



REPUBLIC OF KENYA

IN THE ENVIRONMENTAL AND LAND COURT AT NAIROBI

ELC SUIT NO. 6 OF 2013

MARY MBULA MUKUVI.....PLAINTIFF

VERSUS

DAVID MWOSE MWALUKO

T/A ABERDEEN PROPERTIES LIMITED.....1^{Sst} DEFENDANT

LAND REGISTRAR MACHAKOS.....2ND DEFENDANT

PETER MUNGAI GACACA.....3RD DEFENDANT

BENARD MAKWANA MAGE.....4TH DEFENDANT

MUNIIRA HAMISI MWALALE.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

The Plaintiff has filed two Notices of Motion which are before the court for determination. The first Notice of Motion is dated 11th February 2013 and the Plaintiff is seeking the following orders therein:

1. That leave be granted to the Plaintiffs to enjoin Peter Mungai Gacaca, Bernard Makwama Mage, Muniira Hamisi Mwalele and the Hon. Attorney General to the Notice of Motion Application and Complaint as the 3rd, 4th, 5th and 6th Defendants forthwith.
2. That leave be granted to the Plaintiff to amend his pleadings and Notice of Motion Application dated 16th July 2012 forthwith.
3. That pending the hearing of the application an order do issue as prayed in prayer 3 of the Notice of Motion application dated 16th July 2012 that costs be in the cause.

The second Notice of Motion is dated 25th February 2013 in which the Plaintiff is seeking orders that :

1. An order of the court do issue for the plaintiff to effect service of the Amended Notice of Motion, Amended Complaint and Summons to Enter Appearance by way of substituted service upon the 3rd, 4th and 5th Defendants herein in one of the daily circulating newspapers, or as the court may direct.
2. The Court do issue a hearing date for the hearing of the said Amended Notice of Motion.

The Notice of Motion of 11th February 2013

The grounds for the Notice of Motion dated 11th February 2013 are that when the Plaintiff filed suit on 16th July 2012 he had not known that the 1st Defendant had purportedly sold some plots to Peter Mungai Gacaca, Bernard Makwana Mage and Muniira Makwana Mwalele, and came to know the same after the 1st Defendant filed his papers in Court. Further, that the Attorney General ought to be enjoined in his capacity as the Chief Legal Government adviser and as the 2nd Defendant has refused to enter appearance .

The Plaintiff's counsel reiterated these grounds in submissions dated 25th March 2013 and relied on Order 1 Rule 3 of the Civil Procedure Rules for the joinder of the Defendants. He further submitted that the proposed amendments to the pleadings would not cause any prejudice to the Defendants.

The 1st Defendant opposed the Notice of Motion in a replying affidavit sworn on 26th February 2013 and stated that the Plaintiff's supporting affidavit contains deliberate falsehoods as the Plaintiff's own bundle of documents and pleadings filed herein demonstrate that the Plaintiff was aware of that the parcel of land in dispute had been subdivided and lawfully transferred to third parties. Further, that the Plaintiff has not demonstrated sufficient reason to enjoin the Attorney General as a party herein.

The 1st Defendant's counsel filed submissions dated 10th May 2013 in which he argued that the joinder of the Attorney General would result in duplicity of parties and unnecessary costs of litigation. He was however not opposed to the joinder of the proposed 3rd, 4th and 5th Defendants. He also submitted that the prayer of the Notice of Motion seeking orders in terms of prayer 3 of the Notice of Motion dated 16th July 2012 is misplaced as no such prayer exists in the said application, and as the present application is seeking to amend the said Notice of Motion. Further, that granting the said prayer would amount to granting substantive relief against parties who have not yet been formally joined to the suit.

I have considered the pleadings and submissions by the Plaintiff and 1st Defendant. The issues raised by the application are firstly, whether the proposed 3rd -6th Defendants can be joined as parties to this suit, secondly whether the Plaint and Notice of Motion both dated 16th July 2012 can consequently be amended, and lastly whether prayer 3 in the Notice of Motion dated 16th July 2012 can be granted

On the joinder of the proposed Defendants, Order 1 Rule 3 of the Civil Procedure Rules provides as follows:

“ All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

Order 1 Rule 10(2) in addition provides as follows in this regard:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

The Plaintiff herein is seeking the same relief sought against the 1st Defendant as against the 3rd, 4th and 5th Defendants arising from the same suit property. The outcome of the suit filed herein will also affect the said proposed Defendants who are the registered proprietor of sub-divisions of the suit property . It is thus my finding that the proposed 3rd, 4th and 5th Defendants are not only a proper parties to be joined

under Order 1 Rule 3 of the Civil Procedure Rules, but also necessary party under Order 1 Rule 10(2) of the said rules. I am in this regard persuaded by the decision in **Werrot and Company Ltd and others v Andrew Douglas Gregory and others, Nairobi (Milimani) High Court Civil Case No. 2363 of 1998 (1998) LLR 2848 (CCK)** where Ringera J. (as he then was) held as follows:

“For determining the question whom is a necessary party there are two tests: (i) There must be a right to some relief against such party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.”

