



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**

**ELC CIVIL SUIT NO. 77 OF 2014**

**MAHADIA WANJIRU ISSA..... 1<sup>ST</sup> PLAINTIFF**

**ALIMA WANJIKU KINUTHIA.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**HON. HARRISON KINUTHIA MBUGUA.....1<sup>ST</sup> DEFENDANT**

**FRANCIS MUREITHI KIBICHO.....2<sup>ND</sup> DEFENDANT**

**GEORGE MUNYUNGU KAMAU.....3<sup>RD</sup> DEFENDANT**

**GEORGE KAMAU KINUTHIA.....4<sup>TH</sup> DEFENDANT**

**KELVIN MBUGUA KINUTHIA.....5<sup>TH</sup> DEFENDANT**

**ERIC NJAU KINUTHIA.....6<sup>TH</sup> DEFENDANT**

**RULING**

There are three applications for determination before the Court. The first application is a Notice of Motion dated 5<sup>th</sup> May 2014 brought by the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants under section 1A, 1B and 3A of the Civil Procedure Act, Order 2 Rule 15(1), (b), (c) and (d), Order 8 Rule 2(1), (2) and (3), Order 51 Rule 1 of the Civil Procedure Rules and section 7 of the Limitation of Actions Act. The Defendants are seeking an order to strike out the amended plaint dated 24<sup>th</sup> March 2014. The Defendants have also sought orders to have the suit against them dismissed and entry of judgement as prayed for in their counterclaim dated 18<sup>th</sup> March 2014.

The application is supported by the 1<sup>st</sup> Defendant's affidavit sworn on 5<sup>th</sup> May 2014 where the Defendants aver that the Plaintiffs amended their Plaint by extracting information from their defence. The Defendants contend that the documents attached to the amended plaint were supplied in the list of documents filed together with their defence and counterclaim. It is the Defendants' averment that the Plaintiffs have acted in extreme bad faith and have taken advantage of their good faith in supplying a comprehensive defence supported by documents to breathe life into their claim.

Further, the Defendants' state that the Plaintiffs suit as filed is frivolous, scandalous and abuse of the court process since the Plaintiffs do not know the nature of their claim. The Defendants also contend that the Plaintiffs' claim is statute barred pursuant to the provisions of section 7 of the Limitation of Actions Act. It is the 1<sup>st</sup> Defendant's claim that the 2<sup>nd</sup> Plaintiff transferred the suit property known as

**Dagoretti/Mutu-ini/818** as a gift and that he was duly registered as owner on 19<sup>th</sup> July 1991. According to this Defendant, the Plaintiffs cause of action arose after his registration on 19<sup>th</sup> July 1991 and that the claim became time barred after the expiry of 12 years.

The 3<sup>rd</sup> Defendant filed a replying affidavit sworn on 14<sup>th</sup> May 2014 in support of the application by the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendant. The 3<sup>rd</sup> Defendant avers that the Plaintiffs do not have a tangible case and have been on a hunting mission to build their claim against the Defendants. It is the 3<sup>rd</sup> Defendant's averment that he has been in occupation of LR Dagoretti/Mutuini/939 since 1997 where he has built his matrimonial home and further that the Plaintiffs who live on adjacent parcels knew of his purchase of the suit property and subsequent occupation.

According to the 3<sup>rd</sup> Defendant, the Plaintiffs never took any action and have waited beyond the contractual period of 6 years since his sale agreement with the 2<sup>nd</sup> Plaintiff to bring their frivolous application. Further, the 3<sup>rd</sup> Defendant avers that the averments in the amended plaint are an extreme departure from the original plaint and further, that it is evident that the Plaintiffs relied on the 1<sup>st</sup> and 3<sup>rd</sup> Defendant's defences to create a case for themselves and the court was urged to see through the Plaintiffs' mischief and decline the amendment.

The 1<sup>st</sup> Plaintiff opposed this application through her replying affidavit filed on 1<sup>st</sup> September 2014 where she contends that the rules allow a party to amend pleadings any time before judgement if they so deem necessary. The 1<sup>st</sup> Plaintiff avers that the amendment was necessitated by the fact that the 2<sup>nd</sup> Plaintiff who was the initial registered owner of the suit property got sight of the documents in possession of the 1<sup>st</sup> Defendant and therefore, that there was need to amend the Plaint so as to avail to the court the full and correct position since the date of issuance of the title to the date of the last subdivision and transfer thereof.

