



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
ENVIRONMENT AND LAND COURT
ELC. CASE NO. 1340 OF 2007

GEORGE GICHURU NJOROGE.....1ST PLAINTIFF
HANNAH WAMBUI NJOROGE.....2ND PLAINTIFF
BERNARD NGACHA BARUA.....3RD PLAINTIFF
(Trustees for Kariri & Gikaru Family)

VERSUS

SAMUEL MUTHUI.....1ST DEFENDANT
STEPHEN GICHOHO.....2ND DEFENDANT
JOSEPH KELAI.....3RD DEFENDANT
BERNARD KAMAU MATHU.....INTERESTED PARTY

RULING

Coming up before me for determination is the Notice of Motion dated 5th March 2015 in which the Defendants/Applicants seek for orders that they be granted leave to amend their Defence in terms of the annexed Amended Defence and for the same to be deemed as duly filed subject to payment of the requisite court fees.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of the 1st Defendant, Samuel Muthui, sworn on 5th March 2015, in which he averred that the Plaintiffs' claim in this suit is to seek a permanent injunction against the Defendants from encroaching and interfering with the beacons of and boundary of the parcel of land known as Nairobi/Block 126/479 (hereinafter referred to as the "suit property"). He further averred that the Defendants filed their Defence to that claim on 10th August 2009. He added that the Defendants/Applicants content that they are occupants of parcels of land known as Nairobi/Block 126/480, 481 and 482 since the 1980s. He added that the Defendants/Applicants are entitled to claim those parcels by way of adverse possession hence the need to put in a counterclaim in their Defence.

The Application is contested. The Plaintiffs/Respondents filed their Grounds of Opposition dated and filed on 5th May 2015 in which they stated as follows:

1. That the proposed amendment is not necessary for the determination of the real questions arising in this suit but to bring a new cause of action whose institution is contrary to the mandatory provisions of Order 37 rule 7 of the Civil Procedure Rules, 2010.
2. That the proposed counterclaim is defective as it offends the mandatory provisions of Order 7 rule 8 of the Civil Procedure Rules, 2010.
3. That the proposed amendment is mischievous as it is intended to overturn and render futile the order made on 1st July 2004 without the due process of law.
4. That the proposed amendment is prejudicial to the Plaintiffs and is not in the interest of justice.

Both parties filed their written submissions.

The court is to determine whether or not to allow the proposed amendments to the Defence filed by the Defendants/Applicants. On that issue, the applicable law is as follows:-

Order 2 Rule 15 of the Civil Procedure Rules, 2010 provides that,

“(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-

- a. It discloses no reasonable cause of action or defence in law.***
- b. Its scandalous, frivolous or vexatious; or***
- c. It may prejudice, embarrass or delay the fair trial of the action; or***
- d. It’s otherwise an abuse of the Court process and may order the suit be stayed or dismissed or judgment to be entered accordingly as the case may be.”***

Going by these legal provisions, it would appear that a court has a free hand to allow the amendment of pleadings on the grounds enumerated. In the Court of Appeal case of **Eastern Bakery vs. Castelino (1958) EA 461**, it was held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this particular case, the sought after amendments are contested on the ground that the Counterclaim raises a completely new cause of action which cannot be commenced in the manner taken by the Defendants/Applicants. The Plaintiffs/Respondents content that they will as a result suffer prejudice their interests in this suit.

My observation is that the suit property is parcel of land known as Nairobi/Block 126/479 whereas the counterclaim the Defendants seek to introduce by way of amendment relates to three other different parcels of land being Nairobi/Block 126/480, 481 and 482 to which the Defendants claim adverse possession. My overall impression is that the Defendants/Applicants are in effect trying to introduce a completely separate and new cause of action to this suit by way of their proposed amendment. I am of the view that if allowed, such an amendment will only serve to confuse the issues raised by the Plaintiffs in the Plaint and would in essence prejudice the interests of the Plaintiffs. The upshot of this is that I decline to allow the proposed amendment and proceed to dismiss this Application. Costs in the cause.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 16TH DAY OF SEPTEMBER 2016.

MARY M. GITUMBI

JUDGE