



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT NAIROBI

ELC CIVIL SUIT NO. 789 OF 2003

1. NAOMI LINAH WERE

2. CHRISTINA WERE.....PLAINTIFFS/APPLICANTS

=VERSUS=

NATIONAL SOCIAL SECURITY

FUND BOARD OF TRUSTEES.....DEFENDANT/RESPONDENT

R U L I N G

Introduction:

1. This suit relates to a house situated in Mountain View Estate, LR No.12948/78 (hereinafter referred to as **'the suit property'**). The suit property was previously owned by the Defendant, National Social Security Fund Board of Trustees. The 1st Plaintiff lived in the suit property as a tenant. Subsequently, the Plaintiff together with three other persons applied to buy the suit property under the Defendant's Tenant House Purchase Scheme. They paid a Deposit of Kshs.850,000. For reasons that are not clear at this stage, the sale/purchase was not completed. The suit property was instead sold to Elkanah Onderi Bosire Sechero and Donald Misati Bosire. Subsequently, Elkana Onderi Bosire opted out of the purchase and the purchase was completed by Donald Misati Bosire. Title was transferred to Donald Misati Bosire. The suit herein was triggered by the non-completion of the first sale transaction.

2. In 2003, the 1st Plaintiff, aggrieved by the Defendant's decision to sell the suit property to third parties filed this suit through a Plaint dated 30/7/2003. She substantively seeks, among other prayers, a declaration that she is the rightful owner of the suit property.

The Application

3. On 9/8/2016, the 1st Plaintiff, Naomi Linah Were, filed a Notice of Motion dated 2/8/2016. It is expressed to be brought under Sections 1A, 1B, 3A and 100 of the Civil Procedure Act and Order 8, Rules 3 and 5 of the Civil Procedure Rules and Article 159 of the Constitution of Kenya. Through the Application, the Plaintiff seeks leave of the court to amend the Plaint dated 30/7/2003 to enjoin one Christina Were as a co-plaintiff, among other amendments.

4. The Application is predicated upon three grounds set out in the Application namely; 1) the inclusion of Christina Were as a Plaintiff is necessary for the court to make an informed decision; 2) the amendment is necessary for determining the real issues in dispute; and 3) no prejudice will be occasioned on the

Defendant if the amendments are allowed. The Application is supported by the Affidavit of Naomi Linah Were [the 1st Plaintiff herein] sworn on 2/8/2017 and annexed to the Application.

5. The Defendant opposes the Application through a Replying Affidavit by Purity Mbabu, sworn on 21/2/2017. In summary, the Defendant opposes the Application on the grounds that: 1) In 2003, through an Application dated 7/10/2003, the Plaintiff sought leave to amend the Plaintiff, was granted leave and subsequently filed an Amended Plaintiff bringing on board Christina Were as 2nd Plaintiff and the Defendant in reply filed an Amended Defence bearing Christina Were as 2nd Defendant; 2) On several occasions, the Plaintiff has made applications for leave to amend her pleadings; to wit, the Applications dated 7/10/2003, 9/7/2007, 5/5/2008, 1/3/2010 and 2/8/2016, all aimed at scuttling the hearing and final determination of this Matter; 3) The Plaintiff filed a Further Amended Plaintiff on 6/6/2011 pursuant to leave granted on 26/5/2011; 4) On 26/6/2014 the Plaintiff was granted leave to further amend the Plaintiff but she did not amend it; 5) and that the Plaintiff having filed a Notice to act in Person, and there being no Notice of Appointment by John Mwariri Advocate, the present Application has been brought by an advocate who is not on record in this suit.

Submissions

6. In his oral submissions, counsel for the Plaintiff, John Mwariri, argued that the intended amendments are necessary first because the name of Elkana Onderi Bosire Sechero having been struck out, there is no need for the Plaintiff to pursue prayers that are unavailable. Secondly, he submitted that the intended amendments seek to give particulars of alleged illegality on part of the Defendant. He further submitted that the law permits amendments at any stage before trial. He relied on **Eastern Bakery –Vs-Castellino (1958) EA 461**.

7. In her submissions, counsel for the Respondent, Purity Mbabu, submitted that the present Application is an abuse of the process of the court. She argued that the Advocate who filed the present Application was not on record at the time of filing the Application. Secondly, she argued that the Applicant was granted leave on 26/6/2014 to amend the Plaintiff within 30 days and she did not amend the Plaintiff as directed. In the circumstances, she argued, the only platform available is an application for extension of time within which to amend the Plaintiff. Counsel further argued that the application for leave to amend ignores the fact that the Plaintiff has previously been amended. She further contended that the second Plaintiff whom the Applicant seeks to bring on board was added as a party long time ago. Lastly, she argued that unnecessary prayers can be abandoned by way of submissions and they do not warrant an amendment.