It is the Plaintiffs' case that the Defendants' documents and the information extracted there from was not previously within their knowledge to enable them have the correct information since the documents were solely in the possession of the 1<sup>st</sup> Defendant. The Plaintiffs aver that the documents form part of public documents and further, that their claim has not changed. It is the Plaintiffs' case that there is no law that bars a party from amending a pleading so as to bring the correct position before the court.

In respect to the Defendants' assertion that he claim is time barred, the Plaintiffs contend that they have explained when the issues were discovered and the fraud that took place and when the same was discovered. The Plaintiffs aver that the suit is properly before the court and that limitation has not arisen. According to the Plaintiffs, the 1<sup>st</sup> Defendant's claim that the cause of action arose in 1991 after the transfer to him is defeated by the fact that it is the 1<sup>st</sup> Defendant who had custody of the title deed since 1985 and continued to do so thereafter without the Plaintiffs knowledge. The Plaintiffs contend that the court should be allowed to interrogate the case and make a determination on the basis of the evidence in the interest of justice.

The 2<sup>nd</sup> Application is a Notice of Motion dated 1<sup>st</sup> October 2014 brought by the 2<sup>nd</sup> Defendant under the provisions of sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 6(1), 15 and Order 51 Rule 1 of the Civil Procedure Rules. The 2<sup>nd</sup> Defendant is seeking an order to strike out the amended plaint dated 24<sup>th</sup> March 2014 as well as an order dismissing the suit herein with costs.

The application is supported by the 2<sup>nd</sup> Defendant's affidavit sworn on 1<sup>st</sup> October 2014 where the 2<sup>nd</sup> Defendant states that the amended plaint does not disclose any cause of action whatsoever. The 2<sup>nd</sup> Defendant avers that the claim made in the amended plaint is a complete departure from the original plaint. He contends that the amended plaint is frivolous, scandalous, vexatious and an abuse of the court process for reasons that the Plaintiffs don't know what their particular claim is.

The Plaintiffs opposed the application through a replying affidavit sworn by the 1<sup>st</sup> Plaintiff on 6<sup>th</sup>

October 2014 where the 1<sup>st</sup> Plaintiff adopted her affidavit sworn on 21<sup>st</sup> May 2014 in response to the application dated 5<sup>th</sup> May 2014. The Plaintiffs deny the assertion that the amended plaint is a complete departure from the claim in the original plaint and state that the subject matter of their claim is the property that the 2<sup>nd</sup> Defendant inherited which was subsequently subdivided and allocated to the Defendants.

It is the Plaintiffs' assertion that their cause of action as against the Defendants is for fraudulently hiving off of property and that the claim has not changed even after the amendment since it relates to the same parties. The Plaintiffs aver that the 1<sup>st</sup> Defendant who had custody of the title on behalf of the 2<sup>nd</sup> Plaintiff fraudulently caused the subdivision and allocation to the Defendants on diverse dates. They contend that they are seeking to have the said allocations declared a nullity and the titles cancelled and the property being returned to them and therefore, that there is a clear cause of action.

The third application is a Notice of Motion dated 19<sup>th</sup> November 2014 brought by the 3<sup>rd</sup> Defendant under sections 1A, 1B and 3A of the Civil Procedure Act and Order 2 Rule 6(1) and Rule 15(1) and Order 51 Rule 1 of the Civil Procedure Rules.

The grounds upon which the application is premised are detailed in the 3<sup>rd</sup> Defendant's supporting affidavit sworn on 19<sup>th</sup> November 2014 where he avers that the amended plaint does not disclose any cause of action whatsoever and that the same is a complete departure from the claim in the original plaint. The 3<sup>rd</sup> Defendant contends that the amended plaint is frivolous, scandalous and vexatious since the Plaintiffs do not know what their claim is in particular.

The applications were canvassed by way of written submissions and the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants in submissions dated 24<sup>th</sup> November 2014 argued that the 2<sup>nd</sup> Plaintiff has not given the 1<sup>st</sup> Plaintiff authority to swear the affidavit on her behalf as required by Order 1 Rule 13(1) and (2) and therefore, that the 1<sup>st</sup> Plaintiff's affidavit is fatally defective and incompetent.

Counsel for the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants submitted that amendments to pleadings should be allowed provided no injustice is visited upon the other party. The Defendants relied on the cases of **Orbit Chemical Industries Ltd vs. National Bank of Kenya Ltd (2006)eKLR**, **Central Kenya Ltd vs. Trust Bank Ltd (2000)eKLR**, **Eastern Bakery vs. Castelino (1985) EA 461** and **John Gitau Mungai vs. Stephen Thuku Kabebe & 3 others(2014)** where the gist of the Court's findings was that amendments should be freely allowed at any stage of the proceedings provided no injustice is occasioned to the other party.

