



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
IN THE ENVIRONMENT AND LAND COURT

ELC.NO.132 OF 2015

SOY DEVELOPERS LIMITED.....PLAINTIFF/ RESPONDENT

=VERSUS=

KENAGRI PRODUCTS LIMITED.....1ST DEFENDANT/ RESPONDENT

DEPOSIT PROTECTION FUND BOARD

(As liquidators of Post Bank Creditors Limited

(In liquidation).....2ND DEFENDANT/RESPONDENT

A.S.L LIMITED.....3RD DEFENDANT/APPLICANT

THE CHIEF LANDS REGISTRAR.....4TH DEFENDANT/RESPONDENT

RULING

There are two applications for determination herein. The one dated **15th July 2015** and the other dated **3rd August 2015** .Both applications are brought by A.S.L Ltd, the **2nd** Defendant in the Plaint.

The **1st** application is a Notice of Intention to cross examine, Sammy Boit who swore affidavits dated **16th February 2015**, and **31st March 2015**. The said application is made on the following grounds.

- 1. The 3rd Defendant, bona fide requires that the deponent of the Affidavits be produced for cross-examination.***
- 2. The deponent of the Affidavits has allowed himself to be used as purveyor of falsehoods and defamatory innuendo. He ought to avail himself for cross-examination to enable the court ascertain whether he is guilty of perjury.***
- 3. The affidavits offend the provisions of Order 19 rule 3(1) of the Civil Procedure Rules as several paragraphs of the affidavits are not based on the deponents own knowledge.***
- 4. The deponent of the Affidavits has alluded to matters of fraud, bad faith and malafides. Such claims cannot be proven by affidavit but must be subjected to cross-examination.***

5. The affidavits sworn by Mr Sammy Boit consist of matter of pure hearsay. It is therefore necessary that the deponents of the Affidavit be cross –examined on the bona fides of his averments.

6.The affidavits contain allegations that are oppressive to the 3rd Defendant. It is therefore necessary that the deponent be summoned to attend Court.

7. The Affidavits are scandalous and vexatious. It is important that the deponent of the Affidavits be cross-examined on the contents thereof so that a foundation for the highly provocative allegations can be laid or discounted.

The 2nd Application is dated 3rd August 2015, and is seeking for the following orders:-

1. That this Honourable Court be pleased to disallow the amendments to the Plaintiffs Notice of Motion application dated 16th February 2015 and amended on 31st March 2015.

2. That the cost of this application be borne by the Plaintiff.

The application is supported by the grounds stated on the face of the instant Notice of Motion and on the Supporting Affidavit of **KARTIK.S.PATEL**, the Group Financial Controller of the 3rd Defendant/Applicant.

These grounds are:-

1. The purported amendment intends to introduce a completely new and inconsistent basis for the suit.

2. The 3rd Defendant has already given Notice of Intention to Cross Examine the deponent of the affidavits in support of the application.

3. The Amended application is only filed to circumvent the allegations of perjury against the deponent of the Supporting Affidavits and is therefore malafides.

4. The Plaintiff has not been candid and is undeserving of the discretion of this Honourable Court.

5. The Amended application offends the provisions of Order 19 Rule 3 (1) of the Civil Procedure Rules, 2010 as the deponent of the Supporting Affidavits has in several instances failed to disclose the source of his information.

6. The application is an affront to the dignity of the court and is a classic example of abuse of the process of this Honourable Court.

7. It is in the interest of justice that this application be allowed as prayed.

In his Supporting Affidavit **Kartik S. Patel** the Group financial controller of the 3rd Defendant/Applicant herein reiterated the averments contained on the grounds in support of the instant Notice of Motion and the contents in his Statement of Defence.

The application is opposed by Plaintiff/Respondent , and **SAMMY BOIT ARAP KOGO**, the Director of the Plaintiff/Respondent filed a Replying Affidavit on **15th September 2015**, and reiterated the averments contained in the grounds in support of Notice of Motion filed on **1st of April 2015**.

