



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND DIVISION**  
**ELC CIVIL SUIT NO. 289 OF 2012**

**NANCY BOMET..... 1<sup>ST</sup> PLAINTIFF**

(Suing on behalf of Jamhuri East Residents Association in Her capacity as the Chairlady thereof)

**JOHN EVANS AREK ..... 2<sup>ND</sup> PLAINTIFF**

(Suing on behalf of Jamhuri East Residents Association in his Capacity as the Secretary thereof)

**FRED KINUTHIA ..... 3<sup>RD</sup> PLAINTIFF**

(Suing on behalf of Jamhuri East Residents Association in his Capacity as the Treasurer thereof)

**VERSUS**

**JAMALDIN YAHYA .....1<sup>ST</sup> DEFENDANT**

**BARNABA AGAR NYANDIERO..... 2<sup>ND</sup> DEFENDANT**

**ALI BULLS ..... 3<sup>RD</sup> DEFENDANT**

**KHADIJA RRII ..... 4<sup>TH</sup> DEFENDANT**

**KHA LFAN JUMA SULEIMAN.....5<sup>TH</sup> DEFENDANT**

**SAMUEL KETAI .....6<sup>TH</sup> DEFENDANT**

**JENNIFER KISURU MUSIWA ..... 7<sup>TH</sup> DEFENDANT**

**HELLEN CHEPKEMBOI ..... 8<sup>TH</sup> DEFENDANT**

**PAMELA CHEPKEMBOI ..... 9<sup>TH</sup> DEFENDANT**

**MWANGI KAWAYA t/a THINKER'S PUB ..... 10<sup>TH</sup> DEFENDANT**

**EZEKIEL REMA..... 11<sup>TH</sup> DEFENDANT**

**LUCY MUTHONI t/a LUCY'S HOTEL..... 12<sup>TH</sup> DEFENDANT**

**JOSEPH MUNGAI KIMANI.....13<sup>TH</sup> DEFENDANT**

**REBECCA SAMBEKI t/a SAMBEKI PUB.....14<sup>TH</sup> DEFENDANT**

**JAIRUS SAWE t/a WOTE BUTCHERY .....15<sup>TH</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 15<sup>th</sup> October 2014 (hereinafter referred to as the "Second Application") in which the Plaintiffs/Applicants seek for the following orders:

1. That leave be and is hereby granted to the Plaintiffs/Applicants to file and serve an Amended Plaintiff
2. The Amended Plaintiff attached be deemed duly filed
3. That the Honourable Court be pleased to review the order granted on the 2<sup>nd</sup> day of May, 2014 to include the following parcels of land:

- i. Nairobi/Block 62/749
- ii. Nairobi/Block 62/750
- iii. Nairobi/Block 62/751
- iv. Nairobi/Block 62/753
- v. Nairobi/Block 62/768
- vi. Nairobi/Block 62/770
- vii. Nairobi/Block 62/765
- viii. Nairobi/Block 62/777
- ix. Nairobi/Block 62/779
- x. Nairobi/Block 62/762
- xi. Nairobi/Block 62/763
- xii. Nairobi/Block 62/764
- xiii. Nairobi/Block 62/766
- xiv. Nairobi/Block 62/767
- xv. Nairobi/Block 62/752
- xvi. Nairobi/Block 62/769
- xvii. Nairobi/Block 62/771
- xviii. Nairobi/Block 62/772
- xix. Nairobi/Block 62/773
- xx. Nairobi/Block 62/774
- xxi. Nairobi/Block 62/775
- xxii. Nairobi/Block 62/776
- xxiii. Nairobi/Block 62/778
- xxiv. Nairobi/Block 62/760
- xxv. Nairobi/Block 62/761
- xxvi. L.R. No. 209/20300
- xxvii. L.R No. 209/20661
- xxviii. Nairobi/Block 62/799
- xxix. Nairobi/Block 62/780
- xxx. Nairobi/Block 62/781
- xxxi. Nairobi/Block 62/782
- xxxii. Nairobi/Block 62/783
- xxxiii. Nairobi/Block 62/784
- xxxiv. Nairobi/Block 62/787
- xxxv. Nairobi/Block 62/788
- xxxvi. Nairobi/Block 62/789

xxxvii.Nairobi/Block 62/791  
xxxviii.Nairobi/Block 62/792  
xxxix.Nairobi/Block 62/795  
xl.Nairobi/Block 62/797  
xli.Nairobi/Block 62/796

4. Costs of this Application be in the cause.

The Second Application is premised on the grounds set out on its face together with the Supporting Affidavit of Thuita Ritho, a member of JERA, sworn on 15<sup>th</sup> October 2014, in which he averred that pursuant to a Notice of Motion dated 24<sup>th</sup> May 2012 (hereinafter referred to as the “First Application”), this court granted a temporary injunction and a mandatory order in respect of 9 parcels of land whose Certificates of Lease were adduced at the material time of filing the First Application while some Certificates of Lease were inadvertently not produced in support of the First Application due to loss or misplacement by the various registered owners. He further averred that the said Certificates of Leases could not be adduced previously without exercising due diligence search as some of the owners were not available having travelled out of the country or up country without any forwarding address or telephone contacts. He stated that the orders earlier granted by the court pursuant to the First Application may be rendered nugatory and in vain as the Defendants shall continue to occupy all the other neighboring parcels of land omitted in the order unless the order is reviewed to include all the parcels of land for which Certificates of Lease have now been adduced.