The 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants submitted that since our system is adversarial where the Plaintiff lodges a claim first before the Defendant files a defence, the Plaintiff should not be allowed to use the Defendant's defence and documents to frame a fresh suit for the court to determine. Counsel argued that the 1<sup>st</sup> Plaintiff was on a fishing expedition and that there was no claim in the first place. It is the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants' submission that the amended plaint is not an amendment of pleading but an amendment of fact.

In further submission, the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants submitted that the Plaintiffs' claim is statute barred by the provisions of section 7 of the Limitation of Actions act. Counsel averred that the 1<sup>st</sup> Defendant's title dated 19<sup>th</sup> July 1991 was issued more than 22 year ago prior to the filing of this suit. It is the Defendants' submission that the 2<sup>nd</sup> Plaintiff who was involved in the transfer has not filed an affidavit to deny the transaction and further, that the 1<sup>st</sup> Plaintiff has no locus in this matter which is between the 2<sup>nd</sup> Plaintiff and the Defendants.

In respect to the allegations of fraud in the replying affidavit, the 1<sup>st</sup> Defendant submitted that no charges have been preferred against him and further, that the 1<sup>st</sup> Plaintiff had not stated that she reported the fraud

to the nearest police station. Counsel argued that the 1<sup>st</sup> Plaintiff had not indicated when she became aware of the fraud and that if the same was in 2009 when she became the registered proprietor of **Dagoretti/Mutuini/921** now known as **Dagoretti/Mutuini/1112**, she waited for more than 4 years to file the instant suit.

The 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants submitted that they have been in possession of the suit premises and have built permanent structures with the full knowledge of the 2<sup>nd</sup> plaintiff who transferred the property to the 1<sup>st</sup> Defendant. It is therefore their submission that the alleged discovery of fraud by the 1<sup>st</sup> Plaintiff is an afterthought and an attempt to come within the provisions of section 26 of the Limitation of Actions Act and a scheme to subvert the course of justice. The Court was referred to the case of **Mesen Shisia Juma vs. Bilha Olingo Muluka & another (2012) eKLR** where it was held that the Plaintiff's cause of action which arose in 1996 was time barred pursuant to the provisions of section 7 of the Limitation of Actions Act.

The 2<sup>nd</sup> Defendant in submissions dated 5<sup>th</sup> November 2014 argued that the amended plaint is a complete departure from the original plaint. Counsel for the 2<sup>nd</sup> Defendant submitted that the departure from the original pleading was a fatal irregularity and reference was made to the provisions of Order 6 Rule (1) of the Civil Procedure Rules. It is the 2<sup>nd</sup> Defendant's submission that the Plaintiffs are on a fishing expedition and further, that their claim is confused, convoluted and lacks foundation in law.

While stating that the Plaintiffs had in the original plaint pleaded that their claim had arisen as a result of the subdivision of **Dagoretti/Mutuini/920**, the 2<sup>nd</sup> Defendant averred that this position was changed in the amended plaint which states that the parcel in dispute is **Dagoretti/Mutuini/699**. It is the 2<sup>nd</sup> Defendant's submission that this constitutes a complete change in the substratum of the suit.

Counsel for the 2<sup>nd</sup> Defendant relied on the treatise **Bullen & Leake and Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition page 136** which made reference to the case of **London Passenger Transport Board vs. Moscrop (1942) AC 332 at 347** where it was held that any departure from the cause of action alleged or the relief claimed in the pleadings should be preceded or accompanied by the relevant amendments. Reliance was also placed on the case of **Fidelity Commercial Bank vs. Wordlin Tours & Travel Ltd & another (2004)eKLR** and the 2<sup>nd</sup> Defendant contended that the departure from the original pleading and/or raising of new grounds of claim in the plaint appear inconsistent with a lot of confusion to the defence and to the court.

In further submission, the 2<sup>nd</sup> Defendant averred that he had been in actual, open, peaceful and uninterrupted occupation of the property since June 1996 and that the Plaintiffs who had knowledge of the said occupation never raised any objections. Counsel submitted that the Plaintiffs' right to bring the action for recovery of the land known as **Dagoretti/Mutuini/1114** or any other related thereto was extinguished by prescription. Lastly, the 2<sup>nd</sup> Defendant submitted that the Plaintiffs' alleged claim is barred by the provisions of section 38 of the Limitation of Actions Act since it was filed more than 12 years since the cause of action arose.

