



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

MILIMANI LAW COURTS

ELC NO. 853 OF 2007

JOSEPH KISUKO KIMEU.....PLAINTIFF

=VERSUS=

JOSEPH WANYOIKE MUIRU.....DEFENDANT

RULING

The Defendant filed an application dated **4th September 2013**, seeking an order that he be granted leave to amend his defence in accordance with the draft amended defence and that the same be deemed duly filed upon payment of the requisite filing fees. The application is premised on grounds on the face of the application and supported by an affidavit. The Defendant deposes that he has brought out all issues for determination in the draft amended defence and it would be in the interest of justice, that the same be allowed. Further, that the Plaintiff will not be prejudiced at all if the order sought is granted.

The Plaintiff filed a Notice of Preliminary Objection dated **18th October 2013**, against the Defendant's application. The Plaintiff avers that the application is inconsequential on the basis that the only issue for determination before the Court – boundary dispute – has by consent of both parties been referred to the District Land Registrar and the District Government Surveyor for determination. Consequently, that he stands to be prejudiced if such an application is to be allowed. The Plaintiff also averred that the application is an abuse of the Court process calculated to prevent the cause of justice, as a similar application was filed and allowed on **15th June 2004**.

The Plaintiff also swore a Replying Affidavit on **18th October 2013**, in response to the application. He deposed that the Defendant filed his defence on **20th December 2002**, and that on **8th July 2004**, the Defendant sought leave to amend his defence, which application was allowed without a contest. It was the Plaintiff's deposition that by a consent letter dated **6th June 2007**, both parties agreed that the dispute over the boundary, being the only matter for determination be referred to the District Land Registrar and the District Government Surveyor for determination and filing their report in Court. Further, that the Court made an order to that effect on **14th December 2009**, which order was formally extracted and amended by consent on **23rd September 2013**. Thus, Plaintiff deposed that the alleged acts of tort, alleged criminal proceedings and other issues in the draft amended defence are irrelevant, inconsequential to the proceedings and in any event, time barred. The Plaintiff urged the Court to dismiss the application with costs.

The application was canvassed by way of written submissions. On behalf of the Defendant, counsel submitted that the Defendant sought to introduce particulars of trespass, loss and damage occasioned as a

result of the Plaintiff's actions. Counsel submitted that the issues raised by the Defendant arose after the filing of the suit and continues to arise and can be pleaded pursuant to **Order 2 Rule 5 of the Civil Procedure Rules**. It was further submitted that a party may amend his pleadings at any time before Judgment is entered. Counsel also submitted that the Surveyor was yet to go to the ground and that in any case, the surveyor's report cannot bar the Defendant to amend his pleadings. Further, that despite the Court's directive that the issue of boundary be referred to the District Land Registrar, the Plaintiff continues to trespass in the Defendant's parcel and causing damage.

On behalf of the Plaintiff, counsel submitted that the only issue having been referred to the Surveyor for determination, *ipso facto*, the issue as to who is the trespasser will depend on the outcome of the survey.

The general rule as to amendment of pleadings was aptly stated in the case of **Eastern Bakery –v- Castlino (1958) (E.A. 461)** 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 there is no injustice if the other side can be compensated by costs.....The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

The Court has discretionary power to amend pleadings before Judgment for purposes of determining the real issues in controversy. However, such discretion ought to be exercised reasonably and judicially.

The Defendant urges this Court to allow the application on the basis that there is continuous trespass by the Plaintiff occasioning him loss and damage. The Plaintiff on his part states that there is only one issue for determination which has already been referred to the Surveyors. Further that the outcome by the surveyor will determine who among the parties is trespassing on the others' property. The question to be answered is whether the amendment is feasible in the circumstances.

It is without doubt that this is a boundary dispute, each party accusing the other of trespass. I have meticulously perused the Court file and established that the parties did enter into consent on **6th June 2007**, to have the matter referred to the District Land Registrar, Thika to establish the boundaries. This was done and a report filed by the Registrar, with a finding that the Defendant is at fault. When the Plaintiff sought Judgment on the basis of the said report, the Defendant challenged the same. The matter was heard by Justice Mbogholi-Msagha who noted that the consent did not expressly state that the report by the Registrar shall be binding upon the parties and that it shall be final and conclusive. In his ruling of **14th December 2009**, the Judge ordered that the parties do re-engage the services of the District Land Registrar and/or Surveyor to examine and chart out the boundaries. The Judge also specified that the Registrar's report shall be conclusive and binding upon the parties.

Having established that the real issue in controversy is a boundary dispute, and there being an order referring the same to the District Land Registrar and/or Surveyor for determination, I am of the considered view, that the amendment sought by the Defendant is unnecessary and hereby dismiss the same.

Importantly, I do note that the Registrar and/or Surveyor is yet to proceed to the ground, five years later. This delay negates the principle of expeditious disposal of suits. It is only prudent to set timelines and assign responsibilities to ensure a speedy determination of the matter. In that regard, the parties are hereby ordered to comply with the orders of this Court made on **14th December 2009** and amended on **23rd September 2013**.

The Court further Orders as follows:-

1. ***The Survey report be filed within 90 days of the date hereof.***
2. ***The Plaintiff shall be responsible to serve this order upon the Registrar and/or Surveyor at***

Thika.

3. *The Plaintiff shall have the costs of this application.*

Dated, Signed and Delivered this 29th day of April, 2016

It is so ordered.

L. GACHERU

JUDGE

In the Presence of:-

None attendance for the Plaintiff

M/s Chepngeno holding brief for Mr Mwenesi for the Defendant/Applicant

Hilda : Court Clerk

L. GACHERU

JUDGE

Court:

Ruling read in open Court in the presence of M/s Chepngeno holding brief for Mr Mwenesi for the Defendant/Applicant and absence of representation from Plaintiff's Advocates.

Notice of delivery of Ruling to be served to the Plaintiff by the Defendants advocates and further mention on 28/7/2016 for the surveyors report. Mention to issue.

L. GACHERU

JUDGE

29/4/2016