The Deposit Protection Fund Board, filed Grounds of Opposition on **15th October 2015** against the

plaintiff's application dated 31st March 2015 and stated that:-

- 1. That the Amended application raises issues of perjury against the deponent of the Supporting Affidavit to the application dated 16th February 2015 and the application amended on 31st March 2015 and is therefore bad in law.**
- 2. That the purported amendments intend to introduce completely new and inconsistent basis for this suit.**
- 3. That the Supporting Affidavit in the Amended application contravenes the provisions of Order 19 Rule 3(1) of the Civil Procedure Rules, 2010.**
- 4. That the Amended application is an abuse of the court Process and ought to be disallowed by the Honourable Court.**

The two applications were canvassed by way of written submissions. The Law Firm of **Iseme, Kamau & Maema Advocates** for the 3rd Defendant/ Applicant filed their written submissions on **17th November 2015**, and urged the court to dismiss the instant application with costs. They relied on various decided cases among them, the case of **Hiten Kumar A.Raja versus Green Span Limited & 4 Others[2013] eKLR** where the Court cited with approval the holding in **Gandhi Vs Njagi Nrb Hccc No.1330 of 2001** where the Court held that:-

".....conflicts in Affidavits Evidence can only be resolved by Cross Examination of the deponent."

The Law Firm of **Rachier & Amollo Advocates** for the Plaintiff filed their written submissions on **10th October 2015** and urged the court to dismiss the instant applications with costs. They relied on various decided cases among the case of **Kibaki Vs Moi & Another Election Petition No.1 of 1998** where the High Court dismissed an application for Cross Examination of the deponent and stated that:-

"In the ordinary jurisdiction, the High Court is vested with discretionary power to allow the Cross Examination for a deponent upon an application for such an order. However, the power will only be exercised after a proper basis has been laid. If facts of the deponent are not disputed, Cross-Examination will not be allowed."

The Law Firm of **Musyoka Wambua & Katiku Advocates** for the Deposit Protection Fund filed their written submissions on **3rd of November 2015** and urged the court to disallow the amendments to the plaintiff's Notice of Motion dated **16th February 2015** as amended on **31st March 2015**. They relied on the decided case of **Central Kenya Ltd Vs Trust Bank Ltd & others Civil Appeal No.222 of 1998** where the Court relied on the following principles with regards to amendments of pleadings. That party is allowed to make such amendments;

- i. That are necessary for determining the real question in controversy.***
- ii. To avoid multiplicity of suits provided there has been no undue delay.***
- iii. Only where no new or inconsistent Cause of Action is introduced i.e if the new Cause of Action does not arise out of the same facts or substantially the same facts as a Cause of Action.***
- iv. That no vested interest or accrued legal rights is affected; and***
- v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.***

It was submitted that the amendments by the Plaintiff contravenes no **iii** and ought to be disallowed by

this Honourable Court.

This Court has now considered the two applications for determination, the pleadings in general and the annexures thereto and the written submissions. The court has also considered the cited authorities and the relevant provisions of law and the court makes the following findings;

There is no doubt that the Plaintiff herein **Soy Developers Ltd** filed this suit on **13th February 2015** and sought for various prayers. The suit was against the 1st Defendant **Deposit Protection Fund Board**(As liquidators of Post Bank Creditors Ltd(in Liquidation), 2nd Defendant, A.S.L Ltd, and 3rd Defendant , the **Chief Land Registrar**. Among the prayers sought is a permanent injunction against the 2nd Defendant to restrain it from dealing in whichever manner with **LR.NO.209/11151 Grant No 47029**;

Plaintiff/Applicant further sought for mandatory injunction against the 3rd Defendant directing the said 3rd Defendant to rectify the Land Register and reflect the Plaintiff/Applicant as the sole registered owner of the suit property.