The Plaintiffs in submissions dated 2<sup>nd</sup> February 2015 stated that striking out has been held to be a draconian remedy which can only be exercised in the clearest of circumstances. Counsel submitted that pursuant to Order 2 Rule 15(b-d) under which the application dated 1<sup>st</sup> October 2014 has been brought, a party must choose which of the three grounds they intend to use. The Plaintiffs argued that the applicant in this case had adopted all the three grounds for reasons that he was not sure that he had been able to satisfy any of the three grounds.

The Plaintiffs submitted that the Defendants had not demonstrated which part of the amendment was scandalous or would prejudice or embarrass the hearing and further, that they did not demonstrate how the amendment was an abuse of the court process. Counsel for the Plaintiffs submitted that for an applicant to succeed in an application to strike out pleadings, it has to be shown in a plain and obvious manner that there is no reasonable or justifiable cause of action.

It is the Plaintiffs submission that they had pointed out in their pleadings that the 2<sup>nd</sup> Plaintiff gave the 1<sup>st</sup> Defendant the title for safe keeping which was subsequently fraudulently subdivided and allocated to the other Defendants. The Plaintiffs stated that the cause of action on illegality and fraud in the amended plaint was the same as in the initial plaint and further, that the parties in both plaints were the same.

Counsel for the Plaintiffs submitted that the general principle has always been to freely allow amendments as long as the subject was the same. It is the Plaintiffs' submission that amendment of pleadings is meant to ensure that the court has the full and correct facts to enable it make a determination once and for all. While submitting that their claim is for the property which was fraudulently subdivided and allocated to the Defendants to be restituted to them, the Plaintiffs averred that they only amended the facts to correct an error. The Plaintiffs stated that the facts were contained in public documents lodged to further the transfer and subdivision process and further, that having been produced before the court, the information therein was for the benefit of all the parties and to assist the court in determining the issues.

Counsel argued that from the rules and case law, amendments can be allowed even when they introduce a new cause of action. The Plaintiffs argued that the facts amended by the amended plaint could be responded to in the amended defence or raised in the main suit as an issue of fact. It is the Plaintiffs' submission that the issues raised in the amended plaint are matters for defence and not striking out and reference was made to the case of **Atterbuty vs. Jarvie 2H & N 113, 157 ER 47** and **Norton vs. Ellam 2M & W 461, 150 ER 839**.

In further submission, the Plaintiffs averred that the claim as per the amended plaint was predicated on the title number and illegalities as pleaded which are better placed for hearing and determination before the court. The Plaintiffs relied on section 1A and 1B of the Civil Procedure Rules as well as Article 159(2) of the Constitution for the proposition that courts have an obligation to dispense justice to all in an equitable, expeditious and fair manner so as to give effect to the overriding objectives.

In respect to the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants' assertion that the replying affidavit was fatally defective and incompetent because the 1<sup>st</sup> Plaintiff had no authority to swear on behalf of the 2<sup>nd</sup> Plaintiff, Counsel argued that the suit cannot be defeated on a mere allegation that the 1<sup>st</sup> Plaintiff lacks locus and is not properly before the court. It is the Plaintiffs' submissions that justice would call upon the court to deal with the substance of the matter.

In further submission, the Plaintiffs averred that the court should reluctantly exercise the discretion to strike out pleadings since it is a well settled principle of law that no one should be condemned unheard. The Plaintiffs relied on the case of **D. T. Dobie & Company (Kenya) Ltd vs. Joseph Mbaria Muchina & anor (1980) eKLR** where it was held that the power to strike out pleadings should be used sparingly and cautiously.

The Court was also referred to the case of **Capital Construction Co. Ltd vs. National Water Conservation & Pipeline Corporation (2013) eKLR** where it was held that for any court to strike out a pleading on record in line with the principles set out in **D. T. Dobie & Company (Kenya) Ltd vs. Joseph Mbaria Muchina & anor (1980) eKLR**, the threshold is high as to just amount to mere denial, sham or abuse of the process of the court or what would embarrass and delay the court in such processes.

The issue for determination is whether the amended plaint dated 24<sup>th</sup> March 2014 should be struck out for offending the provisions of Order 2 Rule 6(1) and 15 of the Civil Procedure Rules.

