms of prayers 1, 2, 3, and 4 thereof. The respondents shall have the costs of the plaintiff's application while the costs of the defendant's application shall be in the cause.

Delivered and Dated at Nairobi this 24th day of January, 2017.

S. OKONG'O,

JUDGE.

In the presence of:-

Mr. Njenga for Plaintiff

Mr. Adanu for Defendant

Kajuju Court Assistant