Determination

8. The question which this Ruling seeks to answer is whether or not, in the circumstances of this case, the court should grant the Plaintiff leave to further amend the Plaintiff.

9. The legal framework on amendment of pleadings is set out in Order 8 of the Civil Procedure Rules. The guiding principles on amendments are well settled. Sir Kenneth O’Conner, the President of the Court of Appeal for Eastern Africa captured the guiding principle on amendments in **Eastern Bakery Vs Castellino (1958) EA 461** in the following words:

“It will be sufficient....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 the other side can be compensated by costs”

The Learned Judge further observed that:

“The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

10. I have carefully looked at the record. I have also carefully considered the current legal framework

and guiding principles on amendment of pleadings. Lastly I have considered and deeply reflected on the able rival submissions by counsel for the parties.

11. From the record, the Applicant's handling of this suit has been largely careless. There have been a multiplicity of both oral and formal applications for leave to amend the Plaintiff. The latest application culminated in the grant of leave by Nyamweya J in 2014. That leave was never utilized. In the circumstances, the Applicant should have applied for extension of time within which to further amend the Plaintiff. She has instead brought an application seeking fresh leave to amend the Plaintiff dated 30/7/2003. She has ignored the fact that the Plaintiff dated 30/7/2003 was subsequently amended. She also ignores the fact that she obtained leave in 2014 but failed to comply with the set timelines.

12. The instant Application was lodged by John Mwariri Advocate on 9/8/2016. The said Advocate filed a Notice of Change of Advocates on 29/5/2016. Counsel for the Respondent contends that prior to that, the Applicant had filed a notice to act in person. Ordinarily, John Mwariri should have filed a notice of appointment instead of notice of change of advocates. I would say that, in the pre 2010 constitutional dispensation, this procedural technicality would have been fatal to the present Application. However, in our post 2010 legal system, Article 159 of the Constitution has de-emphasized procedural technicalities in Kenya's judicial processes. Consequently, on the strength of Article 159 I will treat the Notice of Change of Advocates filed by John Mwariri Advocate as an adequate instrument placing him on record.

13. I have looked at the Amended Plaintiff filed on 4/11/2003. This is the Amended Plaintiff through which the 2nd Plaintiff was enjoined as a party in this Matter. I have also looked at the Draft Amended Plaintiff attached to the present Application. I have considered the proposed amendments. Among them is a prayer for refund of the deposit paid to the Defendant. I have not observed any indication that the proposed amendments would cause injustice to the Defendant. I will therefore, though quite reluctantly, exercise this court's discretion in favour of the Applicant by extending time for effecting further amendments to the Plaintiff.

14. Before I dispose this Application, I must observe that, a litigant who has been granted leave to amend pleadings must seize that opportunity to effect all necessary and permitted amendments within timelines given by the court. Any subsequent application by the same applicant seeking leave to effect amendments which ought to have been effected pursuant to prior leave exposes the respondent to unnecessary costs. My view is that, except in exceptional circumstances, such applicant should bear the attendant costs. The instant Application does expose the Defendant to an absolutely unnecessary motion. In the interest of justice the Applicant shall bear the Defendant's costs in the circumstances.

15. In exercise of my discretion under the law, guided by the legal framework and guiding principles on amendment of pleadings, and in disposing the Plaintiff's Notice of Motion dated 2/8/2016, I make the following orders:-

- 1. The period of effecting further amendments to the Plaintiff's Plaintiff is hereby extended by Seven (7) working days from today.**
- 2. The intended amendments shall not include the enjoining of Christina Were because she is already a Party to the suit by virtue of the Amended Plaintiff filed on 4/11/2003.**
- 3. Subject to Order 2 above, the amendments shall be in terms of the Draft annexed to the Affidavit in Support of the Application.**
- 4. The Amended Pleadings shall be served upon the Defendant's Advocates within Seven (7) working days from today and the Defendant shall have 14 days within which to amend, file and serve its amended defence, should it deem it necessary.**
- 5. The Plaintiffs shall file a bound, paginated and indexed bundle containing the latest pleadings, witness statements and all documents [exhibits] within 35 days from today and the Defendant shall file and serve a similar bundle within 20 days from the date of service of the**

Plaintiff's bundle.

6. For taking the Defendant through an unnecessary motion, the Applicant Naomi Lintah Were, shall pay the Defendant's Advocates throw-away costs. assessed at Kshs.15,000, to be paid before the next hearing date.

7. This Matter shall be given a hearing date in court upon delivery of this Ruling.

Dated, signed and delivered at Nairobi on 12th day of April 2017.

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B M EBOSO

JUDGE

In the presence of:-

.....Advocate for the Plaintiffs

.....Advocate for the Defendant

.....Court clerk