



REPUBLIC OF KENYA
IN THE ENVIRONMENT & LAND COURT AT KERICHO

CIVIL SUIT NO. 76 OF 2007

KIPLANGAT ARAP KORIR.....PLAINTIFF

VERSUS

RICHARD KIPYEGON KORIR1ST DEFENDANT

SARAH CHEPNGENO CHEPKWONY.....2ND DEFENDANT

STANLEY KIPKOECH.....3RD DEFENDANT

KIPYEGON KOECH.....4TH DEFENDANT

RULING

(Application for leave to amend plaint; plaintiff having filed suit to claim certain land; the land now being subdivided; plaintiff seeking to cancel the new titles; no change in subject matter; application allowed)

The application before me is that dated **18th April 2016** filed by the plaintiff. It is an application seeking leave to amend the plaint. The application is opposed and before I go to the gist of it, I think it is prudent that I set out some background leading to the same.

This suit was commenced by way of plaint filed on **6th July 2007**. There was an amendment that was effected on **15th October 2007**. In this amended plaint, it was pleaded that the plaintiff is the registered proprietor of the **land parcel Transmara/Kimintet/441** measuring 5 acres. It was claimed that the four defendants named in the said amended plaint had unlawfully encroached into the said land yet they have no proprietary interest. In the suit, the plaintiff sought eviction orders against the defendants. No defence was filed by the defendants although the 2nd and 3rd defendants had entered appearance. The plaintiff then listed the suit for hearing on **30th June 2010** before Honourable Justice GBM Kariuki (as he then was). On that day, counsel for the 2nd and 3rd defendants applied for adjournment but this was denied and the matter proceeded. Judgment was delivered on **28th July 2010** in favour of the plaintiff, the court allowing the prayers for eviction of the defendants from the suit land. An order of eviction was eventually issued on **16th October 2010**.

An application dated **20th March 2012** was filed by the 1st and 4th defendants seeking to set aside the judgment and for leave to defend. On **23rd September 2013**, a consent was recorded setting aside the judgment and permitting the defendants to file defence. The 1st and 4th defendants represented by the law firm of M/s Obondo Koko & Company Advocates thereafter proceeded to file a Statement of

Defence. The 2nd and 3rd defendants, represented by the law firm of M/s Bigogo Onderi & Company Advocates also filed a joint defence. In their defence, they pleaded inter alia that part of the suit land (12.5 acres) had through the process of land adjudication been allocated to the defendants and the plaintiff is therefore not entitled to it. They filed a counterclaim for 12.5 acres.

This application has now been filed seeking to further amend the plaint. Annexed to the application is a draft further amended Plaint which I have gone through. I can see that there is a proposed new pleading that the defendants have fraudulently caused to be subdivided the **land parcel Transmara/Kimintet/441 D** which has resulted into the **land parcels Transmara/Kimintet/441D/1426 and 1427**. It is averred that the defendants are now the registered proprietors of the two land parcels. In addition to the prayer for eviction, there is a prayer for cancellation of the resultant titles.

The 2nd and 3rd defendants have not opposed the motion but the 1st and 4th defendants have opposed it through the replying and further affidavits of Richard Kipyegon Korir. He has deposed inter alia that it is not true that he and the 4th defendant have fraudulently caused the subdivision of the **land parcel Transmara/Kimintet/441 D**. He has further deposed that the subdivision was effected through a **Gazette Notice No. 15176 dated 26th October 2012** following a decision by the Minister in the process of land adjudication. It is averred that the decision has never been challenged and is final.

Both Mr. Orina for the plaintiff/applicant and Mr. Koko for the 1st and 4th defendants filed written submissions which I have taken note of.

Most of the submissions of Mr. Koko dwelt on the argument that the defendants have properly procured their title deeds. I need to emphasise that the issue before me is not whether or not the two titles, **Transmara/Kimintet/441D/1426 and 1427** were procured by way of fraud. That is an issue to be determined at the hearing of the suit and not in this application. Of course what the plaintiff wants is to be granted leave to plead that there are now two resultant titles out of the original **land parcel Transmara/Kimintet/441 D** and to further be allowed to press the case that the subdivided titles are fraudulent. In other words, that is what the plaintiff wants to present in the event that the amendment is allowed.

The question that I have asked myself is whether there is any reason which would militate against me allowing the plaintiff to present this case and in my opinion there is none. Allowing the plaintiff to amend does not mean that it has been proved that the titles in issue were procured by fraud. It only allows the plaintiff to table that case for determination. I do not indeed see how the plaintiff can proceed with the case as originally filed without effecting the proposed amendments. This is because the subject matter in the original pleadings relate to the **land parcel Transmara/Kimintet/441 D** which land parcel no longer exists. What now exists is the **land parcels Transmara/Kimintet/441 D / 1426 and 1427**. If it remains un-amended, there will be no subject matter left to go for trial given that the original title has been subdivided.

It was also argued by Mr. Koko, that the amendments introduce a new cause of action. I don't think so. The cause of action in the original suit was that the plaintiff is entitled to the **land parcel Transmara/Kimintet/441**. It is still his case that he is entitled to the said land only that now the land is subdivided into two portions. There is no change in the cause of action or any change in the subject matter. It remains the same, only now, in two subdivided portions. The claim of the plaintiff has not changed. It is still the view of the plaintiff that he is entitled to the whole of this land to the exclusion of the defendants.

I really do not see any basis upon which I can deny the plaintiff the opportunity to plead his case as he wishes. The case has not commenced and I do not see what prejudice the defendants stand to suffer. If the amendment is allowed, they can also proceed to amend their defence to suit the new pleadings.

I therefore allow the application for amendment. I direct the plaintiff to file and serve the amended plaint within 14 days from today. Upon service, the defendants are at liberty to amend their defences and

or/counterclaim.

For the reason that this amendment has been necessitated by the change in character of the original parcel of land, of which the plaintiff had no control, I order that costs be in the cause.

It is so ordered.

Dated, Signed and delivered on this 29th day of July, 2016

MUNYAO SILA

JUDGE

ENVIRONMENT AND LAND COURT

PRESENT

Mr. Orina present for Plaintiff/Applicant

Mr. Koko present for 1st and 4th Defendants/ Respondents

No appearance on part of M/s J.K. Mutai for 2nd and 3rd Defendants/ Respondents

Court Assistant; Gladys Wambany