The Plaintiffs amended their plaint on 24<sup>th</sup> March 2014, without leave of the Court. Pleadings in this matter had not closed and therefore, the Plaintiffs did not require leave to amend their Plaint under Order 8 Rule 1 of the Civil Procedure Rules. Under Order 8 Rule 2 (1), a party served with a pleading amended under Rule 1(1) may apply to the court to disallow the amendment.

The application dated 5<sup>th</sup> May 2014 by the 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants seeks an order to strike out the amended plaint on grounds that the Plaintiffs relied on documents filed together with their defence and

counterclaim to breathe life into their claim.

According to the said Defendants, the Plaintiffs acted in bad faith by taking advantage of their good faith in supplying a comprehensive defence supported by documents. On the other hand, the Plaintiffs contend that the amendments were necessitated by information extracted from the Defendants' documents which was not previously within their knowledge. The Plaintiffs argue that the amendment was necessary in order to bring the correct information before the court.

The principles that guide the court on applications for amendment of pleadings are well settled. The Court of Appeal in the case of **Central Kenya Ltd vs. Trust Bank Ltd (2000) eKLR**, held inter alia;

**"The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.**

The Defendants have not demonstrated that the amendments are not necessary for the just determination of the controversy between the parties. Therefore, they cannot seek to have the amended plaint struck out solely on grounds that the Plaintiff extracted information from their documents. No prejudice will be suffered by the Defendants who have a right to amend their pleadings accordingly and will also have an opportunity to controvert the Plaintiffs' case at the main hearing through cross-examination and calling evidence in rebuttal.

The 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants further challenge the Plaintiffs suit on grounds that the claim is statute barred pursuant to the provisions of section 7 of the Limitation of Actions Act. The Defendants state that the cause of action arose after registration of the 1<sup>st</sup> Defendant on 19<sup>th</sup> July 1991 and that 12 years had lapsed before the institution of the instant suit.

The Plaintiffs contend that limitation has not arisen since they explained when fraud was discovered. In their amended plaint, the Plaintiffs aver that the anomalies in the title to the suit property were discovered on 3<sup>rd</sup> September 2009 when the 1<sup>st</sup> Plaintiff was issued with a title deed for the property allocated to her. Section 26 of the Limitation of Actions Act provides for extension of the limitation period in case of fraud or mistake. The trial court is best suited to determine whether limitation had arisen and/or whether there was extension of the limitation period upon hearing evidence. The 1<sup>st</sup>, 4<sup>th</sup> and 6<sup>th</sup> Defendants' objection on the ground of limitation fails and the application dated 5<sup>th</sup> May 2014 is therefore dismissed with costs.

The main ground in the application dated 1<sup>st</sup> October 2014 is that the amended plaint does not disclose any cause of action and further, that the same is a complete departure from the original plaint. The Plaintiffs have averred that their cause of action is based on the fraudulent transfer of the suit property by the 1<sup>st</sup> Defendant and subsequent allocation to the other Defendants. The Court of Appeal defined a reasonable cause of action in the case of **D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another (1980) eKLR** as follows:

**"No exact paraphrase can be given but I think reasonable cause of action means a cause of action with some chance of success when (as required by paragraph(2) of the rule) only the allegations in the plaint are considered"**

The dictum of Madan J.A. (as he then was) in **D T Dobie & Company (Kenya) Limited vs Muchina (1982) KLR 1** is instructive. He said at page 9:

**"No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and**

**incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it”.**

In my view, from the pleadings, the Plaintiffs have established that they have a reasonable cause of action and there are triable issues. The 2<sup>nd</sup> Defendant has not demonstrated how the amended plaint is frivolous, scandalous, and vexatious and an abuse of the court process. In respect to the averment that the amended plaint is a complete departure from the original plaint, Order 8 Rule 3(5) of the Civil procedure Rules allows amendments to pleadings even where the effect is to add or substitute a new cause of action provided the new cause

of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed. The application dated 1<sup>st</sup> October 2014 is without merit and is dismissed with costs.

The application dated 19<sup>th</sup> November 2014 whose grounds are that the amended plaint does not disclose any cause of action, that the amended plaint is a complete departure from the claim in the original plaint and that the same is frivolous, scandalous and vexatious also stands dismissed with costs for the same reasons advanced above.

Orders accordingly.

Ruling dated, signed and delivered this.....25<sup>th</sup>.....day of...**March**.....2015.

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

.....For the Plaintiffs

.....For the Defendants