In the filed Plaint, the Plaintiff alleged that in the year **1991** the title to the suit property got lost and /or was misplaced within the Plaintiff's offices. That the Plaintiff sought for a Provisional Certificate of Title to the suit property from the Land Registry but was informed that the file in respect of the suit property was missing .It was further alleged that the file resurfaced in the year **2015**, and the Plaintiff's Director was shocked to note that several transactions on the suit property had been registered and the last one was in the name of 2nd Defendant, **ASL LTD**.

It is also evident that simultaneous to the Plaint, the Plaintiff also filed a Notice of Motion dated **16th February 2015**, and sought for temporary injunction against the 2nd Defendant to restrain it from dealing with the suit property in whichever manner.

Among the grounds in support of that Notice of Motion dated **16th February 2015** were that. Plaintiff was allotted the suit property **1989** and Grant was registered in its name on **1st April 1989**.

Further that Plaintiff/Applicant has never transferred, charged or alienated the suit property since the time it got registered as the sole proprietor. It also averred that the title to the suit property got lost and /or was misplaced due to no fault of the Plaintiff and upon failing to trace the title, the Plaintiff proceeded to the Lands Registry and attempted to apply for Provisional Certificate of Title. However his attempts were frustrated because the file disappeared from the Lands Office but only resurfaced in the year **2015**.

In the Supporting Affidavit to the above stated Notice of Motion, the Plaintiff attached various Correspondences, specifically letters to the Lands Registry indicating that the title to the suit property **LR.N.209/11151** disappeared from their offices and sought for a duplicate certificate. Vide a letter dated **11th June 2007**, **Sammy Boit A .Kogo**, a Director of the Plaintiff indicated that there was possibility that one **Johnstone Kiplimo Chemos** was in possession of the title that he had been looking for years and that the said **Johnstone Chemos** was looking for a buyer.

From the above analysis of the pleadings, it is evident that the Plaintiff narrative was that it's certificate of title got lost without their own fault and therefore it, did not authorize the subsequent transactions on the title. Therefore, it alleged that the subsequent transactions on the title was without its authority or knowledge and were therefore done fraudulently. However, it is evident that in the year **2007**, the Plaintiff's Director was aware that **Mr.Johnstone Kiplimo Chemos**, was in possession of the Certificate of Title and was looking for a buyer. It is evident that the Plaintiff never filed any suit then to protect its title.

It is also clear from the court record that the 2nd Defendant filed a detailed Replying Affidavit which was sworn by one **Kartik S. Patel**, the Group Financial Controller detailing how the 2nd Defendant acquired the suit property. Several annexures were attached to the said Replying Affidavit.

It is also evident that on **1st April 2015**, the Plaintiff filed an Amended Notice of Motion dated **31st March 2015**, and in it, another party was added as the 1st Defendant/Respondent. The said added party is ***Kenagri Products Ltd.***

The said alleged ***Amended Notice of Motion***, was supported by various grounds. The Plaintiff deleted the allegation of a lost and /or misplaced certificate of title and replaced the same with allegations that in the year **1991**, the Plaintiff entered into a sale agreement with the alleged 1st Defendant, ***Kenagri Products Ltd*** in year **1991**.

That the said ***Kenagri Products Ltd*** was to purchase the suit property and as per the said sale agreement, the Plaintiff released the title of the suit property to the said ***Kenagri Products Ltd***. It was further alleged that the said sale agreement was not performed to its conclusion as the alleged buyer frustrated the same and therefore the Plaintiff terminated the said sale agreement. Plaintiff further alleged that upon termination of the said agreement, the Plaintiff requested for the return of the title to the suit property from the said ***Kenagri Products Ltd***, but it refused, failed, and neglected to return to the Plaintiff. It was also alleged that the Plaintiff could not protect its interest on the suit property by registering a caveat or caution because the Lands Registry's file was not traced. However there is no evidence that the Plaintiff herein filed a suit against the said buyer ***Kenagri Products Ltd*** ,seeking for return of the said certificate of title or breach of the sale agreement.

