



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT KERICHO

ELC NO.23 OF 2013

PETER LETOTIN LEMOOSA.....PLAINTIFF

VERSUS

RAELI CHEPNGETICH LANGAT & 5 OTHERS.....DEFENDANTS

RULING

(Application to amend plaint; case having been heard and hearing closed; case only awaiting submissions of counsel; amendment seeking to introduce a new capacity to one of the defendants; apparent that the plaintiff was aware of this all along; no explanation as to why it is thought important to amend the capacity of the said defendant at this stage of the proceedings; effect will be to essentially introduce a new party, which, given the extent to which the proceedings have gone, will cause injustice; application for amendment disallowed)

1. The application before me is the application dated 28 July 2016 and filed on 29 July 2016 by the plaintiff. Through that application, the plaintiff seeks leave to amend his plaint. The application is opposed and before I go to the gist of it, I think it is prudent that I sent down a little background on the suit.

2. This suit was commenced by way of plaint filed on 23 April 2013. The case of the plaintiff is that he purchased the **land parcel Kericho/Sosiot/1811** (hereinafter "the suit land") measuring 4.26 acres from one Elijah Langat (deceased) and the 5th and 6th defendants. He pleaded that the defendants have now interfered with the said land, and in the suit, he has asked for a declaration that he is the legal and lawful proprietor of the suit land, an order of permanent injunction against the defendants, an order of eviction, mesne profits and costs.

3. The defendants entered appearance and filed defence vide which they averred that the plaintiff has no legal right over the property. They contended that the purported sale agreements are null and void since no consent of the Land Control Board was obtained.

4. The hearing of the suit commenced on 24 June 2015 when the plaintiff gave evidence. The hearing proceeded on various dates thereafter and the plaintiff closed his case on 27 January 2016 after calling his fourth and last witness. I also took in the evidence of the defence who called four witnesses in total, with the last witness testifying on 5 April 2016. The hearing of the matter closed and I directed counsels to file and exchange their written submissions within 30 days. I gave a mention date for 27 May 2016 for any oral submissions. Counsel for the defendants filed his submissions on 26 May 2016, and on 27 May 2016, Mr. Koko for the plaintiff, sought a further 30 days to file his submissions. I allowed this request and directed that the case be mentioned on 29 July 2016. No submissions were filed by counsel within this

period and it will be observed that it is on the date scheduled for mention for submissions that this application for amendment of plaint was filed.

5. It is averred inter alia that the amendment is only to correct the capacity of one defendant which fact was erroneously omitted. It is further stated that evidence in relation to the amendment has already been tendered and no harm shall be visited upon the defendants. The supporting affidavit to the application is sworn by Mr. Koko, learned counsel for the plaintiff. He has deposed that he has noticed some omissions in his client's pleadings which are important and need amendment. A draft amended plaint is annexed. I have gone through the same and I note that the amendment seeks to add that the 5th defendant, one Paul Kiptonui Langat, is sued in his personal capacity and as a personal representative of the estate of Martha TaprunoByebei (deceased). There are also two additional paragraphs identified as paragraphs 8A and 9A in the body of the plaint which aver as follows :-

8A. The 5th defendant is a personal representative of the estate of the deceased Martha TaprunoByebei having been issued with a Grant of Letters of Administration Intestate on 22/4/2005.

*9A. The defendants and in particular the 5th defendant had agreed to take out Letters of Administration to the estate of the deceased Martha TaprunoByebei to enable them transfer the sold portion of 4.26 acres of **Kericho/Sosiot/1811** to the plaintiff.*

6. The defendants have opposed the application through the replying affidavit of RaeliChepngetich Langat, the 1st defendant. It is averred inter alia that the portion of land is family land; that no succession cause has been conducted; and that the beneficiaries of the property objected to the said transaction. It is said that no agreement of sale was signed in respect of the same.

7. I have considered the application alongside the submissions of both Mr. Koko for the plaintiff and Mr. Bii for the defendants.

8. The application is one for amendment and the applicable law is **Section 100 of the Civil Procedure Act, Cap 21, Laws of Kenya**, and **Order 8 of the Civil Procedure Rules, 2010**.

