REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 113 OF 2012

LAWRENCE OWINO OMONDI.....PLAINTIFF

VERSUS

KENETH INEA MUYERA.....DEFENDANT

R U L I N G

1. The plaintiff filed a notice of motion dated 24/3/2017 seeking leave to amend his plaint as per the draft annexed to the supporting affidavit.

2. According to the plaintiff, who swore the supporting affidavit dated 24/3/2017, the trustees of the Gospel Harvest Ministries Church of Kitale are the owners of land known as **Kitale Municipality Block 3/929** which borders Plot No. **Kitale Municipality Block 3/725** which latter plot is owned by Jimudu Women Group. He says that the owners of **Plot No. Kitale Municipality Block 3/725** have for long encroached upon and annexed part of the church plot. When the suit was instituted the plaintiff believed that the defendant was the owner. However, the plaintiff has come to learn that **Plot No. Kitale Municipality Block 3/725** was first allocated to one **Helen Muyera** who later transferred it to the **Jimudu Women Group** who are the owners of Bondeni Primary School and that Bondeni Primary School is the actual occupant of the plot. As a consequence of that discovery the plaintiff is of the opinion that the property parties who should have been enjoined as defendants in this suit are Jimudu Women Group and Bondeni Primary School, hence the need to amend the plaint to strike out the name of the current defendant and enjoin Helen Muyera, Jimudu Women Group and the Board of Management, Bondeni Primary School.

3. The respondent has filed 8 grounds of opposition. The respondent submits through his written submissions that the suit was pending for judgement prior to the filing of the instant application; that there has been undue delay in seeking leave to amend the plaint hence the respondent has been dragged through this litigation for five years, and now it is at the point of conclusion.

4. Further on this ground, the respondent states that the proposed amendment includes enjoining of new parties as defendants and at the same time withdrawing the suit against him yet he has not been served with a notice of withdrawal of suit against him. Parties have closed their respective cases and parties have taken their fair share of judicial time and resource. The plaintiff has admitted in their submission on the application that the defendant/respondent does not enjoy either legal or equitable right over the suit property. Lastly, the plaintiff has not disclosed when he discovered that the new facts that warrant the amendment. The respondent relied on the case of ***Raphael Mkare & 515 others***. It is respondent's argument that a new and inconsistent cause of action is being introduced by the plaintiff, which contradicts the plaintiff's own previous pleadings, yet no application for substitution and addition of parties has been made by the plaintiff under ***Order 10 Rule 2 of the Civil Procedure Rules 2010***. The evidence on the record cannot be used against the new defendants who never participated in the hearing.

5. The defendant pleads that the intended amendments are inconsistent to the previous pleading due to the fact that the plaintiff now seek injunctive orders against the intended 1st – 3rd defendants while they had sought eviction orders against the respondent in the original plaint. It is submitted on behalf of the respondent that the parties that the plaintiff seeks to enjoin were disclosed to the plaintiff vide a counterclaim filed in this suit which was filed on 7th May, 2017.

6. Citing the case of ***Raphael Mkare, (Supra),*** the respondent urges that suit would be withdrawn without the plaintiff being held accountable for having dragged the respondent through a full trial. He also cites the additional case of ***Harrison C. Kariuki –vs- Blue Shield Insurance Co. Ltd 2006 eKLR*** where the court was faced with a similar application and stated as follows:-

> **"I hold that to allow extensive amendments sought by the plaintiff at this late stage will occasion great prejudice to the defendant that cannot be made good by costs. it will occasion injustice to the defendant who will have to extensively amend its defence. The defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expended case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted".**

7. Lastly the respondent urges that the amendments would not be in furtherance of the overriding objectives of the ***Civil Procedure Act (Section 1A and 1B*** or ***Order 8 Rule 3 of the Civil Procedure Rules***). The respondent prays that the application be dismissed with costs.

8. The plaintiff has in his submissions urged that the acts of trespass complained against were perpetrated by the defendant for the benefit of the school. However, it cannot be understood why if that is the case, the respondent is sought to be dropped from these proceedings. The plaintiff proceeds to state that the school through the Board of Management, the proposed 3rd defendant is the equitable owner, Jimudu Women Group is the legal owner while Hellen Afwandi Muyera is the lessee. The defendant, so state the plaintiff, enjoys neither legal nor equitable or a direct beneficial right over the suit property. It is therefore necessary for the proper parties to be sued.

9. The plaintiff is said to have been acting in person at the time of the commencement of the suit, hence the joinder of the "person who was at the frontline". However the impression that the defendant was the actual and beneficial owner of the property adjacent to the plaintiffs diminished when the defendant produced evidence to the contrary.

10. The plaintiff maintains that since the court has issued a directive that PW1 should be recalled to testify as his evidence cannot be found on the record, then that automatically reopened the plaintiff's case and any amendments desired can be effected by the utilizing the newly opened window.

11. The ***Civil Procedure Rules at Order 8 Rule 5***, it is urged mandate the court and the parties to cause an amendment as long as the intended amendment is meant to determine the real issue in controversy between the parties. It is urged that the respondent would not be occasioned any prejudice, but he would be relieved of the burden of litigation by the granting of the application.

12. The apprehension raised by the applicant is that in the event judgement is entered in their favour in the absence of the participation of the intended defendants then there would be difficulties in the implementation of that judgment, yet court orders should not issue in vain.

13. Lastly it is urged that the issues leading to the current situation are as a result of a procedural technicality or an inadvertent fault "on the part of someone who ought to have acted".

14. The issues for determination in this application are as follows:-

(1) Whether the plaintiff may be granted orders sanctioning the amendment of the plaint even after the suit has been fully heard all evidence taken and it is now only pending judgement.