If the above stated facts were within the knowledge of the Plaintiff, it could certainly not have stated that its certificate of title got lost and / or misplaced from its office at no fault of its own.

It is from the above background that the 2nd Defendant filed the two applications for determination. Notice of Intention to Cross Examine the deponent of the affidavits filed by the Plaintiffs in support of the two Notices of Motion. The said deponent is **Mr.Sammy Boit** a Director of the Plaintiff herein. This Notice is dated **15th July 2015**.The second application is dated **3rd August 2015**, requesting the court to disallow the amendments to the Plaintiff's Notice of Motion amended on **31st March 2015**.

The two applications are of course opposed by the Plaintiff and supported by other Defendants.

Since the court directed that the two applications be canvassed together, the court will therefore endeavor to determine them in this Ruling. The Court proposes to first deal with the Notice of Motion dated **3rd August 2015** on whether to disallow or allow the amendments to the Plaintiff Notice of Motion dated **16th February 2015**, amended on **31st March 2015**.

Order 8 Rule 2 of the Civil Procedure Rules provides that a party may apply to the court to disallow amendment to the pleadings:

This application is also anchored under **Sections 1A,1B and 3A of the Civil Procedure Act** which grant the court the power and duty to ensure that overriding objective of the Act are met and also to make such orders that are necessary for end of justice to be met and prevent abuse of the court process. The Plaintiff herein amended the Notice of Motion and included another party and also changed the grounds in support of the Notice of Motion. The 2nd Defendant has submitted that the Plaintiff herein amended the Notice of Motion without leave of the Court which is against the law. In deciding this application the court will bear in mind the provisions of **Order 8 Rule 1** of the Civil Procedure Rules which provides that;

“A party may without the leave of the court amend any of his pleadings once at any time before the pleadings are closed”

Further **Order 8Rule 3** also provides that;

“The court may at any stage of the proceedings, or such terms as to cost or otherwise as may be just and in such manner as it may direct allow any party to amend”

It is therefore clear from the above provisions of the law that the court has discretion to allow amendments of pleadings at any stage of the pleadings. However the said discretion must be exercised judicially and not whimsically or capriciously.

The court will also bear in mind that courts have generally held that;

“Amendment sought before hearing should be freely allowed if they can be made without injustice to the other side and no injustice is caused to the other side if he can be compensated for the costs”

See the case of **Eastern Bakery Vs Castelino, Civil Appeal No.30 of 1958**

The above position applies to amendments sought in respect of pleadings. In the instant case, the Plaintiff indeed amended the Notice of Motion. The 2nd Defendant submitted that a Notice of Motion is not a pleading that can be amended without leave of the court. The 2nd Defendant relied on the case of **George Kamau Kimani & 5 others Vs County Government of Transzoia.**

Having considered the submissions, by all the parties herein and the cited authorities it is evident that a Notice of Motion is not a pleading as envisaged by **Order 2** and **Order 8 Rule 1 of the Civil Procedure Rules.**

Having found that the Notice of Motion is not a pleading prescribed for instituting a suit , the court finds that the same can be amended but with leave of the court. See the case of **Narati Gihir Vs Baltes (1954) 27 LRK 84** where the court held that;

“A motion may be amended with leave of the court or consent”

The Plaintiff herein did not seek the leave of the court but went ahead amended and filed an Amended Notice Motion dated **31st March 2015.**

In the Amended Notice of Motion, the said amendments culminated in the change to the grounds in support of the Notice of Motion and also amendment to the Affidavit of **Sammy Boit.** In the case of **George Kamau Kimani (supra)** the Court held as ***Notice of motion can be amended with the leave of the court but not the Supporting Affidavit.***

The Amended Notice of Motion introduced a new Party and also changed the narrative in support of the Notice of Motion and the entire suit. However the Plaintiff has not been amended. The amendments that have been introduced in the Amended Notice of Motion have introduced a new and inconsistent cause of Action. There is a variance in the Cause of Action pleaded in the Plaintiff and the grounds in support of the Amended Notice of Motion. In the Plaintiff the Plaintiff alleges that the beginning of its problems was the loss or misplacement of the certificate of title in the year **1991.**Whereas in the Amended Notice of Motion, the Plaintiff alleges that his woes began when it entered into a sale agreement with the alleged 1st Defendant **Kenagri Products Ltd** and then handed its Certificate of Title to the said purchaser (Kenagri Ltd)it and later the alleged 1st Defendant refused to return the Certificate of Title to the Plaintiff. The Amended Notice of Motion is therefore not in tandem with the Plaintiff filed in court.