As regards the disputed joinder of the Attorney General as the 6th Defendant, it is provided in section 12 (1) of the Government Proceedings Act that subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be. In addition, section 19(2) of the said Act states that any reference in the Act to civil proceedings against the Government shall be construed to include a reference to proceedings for the vindication of any right or obtaining of any relief against the Attorney General, any Government department or any officer of the Government.

In addition Order 1 Rule 11 of the Civil Procedure Rules provides with respect of civil proceedings by or against the Government, that Order 1 of the said Rules shall have effect subject to section 12 of the Government Proceedings Act. This Court therefore finds that the Attorney General is a proper and necessary party to these proceedings in light of the foregoing provisions of the law.

As regards the issue of amendment of the Plaintiff’s Complaint and Notice of Motion dated 16th July 2012, the court is in this regard granted the discretion under Order 8 Rule 3(1) to grant amendments of pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. I also notes in this regard that such amendments are now necessary in light of the findings of this court as the joinder of the additional Defendants.

Lastly, on the prayer for orders in terms of prayer 3 of the Notice of Motion of 16th July 2012, I agree with the Defendant’s submissions that as the said Notice of Motion is subject to amendment, the Plaintiff should await the service of the amended Notice of Motion and substantive hearing of the amended Notice of Motion before seeking the grant of any prayers therein

I therefore accordingly order as follows with respect to the Plaintiff’s Notice of Motion dated 11th February 2013:

1. That Peter Mungai Gacaca, Bernard Makwama Mage, Muniira Hamisi Mwalele and the Honourable Attorney General be and are hereby joined as the 3rd, 4th, 5th and 6th Defendants respectively in this suit.
2. The Plaintiff is hereby granted leave to amend the Complaint and Notice of Motion filed herein both dated 16th July 2012 and to file and serve the Defendants herein with the Amended Complaint and Amended Notice of Motion within 15 days of the date of this ruling
3. The costs of the said Notice of Motion shall be in the cause.

The Notice of Motion dated 25th February 2013

The grounds for the Plaintiff’s Notice of Motion dated 25th February 2013 are that service upon the 3rd, 4th and 5th Defendants has been very difficult as the said Defendants are not known to the Plaintiff. Further, that the Plaintiff’s advocate has tried to trace the three Defendants with no positive results, and has sent them letters and copies of summons to enter appearances by way of registered post. The Plaintiff

annexed the certificate of registered post as evidence. The Plaintiff's counsel in submissions dated 25th March 2013 relied on the provisions of Order 5 Rule 17 of the Civil Procedure Act on substituted service.

The 1st Defendant opposed the Notice of Motion in Grounds of Opposition dated 26th February 2013 and in submissions filed by his counsel dated 10th May 2013. He argued that the Plaintiff had not shown any proof of attempts to personally serve the proposed Defendants, or of attempts to trace the Defendants. Further, that he has not sought any information from the 1st Defendant as to the whereabouts of the 3rd-4th Defendants.

The law on substituted service is in Order 5 Rule 17 of the Civil Procedure Rules, which provides that where the court is satisfied that for any reason there can be no personal service of summons in accordance with the rules of Order 5, it can order that service be effected in such other manner as the court thinks fit. The Plaintiff has deponed not to know the whereabouts of the 3rd -5th Defendants, and to have previously attempted service with no result. I find that this is sufficient reason for this court to order substituted service, which substituted service is also necessary in order to facilitate the expeditious hearing of the suit filed herein pursuant to sections 1A and 1B of the Civil Procedure Act.

The Plaintiff Notice of Motion dated 25th February 2013 is therefore only allowed to the extent of the following orders:

1. The Plaintiff is granted leave to serve the 3rd -4th Defendants with the Amended Plaintiff, Amended Notice of Motion and Summons to Enter Appearance by way of advertisement in **The Daily Nation** newspaper on a weekday. The said Defendant's to be required to enter appearance within 30 days.
2. The prayer that the Court do issue a hearing date for the Amended Notice of Motion is denied for the reasons that the said Amended Notice of Motion is yet to be filed and served on the Defendants.
3. The costs of the Plaintiff's Notice of Motion dated 25th February 2013 shall be in the cause.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___4th___ day of ___March___, 2014.

P. NYAMWEYA

JUDGE