(2) Whether in the face of the sworn averments in the plaintiff's affidavit this suit should be maintained struck out.

(3) Who should bear costs?

The issues are addressed as hereunder:-

(1) Whether the plaintiff may be granted orders sanctioning the amendment of the plaint even after the suit has been fully heard all evidence taken and it is now only pending judgement.

15. In my view, pleadings may be amended at any time before the delivery of judgment. The applicable provisions in this situation are ***Order 8 Rule 3 of the Civil Procedure Rules*** which states 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.

16. In the current case the plaintiff relies on ***Order 8 Rule 3*** above. The discretion of the court is made to be subject to satisfaction on the courts part that:-

(1) The mistake sought to be corrected was a genuine mistake.

(2) The mistake was not misleading.

(3) The mistake was such as to cause any reasonable doubt as to be identity of the person

intending to sue or intended to be sued.

17. The amendment of pleadings is envisaged in***Order 8*** is however subject to the provisions of ***Order 1 Rule 9, 10*** and ***Order 24 Rules 3, 4, 5*** and ***6. Order 1 Rule 9*** provides as follows:-

> **"No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it."**

Order 24 has no application in the current situation as it relates to death and bankruptcy of parties.

18. Was the mistake sought to be corrected a genuine mistake?

The plaintiff ought to have conducted a search at the Lands Registry before the commencement of the suit. That is standard procedure where one is not certain as to whether the person intended to be sued is the proper party or not. Even the current application displays quite a sloppy approach where the averments as to ownership are not backed by any evidence other than the plaintiff's bare statements. I find that the action of joinder of the defendant on the part of the plaintiff was not a genuine mistake but sheer negligence which led to the suit being filed against an actual real person whom the plaintiff now admits has no interest in the subject matter.

19. The real issue however is the delay in the bringing of the application for orders of amendment. It is averred the delay is excessive. I agree. The plaint was filed on 15/8/2012, and the defendants statement of defence and counterclaim on 7/5/2013. The counterclaim pleaded that the land belongs to the Jimudu Self Help Group who own and run the Bondeni Academy which school was founded by the defendant's wife one Hellen Muyera. I find the counterclaim filed by the defendant to be detailed enough. It should have led the plaintiff to file the application for amendment soon after the disclosures were made. The plaintiff did not do so, now the suit has been heard.

20. Notwithstanding that the missing records have prompted a direction by the court that the plaintiff's evidence be taken afresh I find that the amendment of the plaint as proposed would lead to a virtual retrial whereby all the witnesses may have to testify afresh and the new parties may have to call their evidence too. The proposed amendment seems to implicitly withdraw the plaintiff's case against the defendant yet no order to that effect has been sought.

21. Does the plaintiff's claim that the window of opportunity occasioned by loss of proceedings relating to the plaintiff's evidence affect the determination of the issue of delay herein? The answer in my views is "no". Though ***Order 1 Rule 9*** provides that the no suit shall be defeated by reason of misjoinder or non-joinder of parties, the court is mandated to deal with the matter in controversy so far as regard the rights and interests of the parties actually before it.

22. In this case where the only parties actually before the court are the plaintiff and the defendant introduction of a new cause of action though based on the save facts, is as against entirely new parties. In my view, it is as though a new suit has been begun against the intended defendants while the old suit against the plaintiff has been abandoned.

23. The plaintiff in the ***Harrison Kariuki Case (Supra)*** did not seek to amend plaint to include new parties but only sought to plead "specifically the claim or total sums sought which was inadvertently omitted by his advocate". Citing the case of ***Municipal Council of Thika & Another*** the Court in the ***Harrison Kariuki Case*** quoted a passage in the judgement of the Court of Appeal as follows.

The Court proceeded to hold as follows:-

> **"I hold that to allow extensive amendments sought by the plaintiff at this late stage will occasion great prejudice to the defendant that cannot be made good by costs. It will occasion injustice to the defendant who will have to extensively amend its defence. The defendant will**

probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expended case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted".

The Court dismissed the application.

24. In the current application would the defendant suffer any prejudice? The answer is "no". As urged by the plaintiff, I agree that the burden of litigation would be cut loose and roll off his weary back. However, it is not proper for the administration of justice to that a party should wait till all evidence has been given so that they may amend their pleading.

25. If the evidence had not been taken, the situation would have been different. Now here there is risk of more judicial time being expended on this case. There would be an entirely new case against new parties. There is no good reason why the plaintiff cannot withdraw this suit and commence a fresh one against the parties he wishes to enjoin. I therefore find the application to be unmerited.

(2) Whether the suit should be dismissed?

26. The plaintiff has admitted that he has no claim against the defendant. He has finally found the person against whom his claim lies. There would be no need for the evidence of the plaintiff to be taken afresh if the same does not relate to the liability of the defendant. However I find that there is no need for a long judgement based on the recorded proceedings on the matter, the plaintiff having admitted that he has no claim as against the defendant, and having attempted to drop his name from these proceedings. Consequently the suit should be dismissed.

27. I therefore issue the following orders:-

(1) The application dated 24/3/2017 is hereby dismissed

(2) The plaintiff's suit, having been defended, is hereby dismissed upon admission of the plaintiff that he has no claim against the defendant.

(3) The plaintiff shall bear the costs of the application and of the suit.

It is so ordered.

Dated, signed and delivered at Kitale on this **28th** day of **September, 2017.**

MWANGI NJOROGE

JUDGE

28/09/2017

Before – Mwangi Njoroge Judge

Court Assistant – Picoty

Mr. Bisonga for Defendant

Mr. Teti holding brief for Karanif or Plaintiff

Ruling read in open court in the presence of counsel for the parties.

MWANGI NJOROGE

JUDGE

28/09/2017