The Amended Notice of Motion has **1st,2nd,3rd & 4th** Defendants whereas the Plaintiff has only the **1st,2nd** and **3rd** Defendants. The court finds that the filed Amended Notice of Motion goes against the Rules of Procedure and the Plaintiff cannot seek refuge in **Article 159** of the Constitution since **Article 159** did not come to replace the Rules of Procedure. The Court finds that the instant application is an abuse of the court process which **Section 3A of the Civil Procedure Act** seeks to prevent.

Further this Amended Notice of Motion was filed after the 2nd Defendant filed a Preliminary Objection to the fact that the suit was barred by Limitation of Actions Act. The amendments are not brought in good faith and therefore this Court will not allow the same to stand.

Having now found that the Amended Notice of Motion dated **31st March 2015** was not properly filed, the Court disallow the same and further proceed to strike it out with costs being in the cause.

On the second application which is a Notice of Intention to Cross Examine the deponent of the Affidavits, **Sammy Boit**, the Court finds that the 2nd Defendant wishes to Cross Examine the deponent on the Affidavits. That means the two affidavits in support of Notice of Motion dated **16th February 2015**, and the alleged amended Notice of Motion dated **31st March 2015**.

However the Court has struck out the Amended Notice of Motion dated **31st March 2015**. Therefore we now have only affidavit which is in tandem with the Plaintiff.

Order 19 Rule 2 grants the court power to order attendance of a deponent for Cross Examination. However the Court finds that with striking out of the Intended Amended Notice of Motion dated **31st March 2015** there is no inconsistency in the Affidavits and there would be no reason to summon the deponent **Sammy Boit** in court for Cross Examination. Being guided by provision of **Sections 1A and 1B of the Civil Procedure Act**, the court should ensure that the judicial time is saved and that matters before the court are dealt with expeditiously. By summoning the deponent to Court for cross examination, the Court may fall in a trap of having a mini trial or trial within a trial. That would not augur well in furtherance of the overriding objective of the Act as provided by **Section 1A of the Civil Procedure Act**.

Having now declined to allow the amendments to the Notice of Motion dated **16th February 2015** as per the amended Notice of Motion dated **31st March 2015**, the Court finds that there are no basis laid down to warrant the summoning of the deponent, **Sammy Boit** for Cross Examination. For the above reasons the Court declines to allow the Notice of Intention to Cross Examine dated **15th July 2015**.

However the Court finds the Notice of Motion dated **3rd August 2015** is merited. The same is allowed entirely with costs being in the cause. Further the Court directs that the Amended Notice of Motion dated **31st March 2015** be struck out and expunged from the court record.

The Plaintiff further is directed to expeditiously set down the Notice of Motion dated **16th February 2015**, for hearing within the next **30** days from the date of this Ruling.

It is so ordered.

Dated, Signed and Delivered this **17th** day of **March 2017**.

L.GACHERU

JUDGE

In the presence of;

Mr Munyua holding brief for Ligunya Plaintiff/Applicant

None attendance Intended 1st Defendant

M/s Chepkong holding brief for Mr Maina 2nd Defendant

M/s Muhoro holding brief for Kamau Karori for 3rd Defendant

None attendance for 4th Defendant

Hilda : Court Clerk

L.GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of the above stated advocates.

Mr Munyua: We seek for leave to appeal.

Court : Leave to appeal is granted.

L GACHERU

JUDGE

17/3/2017