



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU

E.L.C 451 OF 2013

HILLARY KIPNGETICH LANGAT PLAINTIFF

VERSUS

**ERIC KIPROTICH TEREZ (Sued as legal representative of the estate of Paul Kimutai Koech)
.....DEFENDANT**

R U L I N G

1. By a Notice of Motion dated **5th July, 2013** the applicant/plaintiff **Hillary Kipngetich Langat** seeks the following substantive order; that pending the hearing and determination of this suit a temporary injunction be issued restraining the defendant either by himself or his agents and/ or servants from trespassing and or entering, cultivating, building and/ or dealing with the suit parcel to wit **L.R Nakuru/Sururu/404** (“ the suit land”)

2. The application is premised on the grounds on the face of the application and a supporting affidavit sworn by **Hillary Kipngetich Langat** on **5th July, 2013**.

3. The applicant’s case is that he is the registered owner of the suit land and has been in continuous possession thereof. That on **4th July, 2013** while away, he was informed that the defendant had entered onto the suit land through his agents and/ or servants and was in the process of putting up a temporary structure. He urges the court to grant the orders sought as he resides on the suit land with his family.

3. The application is opposed. The Defendant **Eric Kiprotich Terez** swore a replying affidavit under protest on **29th July , 2013**. He deponed that his brother the late Paul Kimutai Koech, was the absolute registered owner of the suit land having been allocated the same in 1995 by the Ministry of Lands and issued with a title deed in 1997. That in 2007 the plaintiff entered into the suit land and started cultivating therein without the consent of the deceased. The defendant not having taken out letters of administration was not the administrator of the deceased's estate and should therefore not be sued in that capacity. He urges the court to dismiss the application and suit filed against him.

4. I have read and considered the pleadings filed by the respective parties, the affidavit evidence adduced in support thereof and the submissions by counsels.

5. I find the issues for determination to be as follows;

- i) Is the defendant properly sued in this matter? if so**
- ii) Has the applicant satisfied the conditions for grant of an injunction?**

iii) What is the order as to costs?

6. The principles of *locus standi* or standing determine whether a litigant is entitled to institute a particular dispute before the court. The purpose of ascertaining the legal standing of a litigant is among other reasons to ensure that the case is presented in the best way possible, by a person with real interest and to ensure that people do not meddle in the affairs of others. (see **BV Navayana Reddy Vs State Kamataka Air (1985) (KAN99)**)

7. In the instant suit, the defendant not having letters of administration to act as administrator of the estate of Paul Kimutai Koech lacks capacity to be sued as the legal representative of the estate of the deceased.

8. The plaintiff in his pleadings gives an impression that the activities of trespass on going on the suit property are being carried out by the defendant himself and or by his agents and servants. The plaintiff should therefore consider amending his pleadings and bringing the suit against the defendant in his personal capacity.

9. **Section 100** of the **Civil Procedure Act** as read with **Order 8 Rule 5** of the **Civil Procedure Rules** allows the court on its own motion to grant parties the opportunity to amend their pleadings.

section 100 provides: **The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.**

Order 8(5)(1) provides: **For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.**

I also wish to be guided by the decision in **AAT Holdings Limited V Diamond Shields International Limited** NBI HCCC No. 442 of 2013 where the court held as follows:

“The general power of the court to amend pleadings draws from Section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 Rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in **Central Kenya Ltd V Trust Bank Ltd & 5 Others Civil Appeal No. 222 of 1998 as shown below:-**

- i. That are necessary for determining the real question in controversy.
- ii) To avoid multiplicity of suits provided there has been no undue delay.
- iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- iv) That no vested interest or accrued legal rights is affected; and
- v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

10. In the interest of justice I therefore order that the plaintiff makes the necessary amendments to his Pleadings within 30 days from the date hereof failure of which the plaint and the application will stand struck out. Costs for the application are awarded to the defendant.

Orders accordingly.

Dated, Signed and delivered in open Court at Nakuru this 11th day of July 2014.

L N WAITHAKA

JUDGE

PRESENT

Mr Koima holding brief for Mrs Wanderi for the Defendant

N/A for plaintiff

Emmanuel Maelo: Court clerk.

L N WAITHAKA

JUDGE