The Second Application has been opposed by the Defendants who filed Grounds of Opposition dated 21<sup>st</sup> October 2014 together with a Replying Affidavit deposed by the sixth defendant, Samuel Ketai, where they stated that the order sought by the applicants cannot be granted by a single application and that in the event the Plaintiffs/Applicants are granted leave to amend their plaint, fair play demands that the Defendants/Respondents should be afforded an opportunity to amend their defence before further proceedings can be undertaken. He stated that it had not been demonstrated that the new proprietors have authorized the deponent to the supporting affidavit to swear the affidavit on their behalf and there is no demonstration that the proprietors were unavailable at the inception of the suit therefore the Second Application does not meet the threshold set under **Order 45 of the Civil Procedure Rules, 2010**. He further stated that there is no evidence that the new proprietors are members of the Association suing on their behalf and that there is no demonstration that the proprietors are in possession of the suit properties cited therefore the Second Application should be dismissed with costs.

Parties canvassed the Second Application by way of written submissions. The Plaintiffs submitted that Certificates of Title were sacrosanct and indefeasible under **section 26(1) of the Land Registration Act No 3 of 2012** therefore the Defendants are in breach of the law by continuing to unlawfully occupy the Plaintiffs’ properties. That under **Order 45** the grounds for allowing review was upon discovery of new and important matter or evidence which after the exercise of due diligence was not within the applicant’s knowledge or could not be produced by him at the time when the decree was passed or made or on account of mistake or error apparent on the face of the record or for any other sufficient reason. The Plaintiffs/Applicants submitted that the titles listed above could not be produced prior to the order made on the 2<sup>nd</sup> May 2014 due to misplacement or absence of various members of the Association who have relocated abroad or upcountry upon retirement from active employment or business in Nairobi. They relied on the case of **Tarlok Singh Nandhra and 3 others on behalf of the depositors of Trust Bank Limited vs. Robincahil and 8 others t/a KPMG Peat Marwick NBI HCCC 2155 of 2000** where Ringera J as he then was held that,

*“....the named plaintiffs and the persons sought to be represented constitute numerous persons who have the same interest in the suit within the meaning of Order 8 (1) of the Civil Procedure Rules and that there is no discretion on the part of the Court to decline to allow an action which otherwise qualifies as a representative action to continue as such.”*

On amendment of their plaint, the Plaintiffs/Applicants relied on the case of **Philips, Harrison and Crossfield Ltd vs. Kassam [1982] KLR 458** where Hancox held that,

***“An application for leave to amend should be allowed if it is necessary for the purpose of determining the real questions in dispute between the parties and Leave to amend should be freely granted if the amendment can be made without prejudice which cannot be compensated by way of costs being occasioned”***

The 1<sup>st</sup>, 2<sup>nd</sup> and 6<sup>th</sup> to 12<sup>th</sup> Defendants in their submissions stated that the Second Application does not adhere to the rules of amending pleadings under **Order 8 of the Civil Procedure Rules, 2010** in that the amendment should not cause injustice to the other side and that the injustice should not be able to be compensated by costs. They further stated that the introduction of the new properties will introduce new parties as defendants and the order would have been issued without hearing them which will amount to injustice. They relied on the case of **Eastern Bakery vs. Castelino (1958) EA 461**.

I have duly considered the Second Application and the affidavits in support and opposition to the application and submissions filed by the parties. The issue arising for my determination is whether to allow the amendment of the plaint as requested by the Plaintiffs/Applicants and further whether to review the orders issued in the First Application to extend to the additional parcels of land set out in the prayer in the Second Application.

On the issue of amendment of the plaint, the applicable law is as follows:-

**Order 2 Rule 15 of the Civil Procedure Rules, 2010** provides that,

***“(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-***

a.

***order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.”***

The Plaintiffs/Applicants have explained to the court that as at the time they filed the First Application which derived the order of 2<sup>nd</sup> May 2014, the Certificates of Leases that have now been brought in the Second Application could not have been made available because the owners of the said documents had either travelled out of the country or had not left any forwarding telephone contacts but they have now been found and have availed the said documents. They have explained that the lack of availing the said documents in the first place was because of logistical challenges in communication between the registered owners and Association. This court has weighed the explanation given by the Applicants and has also considered the Defendants’ claims that they would be prejudiced if other parties are included in this suit by virtue of the Certificate of Leases attached to this application and find that the defendant’s claim cannot stand for the reasons that the hearing of this suit has not commenced and therefore no prejudice will be occasioned to them. Further, this court appreciates the fact that the very foundation upon which any judicial system rests is that a party who comes to court shall be heard fairly and fully. The court is duty bound to hear all parties to the case and failure to do so is an error. It is also a right that a litigant should be permitted to bring his proceedings without hindrance and have his case decided. This is in tandem with the decision of the court in the case of **Branco Arabe Espanol vs. Bank of Uganda (1999) 2 EA 22**, wherein the court held that,

***“The Administration of justice should normally require that the substance of all disputes should be investigated and decided on their merits, and that errors, lapses should not necessarily debar a litigant from the pursuit of his right and unless a lack of adherence to rules renders the appeal process difficult and inoperative, it would seem that the main purpose of litigation, namely the hearing and determination of disputes, should be fastened rather than hindered”.***

The Defendants will have the liberty to amend their defence after being served the amended Plaint.

Further to the above, I will allow the review of the orders issued on 2<sup>nd</sup> May 2014 in the First Application to include the parcels of land set out in prayer no. 3 of the Second Application only in respect of the temporary injunction but not the mandatory injunction. I also take the liberty to review the ruling in respect of the First Application to exclude the mandatory injunction. Costs in the cause.

It is so ordered.

**DELIVERED AND SIGNED AT NAIROBI THIS 29<sup>TH</sup>**

**DAY OF JANUARY 2016.**

**MARY M. GITUMBI**

**JUDGE**