



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 22 OF 2012

JOHN KIPLAGAT TUWEI.....PLAINTIFF

VERSUS

JOHN KIPSEREM KITUR.....DEFENDANT

RULING

John Kiplagat Tuwei hereinafter referred to as the applicant seeks leave to amend his plaint and that the annexed amended plaint be deemed as duly filed on payment of the required fees vide an application dated 15.7.2014 brought by way of Notice of Motion under Order 8 Rule 3 of Civil Procedure Rules, 2010 and Section 3 and 3A of the Civil Procedure Act. The application is based on the grounds that there exists a decree to wit Kapsabet Land Disputes Tribunal No. 18 of 1997 and therefore the court has to make a finding on the intertwining of this declaratory suit and the Lower Court decree. That unless leave is granted, there is no way any positive outcome will be made in the existence of the said decree of the Lower Court. The plaintiff has made this application timeously for the issues before court to be vindicated as a whole. That it is necessary therefore that before the close of the plaintiff's case, this application be made. That the defendant will not suffer prejudice. That the costs will be sufficient to compensate the defendant..

The application is supported by the affidavit of John Kiplagat Tuwei who begins with an unreserved apology for his failure to have filed the application in time which was occasioned by his poor health arising from the torture he underwent over this matter. That truly, the decree of the court in Kapsabet Land Disputes Tribunal No. 18 of 1997 is at the centre of his suit herein. Upon notification and justifiable explanation given to him, he believes that truly there is need to seek leave of this court to amend his pleadings. That upon amendment, all parties will have the opportunity to vindicate and justify their positions accordingly.

That upon amending his pleadings to bring in the new issues, the court will be able to make a resounding finding over the matter. That truly, he is aggrieved by the said decree for which he was unable to appeal and or do anything save that he cannot just wish it away. That he has not closed his case though at this late stage is only the court's discretion upon this application for leave.

He submits himself to the jurisdiction and the discretion of the court on his seeking this leave. That he would, as he is advised concede to pay costs to the defendant on this application. The amended plaint seeks to challenge the decree in Kapsabet Land Disputes Tribunal No. 18 of 1997 as a nullity as it was made in respect of land with title and the Tribunal cannot subdivide land under Cap. 300 (repealed) as presence of the High Court of Kenya hence acted without jurisdiction. The plaintiff seeks an order that the decree registered on title No. L.R. Mogobich/Mogobich/Block 1/226 be reviewed.

The defendant **John Kipsorem Kitor** filed a replying affidavit stating that the plaintiff's application is

incompetent and has been brought after unreasonable delay. That the plaintiff is a vexatious litigant and wants to convolute this cause as there is a decree concerning the subject matter and the parties herein being Kapsabet Land Disputes Tribunal No. 18 of 1997 and which the applicant herein has admitted in paragraph 4 of his affidavit. That the applicant, if he was dissatisfied with the decree should have appealed against it within the time prescribed. That the applicant filed an application for stay pending an appeal but subsequently failed to prosecute. That instead of the applicant pursuing an appeal or review of the decree, he filed a new suit herein which he is in the process of challenging. The plaintiff has closed his case and in the process of hearing of the main suit, and on cross examination of the applicant, he realized the grave mistake, that is the existence of the decree and wants to cure it by bringing in an amendment of the suit. According to the respondent, the amendment is an afterthought.

That the applicant having known their application for appeal has lapsed and having known that the decree has been executed has embarked upon an abuse of the court process.