Section 100 of the Civil Procedure Act provides as follows :-

100. General power to amend

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

With regard to **Order 8, Rules 3 and 5**, are important in my view. They are drawn as follows :-

3. Amendment of pleading with leave [Order 8, rule 3.]

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may 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, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not

misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

5. General power to amend [Order 8, rule 5.]

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.

9. It will be observed from the above provisions that an amendment may be allowed at any time of the suit. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. Where a new party is sought to be introduced, the court must also assess whether the amendment will prejudice the new party who was hitherto not in the proceedings. That said, it is preferable that applications to amend come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences. I on my part would encourage parties to ensure that their pleadings are in order before proceeding for hearing.

10. In our case, my first observation is that this intended amendment is coming after the close of the hearing of the matter. The respective parties have already called their witnesses and tendered all their evidence. The defendants' counsel has already filed his submissions and the only thing pending is for the plaintiff's counsel to make his final submissions.

11. I must admit that this application has taken me by surprise for there was no indication that the plaintiff would wish to amend his plaint even on the date fixed for oral submissions. What Mr. Koko asked for is for time to file his submissions and not time to file an application to amend.

12. It is not very clear to me when the plaintiff became aware that the 5th defendant is also administrator of the estate of Martha Tapruno Byebei and that it is necessary to make the amendments so as to introduce the estate of Martha Byebei in to this suit . It did emerge in evidence that the suit property is still registered in the name of Martha Tapruno Byebei and that there is an ongoing succession matter touching on her estate. I would imagine that the capacity of the 5th defendant was all along within the knowledge of the plaintiff, for the plaintiff did mention in his evidence that there is an ongoing succession cause in respect of the estate of the late Martha, and did indeed produce the petition for grant of letters of administration. He did give evidence that the succession cause was filed in the year 2002 and that he was mentioned in the succession cause. It is therefore apparent that the plaintiff was all along aware of who the administrator of the estate of the late Martha Byebei was. If indeed the plaintiff thought that he had some sort of claim against the estate of Martha Byebei, then he ought to have made that claim early enough before the case proceeded to the extent that it already has.

13. If I am to allow the amendment it means that I will be introducing a claim against the estate of the

late Martha Byebei which was not there before and was never heard when the parties gave evidence. It will essentially be a new suit against a new party.

14. In my opinion, in as much as an amendment may be made at any time of the suit, the amendment sought herein is too substantive to be allowed at this stage of the proceedings. I do not think the law intended for parties to hear their case and after the case is closed, permit the plaintiff to now introduce a new party and present a claim against such new party especially when all material facts were within the knowledge of the plaintiff. I would probably have been sympathetic if the plaintiff had demonstrated why he had not earlier sued the estate of Martha Byebei and why he felt that it was necessary to do so. But there is no affidavit by the plaintiff to explain this. These are facts that ought to have come from the plaintiff himself and it was unwise for counsel to attempt to depone on such matters.

15. The amendment is not a minor amendment, such as a typographical error on the description of the suit land when it is clear what land is being claimed, but a significant amendment which will indeed entail a reopening of the matter if allowed, for the estate of the late Martha Byebei has not participated in the suit. It matters not that the administrator is already a party as 5th defendant for he participated in the suit in his own capacity and not in the capacity of administrator of the late Martha Byebei.

16. This amendment in my view is an afterthought and an abuse of the process of court. If allowed, it will prejudice and embarrass this trial which has already been concluded. It will introduce a new party to a proceeding that is already finalized and that to me will be an injustice. As I have stated, no explanation has been tendered by the plaintiff as to why he is seeking to amend his pleadings this late.

17. Given the above reasons, I disallow the application for amendment. The defendants shall also have the costs of this application.

18. It is so ordered.

Dated, signed and delivered in open court at Kericho this 3RD day of February 2017

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

KERICHO

PRESENT

Mr. Koko for the Plaintiff/applicant

No appearance on part of M/s V.K. Bii & Co. for the Defendants/respondents

Court Assistant; Wambany