REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 520 OF 2007

SAMUEL KIGATHI GACHARA…….……..…..… PLAINTIFF

VERSUS

CHARLES WANDUTO KIHORO……....1ST DEFENDANT

CHARLES GATHEE MUHORO….……..……2ND DEFENDANT

RULING

The Plaintiff's Application

The Plaintiff filed a Notice of Motion dated 27th February 2014 pursuant to the provisions of sections 1A, 1B and 3A of the Civil Procedure Act, and Order 8 Rule 3(1), (5) and (7) and Order 51 (1) the Civil Procedure Rules. He is seeking leave to further amend its plaint to enjoin the Attorney General as a Defendant in this suit as per the draft Further Amended Plaint annexed to its supporting affidavit, and that the said Further Amended Plaint be admitted as duly filed and served.

The main grounds for the application are that the Plaintiff is seeking certain reliefs against the Chief Land Registrar who can only be sued through the Attorney General, and that the prerequisite notice to institute legal proceedings has already been issued pursuant to the provisions of the Government Proceedings Act.

The Plaintiff in his supporting affidavit sworn on 27th February 2014 explained that the relief he is seeking against the Chief Land Registrar is the cancellation of title issued to the Defendants, and rectification of the register at the land office. He also attached the said notice to institute legal proceedings dated 11th December 2013 that his Advocate sent to the Attorney General, and a letter from the Attorney General to the Ministry of Lands, Housing and Urban Development dated 23rd December 2013 seeking instructions in this regard.

The Plaintiff's counsel in submissions dated 12th May 2014 relied on the decisions in **Leroka vs Middle Africa Finance Company Limited, (1990) KLR 549** and **Timoi Farms and Estate Limited vs Kipngeno A. Ngeny (2013) e KLR** to submit that leave should be granted so that the substantial questions between the parties can be determined. Further, that leave should not normally be refused unless the applicant is acting in bad faith and the opposing party will suffer injustice. He submitted that the Defendants will suffer no prejudice as the Plaintiff is only seeking to enjoin a party who shall be affected by the suit's outcome, and not to change the substance of the suit, and that the suit is yet to

proceed to hearing. Further, that the Attorney General if enjoined is at liberty to plead limitation of action.

The Defendants' Response

The Defendants filed Grounds of Opposition dated 12th February 2014, and opposed the Plaintiff's application on the ground that it had not laid any foundation for the belated attempt to further amend the Plaint. Further that the application was incompetent as it seeks to introduce claims that are statute barred. These grounds were reiterated in a replying affidavit sworn on 24th March 2014 by the 2nd Defendant, wherein he also stated that the Plaintiff had not given any explanation for the delay in making the application.

The Defendants' Advocate filed written submissions dated 23rd May 2014, wherein he contended that the Plaintiff's suit was filed on 11th February 2002, and the Plaint amended in 2010, and that the Plaintiff has not explained why he seeks to amend the Plaint twelve years after filing suit. Further, that the Plaintiff seeks to enjoin the Registrar of Lands on claims that are statute barred and that will prejudice the Defendants.

The Issues and Determination

I have read and carefully considered the pleadings and submissions by the Plaintiff and Defendants. The main issue for determination is whether or not this court should exercise its discretion in the Plaintiff's favour, and grant him leave to further amend its Plaint. The applicable provision of the law is Order 8 Rule 3 of the Civil Procedure Rules which grants this court wide discretion to grant leave to amend pleadings at any stage of the proceedings, notwithstanding that the effect may be to add a new party, or change the capacity in which a party is suing or to add or substitute a new cause of action, provided such action arises out of the same facts.

I am also guided by the decision of the Court of Appeal in **Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365** and the judicial authorities cited by the Plaintiff, that the overriding consideration in circumstances as arise in this case is whether the amendments sought are necessary for the determination of the suit, and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs**.**

It is my view that the real prejudice that is likely to be caused by the proposed amendment by the Plaintiff in the present application only arises from the delay in bringing the subject application. As regards, the prejudice alleged by the Defendants of introduction of claims that are statute barred, I have perused the proposed amendment, and note that it does not introduce any new cause of action against the1st and 2nd Defendants, as all it does is to seek to enjoin another party, which is expressly allowed by Order 3 of the Civil Procedure Rules. In any event the issue of limitation of action can only be determined after full hearing and not at the stage of amendment of pleadings.

It is my opinion that as the overriding principles of Article 159 (2) (d) of the Constitution and sections 1A and 1B of the Civil Procedure Act require that disputes before the courts be heard expeditiously on their merits, it would be just to allow the Plaintiff's application to amend its pleadings. Any prejudice caused in this regard to the Defendants by the delay in applying for the amendment will be mitigated by payment of any costs they have incurred as a result.

It is therefore accordingly ordered as follows:

1. The Plaintiff is granted leave to join the Attorney General as the 3rd Defendant to this suit and to further amend its Plaint on the terms of the draft annexed to its Notice of Motion dated 27th February 2014.
2. The Plaintiff shall file and serve the Further Amended Plaint on all the Defendants within 15 days of the date of this ruling.
3. The Plaintiff shall meet the 1st and 2nd Defendants' costs of the Notice of Motion dated 27th

February 2014.

Orders accordingly.

Dated, signed and delivered in open court at Nairobi this ___24th____ day of_____July____, 2014.

P. NYAMWEYA

JUDGE