REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

ENVIRONMENT AND LAND COURT

ELC NO. 304 OF 2012

DAVID JOSEPH GICHUHI GICHAMBA.....1ST PLAINTIFF

BEATRICE WANJIRU GICHAMBA.....2ND PLAINTIFF

-VERSUS-

JANE WACHEKE NJOROGE.....DEFENDANT

RULING

1. At the conclusion of the parties oral submission on 16th March, 2015 on the Notice of Motion dated 18th December, 2014, I immediately allowed the application conditional only on the Defendant paying costs of the application to the Plaintiff. I also in allowing the application declined to join the Land Registrar Thika whose joinder had been sought by the Defendant. I then proceeded to grant the Defendant seven (7) days to file and serve the amended Defence statement with a counterclaim. Then too, I granted the Plaintiff sevendays following the service of the amended defence and counterclaim to file a reply to defence and defence to counterclaim. I then reserved my reasonsto be rendered to the parties today.

2. The Notice of Motion in question was a routine and simple looking motion. It sought to amend the Defence statement. The core however of the intended amendment was the introduction of a claim by the Defendant against new parties to be invited and impleaded by way of a counterclaim. The counterclaim was substantively not directed at the Plaintiffs. The motion sought to introduce and implead three other parties to the proceedings. They were Mr. Joseph NdunguKamau, the Attorney General and the Land Registrar, Thika.

3. The motion was opposed through the Grounds of objection filed on 13th February, 2015. The 1st Ground stated that under Order 1 Rule 10(2) of the Civil Procedure Rules, the court can duly add a party if the same court strikes out another party wrongfully impleaded or impleading. The Plaintiff also contended that the Defendant was being selective in the parties she sought to join to the proceedings. The Plaintiff further contested the fact that the Defendant, and the court for that matter, in allowing the application would be choosing a defendant for the Plaintiff.

4. Counsel for the Defendant Mr. Theuri Wanjohi submitted that the Defendant was simply introducing a counterclaim and further that the parties sought to be impleaded by way of counterclaim were necessary and proper parties to the proceedings. Counsel relied on the decision of Nyamweya J in **Mary Mbula Mukivi –v- David Mwose Mwaluko & 5 others [2014] eKLR** to support his contentions.

5. I have reflected and my view is still the same. I was not in error when I allowed the application.

6. A cursory glance at Order 1 Rule 10(2) will clearly reveal that under the said Order and rule which must be read with the overriding objective in mind the court need not strike out one party before bringing in another one in his stead. That amounts to substitution of parties which the rule recognizes. The said rule also recognizes the addition of parties whose presence before the court may be necessary for a fair and proportionate as well as effectual and complete adjudication of all questions before the court. It would be a bit too narrow to limit the rule whose objectives are clear to only instances of substitution of parties. The clear objective of the rule was to ensure that all parties necessary for a fair and just determination of the questions before the court be brought forth and joined at any time of the proceedings. This assists not only in an even more expeditious way of determiningdisputes but also invites the concept of finality. Disputes are determined with all necessary and proper parties present once and for all.

7. The second objection that the Defendant was being selective in the parties being impleaded by the Defendant was also not very impressive. Foremost parties must always have the liberty of choosing who to implead. Secondly, non-joinder or misjoinder can never be the basis for defeating a claim. A party may thus jointhe wrong party and leave out the proper and necessary party but the suit cannot be defeated by that reason alone. The court will always deal with the matters in controversy so far as regards the rights and interests of the parties actually before it: see **Order 1 Rule 9** of the **Civil Procedure Rules**. Thirdly, because of the overriding objective and the now elaborate case management procedures, the court will always when it deems it necessary and without any prompting by a party substitute or order the joinder of a party to the proceedings.

8. The third and final objection of substance was that allowing the application would amount tochoosing, for the Plaintiff defendants to the Plaintiff's suit. Certainly, that is not the case in the instant suit. The new parties are defendants to the counterclaim by the Defendant. **Order 7 Rule 8** of the **Civil Procedure Rules** once again is relatively clear. In setting up a counterclaim, a defendant may implead parties who were not originally parties to the suit. The three additional defendants by counterclaim were not intended to be defendants to the Plaintiff's suit. They were intended to be defendants to the Plaintiff's counterclaim. I saw and still see nothing wrong with that.

9. It is critical to note too that I took into consideration the fact that even though amendment of pleadings as well as joinder of parties can be allowed and effected at any stage of the proceedings and freely for that matter certain considerations must always be taken into account by the court. The relevant considerations were expressed first in the case of **Cobbold –v-Greenwhich LBC** an unreported decision of 1999 referred to by myself in this court's decision in **Ann Muthoni Karanu –v- La Nyavu Gardens ELC 181 of 2014.** Those were expounded by our Court of Appeal in the case of **Central Kenya Ltd –v- Trust Bank Ltd [2001] 2E.A 365** and no doubt they stand in good stead till date.

10. In the instant case it is abundantly clear that the parties sought to be enjoined either played a key role in the transactions or ultimately are proper parties against whom relief ought to issue. There is unlikely to be any prejudice to be suffered by the Plaintiffs in their joinder and the public interest in the administration of justice will not be significantly harmed. There may be delay in prosecuting and determining the suit but such prejudice as may be prompted by the amendments and joinder can be compensated for in costs. The Plaintiff has already been awarded costs.

11. In my view, the benefit of having the counterclaim outweighs the hardships it may visit on the parties. If the case management strategies provided for under the Civil Procedure Rules are pursued by the parties properly then too the dispute may be quickly, fairly and justly disposed of.

12. It is to be noted that I declined to join the Land Registrar to these proceedings for the simple reason that the moment the Attorney General was sought to be impleaded under Article 156 of the Constitution, the relevant department of the national government was also by the better reason impleaded through the Attorney General. In my view too, it would be better to enlist the services of the Land Registrar as a witness to these proceedings. That though is a matter the parties will have to pursue and brief the court at the pretrial conference.

13. For the above reasons, my order of 16th March, 2015 in re application dated 18th December, 2014 stood and still stands.

Dated, signed and delivered at Nairobi this 19thday of March, 2015.

J. L. ONGUTO

JUDGE

In the presence of:-

..... for the Plaintiff/Applicant

..... for the Defendants/Respondent