



**REPUBLIC OF KENYA**

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

**LAND CASE NO. 103 OF 2008**

**MANSUKHALAL JESANG MARU.....PLAINTIFF/RESPONDENT**

**VERSUS**

**FRANK WAFULA.....DEFENDANT/APPLICANT**

**R U L I N G**

1. The defendant/applicant filed a notice of motion dated 2/6/2016 in which he seeks leave to amend his defence and include a counter-claim. The applicant contends that he omitted to raise a counter-claim when he filed his defence to the plaintiff's claim. He further contends that the plaintiff will not suffer any prejudice if the intended amendments are effected.
2. The applicant's application is opposed by the respondent through grounds of opposition filed in court on 18/7/2016. The respondent contends that the application is fatally defective and that the cause of action sought to be introduced is statute barred and that this application is an abuse of the process of the court.
3. I have considered the application by the applicant and the opposition thereto by the respondent. A look at the proposed amendments shows that both the applicant and respondent seem to be claiming one parcel of land but under two separate parcel numbers. The proposed amendment is based on fraud on the part of the respondent.
4. The only issue for determination in this application is whether the applicant should be granted leave to amend his defence. A party is allowed to amend his/her pleadings at any stage of the proceedings. It has been held in a number of cases that leave to amend pleadings should be freely allowed unless there will be prejudice on the other party which prejudice will not be compensated in costs.
5. In the instant case the suit was filed on 27/11/2008. Prior to the filing of this suit, the respondent had caused the arrest of the applicant on the ground that he had trespassed on to the suit property. The applicant was subsequently charged in court but the case was subsequently withdrawn under Section 87 A of the Criminal Procedure Code. The applicant later filed a civil suit in the lower court seeking general and special damages for malicious prosecution. The respondent filed a counter-claim in that suit in which he sought orders of eviction of the applicant from the suit property and demolition of structures which the applicant had put up on this property.
6. The magistrate who heard the suit in the lower court dismissed both the applicant's claim and the counter-claim by the respondent. The respondent lost his counter-claim mainly because he had a suit in the High Court [which is now in the Environment and Land Court] in which the same parties were fighting over the same property but under different parcel numbers.

7. During the hearing of the application, Mr. Nyamu for the respondent argued that the applicant had not specified when he discovered the fraud attributed to the respondent. That the applicant had taken long to apply for leave to amend and that one of the prayers in the application was for the court to deem the annexed draft defence and counter-claim as duly filed yet the same had not been signed or dated.

8. It is clear from the pleadings and the application that both the applicant and the respondent are fighting over the same land on the ground but which seems to be having two separate land references. It is therefore important for the court to grant leave to amend the defence and bring a counter-claim. This will enable the court to adjudicate on the issue without letting parties file separate suits. *In Nairobi Court of Appeal Civil Appeal No. 222 of 1998 Central Kenya Ltd -vs- Trust Bank Ltd & 4 Others, the Court of Appeal Judges* had this to say regarding amendment of pleadings:-

*“The overriding consideration in applications for such leave is whether amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining 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 in costs”.*

9. In the instant case, the parties had concentrated their energies on *Kitale Chief Magistrates Court in Civil Case No. 334 of 2011 between Frank Wafula -vs- Mansukhalal Jesang Maru & Another* to an extent that the present suit was about to be dismissed for want of prosecution.

10. There will be no prejudice suffered by the respondent which will be beyond monetary compensation. Granting of leave to amend will enable the court to address the rival contentions by the parties herein. I therefore find that this is a proper case where leave should be granted. I grant leave to the applicant to amend and serve his defence and counter-claim within 14 days from today. Costs of this application shall abide the outcome of the main suit.

It is so ordered.

Dated, signed and delivered at Kitale on this **28<sup>th</sup>** day of **September, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of Ms. Mufutu for Mr. Chepkwony for applicant and Mr. Wanyama for Mr. Nyamu for respondent.

Court Assistant - Isabellah.

**E. OBAGA**

**JUDGE**

**28/9/2016**