That the decree in Kapsabet Land Disputes Tribunal No. 18 of 1997 has already been executed and registered against the plaintiff's title. That the applicant's application for amendment seeks to challenge the decree passed by the Honourable court in 1997 and already executed by being entered against the title. That in light of paragraph 14 above, the court, the Land Registrar and the Tribunal ought to be made parties to the suit as their decisions are being challenged. That he is advised by counsel on record, that since the court, the Tribunal and Registrar have not been enjoined, they cannot be condemned unheard and therefore there is an apparent and deliberate mistake on the application. That the judgment in Kapsabet Land Disputes Tribunal No. 18 of 1997, which is the subject matter of this application was obtained in 1997 that is over 17 years ago. That in light of paragraph 17 above, he is advised by his counsel on record, information which he verily believe to be true that on action may not be brought upon a judgment after the end of 12 years from the date on which judgment was delivered and therefore the application is time barred. That the applicant has further admitted in paragraph 3 that he failed to file the application on time by reason of poor health which he has not supported it with any documentation and which is not a genuine reason lasting for over 17 years. That in further support of paragraph 19 above, the inordinate delay in filing the application is inexcusable and the allegations of poor health is inexcusable.

The plaintiff submits that he wishes to amend the plaint so as to ensure that litigation between parties is conducted on the basis of the true state of things. The plaintiff claims that he needs to amend the plaint to describe the parties and include their address, moreover, that there exist a decree in the Kapsabet Land Disputes Tribunal No. 18 of 1997, which is a nullity. The plaintiff further argues that the amendment will not cause any prejudice to the defendant as the court will make a resound finding of the matter and that the amendment is necessary to enable the court determine the real issues. He has cited *Central Kenya Ltd Vs Trust Bank Ltd and 4 Others – Appeal No. 222 of 1998*, where the Court of Appeal set out principles to be applied in amendments, thus;

1. **Necessarily for determination to real question in controversy.**
2. **To void multiplicity of suits provided that there has been undue delay.**
3. **Only where or inconsistent no new cause of action arises out of the same facts or substantially to see facts as a cause of action.**
4. **That no vested interest or accrued legal rights is affected.**
5. **That no prejudice or injustice is occasioned to the other side which cannot be compensated in costs.**

The plaintiff also relies on *Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limited (2013) ECLR*, where it was held that the power to amend can be exercised by the court at any stage of the proceedings.

The plaintiff further relies on Article 159 of the Constitution of Kenya, 2010 which gives the court a discretion to issue orders that ensure that ends of justice are met.

The defendant on his part submits that the applicant has not explained why he has not challenged the decision of the Kapsabet Land Disputes Tribunal No. 18 of 1997, for 17 years. Moreover, that the

plaintiff intends to challenge the decision of the Kapsabet Land Disputes Tribunal No. 18 of 1997, without giving it a hearing as it is not a party to the proceedings. Moreover, that the applicant has brought the application out of time. The defendant further argues that the amendment if allowed, will cause an injustice to the defendant which cannot be compensated in damages and that it introduces a new cause of action which is barred by the statute.

I have considered the application for amendment and do find that the same is made more than 17 years after the commencement of the suit and after the plaintiff has closed his case and therefore, the defendant is likely to suffer prejudice due to delay which cannot be compensated with costs.

Moreover, the application intends to introduce a new cause of action, thus, the nullification of a decision of the Tribunal which was adopted by the Magistrate's Court in Kapsabet and therefore, a decree of the said court. The decision of the court was only open to challenge by way of appeal to the Appeals' Committee and a appeal to the High Court then or by way of application for judicial review in the High Court and not by way of plaint in the High Court. Moreover, the decree sought to be nullified has been executed by the Land Registration, Nandi and therefore, there is nothing to nullify.

In my view, the amendment sought is not in good faith as the application amounts to fishing for evidence having realized that he is bound by the decision of the court in Kapsabet. The amendment is likely to cause injury to the defendant as it seeks to introduce a new cause of action 17 years after it accrued. Furthermore, the amendment is likely to alter the character of the suit as it seeks to challenge the decision of another court. No reason has been given for the delay in making the application for amendment. The upshot of the above is that the application is dismissed with costs.

DATED AND DELIVERED AT ELDORET THIS 26TH DAY OF FEBRUARY, 2016.

ANTONY OMBWAYO

JUDGE