



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**CIVIL CIVIL SUIT NO. 3 OF 2011**

**CHARLES MAIYO .....1<sup>ST</sup> PLAINTIFF/RESPONDENT**

**FREDRICK K. SAWE.....2<sup>ND</sup> PLAINTIFF/ RESPONDENT**

**VERSUS**

**ELIZABETH NGENY.....DEFENDANT/ APPLICANT**

**RULING**

1. By a plaint dated 18<sup>th</sup> January 2011 the respondents **Charles Maiyo** and **Fredrick K. Sawe**, instituted this suit against the applicant **Elizabeth Ngeny**, seeking among other orders;

(a) A declaration the plaintiffs are the rightful joint owners of the title No. **Kericho Municipality 6/111** (hereafter referred to as the suit land) and the defendants actions of invading the plaintiffs suit land is illegal

b) A permanent injunction restraining the defendant, her agents, servants and or/ employees from trespassing, entering, occupying or in any manner dealing with the suit land

c) costs and any other relief.

2. After being served with summons to enter appearance, the applicant filed her statement of defence and counterclaim on **17th February, 2011** contesting the respondents suit.

3. It is that statement of defence that the applicant now wishes to amend. The time within which to amend the pleadings without leave having expired, the applicants on **26<sup>th</sup> August, 2013** sought leave to amend their defence and counterclaim. The court granted leave and directed that the applicants do file a formal application within 7 days. The applicant filed her application dated **18<sup>th</sup> September, 2013** on **20<sup>th</sup> September 2013** seeking that the court allows the amendments proposed in her defence and counterclaim.

4. The application is supported by the affidavit of the applicant and is premised on the grounds that the proposed amendments seek to introduce a prayer of demolition of illegal structures erected on the suit property during the pendency of this suit. Allowing the amendments will enable the court to determine the suit on its merits and facilitate the complete determination of all issues before the court.

5. In reply to the application, the 1st respondent swore a replying affidavit contending that the application is an abuse of the court process as leave granted by this court had lapsed. No leave was sought thereafter or extended therefore this application is improperly on record; that no new issue has arisen since the filing

of the defence and counterclaim as the developments talked about were already there, duly approved and even the defendants photographs had captured the said developments; that if the applicant intended to enjoin the Land registrar then the proposed defence and counterclaim was defective as this was not captured as an amendment: that the prayers sought are spent as they were addressed by G.B.M Kariuki J in his ruling for injunction and the respondent will suffer prejudice if the application is allowed.

6. Both parties filed written submissions. Counsel for the applicant submitted that the intended amendment is made to include a counter-claim and expound on issues raised in the original defence; that the amendment would enable the court arrive at an informed and justicious determination and that the court has power to allow amendments. He also submitted that no law prevents parties in a suit from alleging fraud against a dead person.

7. Counsel for the respondent submitted that the application was brought in bad faith; that it is vexatious and an abuse of the process of the court and that it was brought to cover up for the applicants' illegal activities on the suit properties. He further submitted that the prayers sought in the counter-claim are statute barred; that the applicants have not supplied any proof that they have the capacity to commence any suit against the respondent and that one cannot allege fraud against a dead person.

8. An issue has been raised by counsel for the respondent that leave was not sought by the applicant's counsel for extension of time to file the application to amend his defence and counterclaim as required by Order 8 Rule 6 which states "**Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.**"

9. I have perused the court record and established that on 26<sup>th</sup> August, 2013 Counsel for the defendant/ applicant was granted seven days to file a formal application to amend his defence and counterclaim. He filed the application on 18<sup>th</sup> September, 2013 way past the time granted. On 23<sup>rd</sup> September, 2013 when Counsels for both parties appeared before me, counsel for the applicant urged the court to admit the application, witness statement and list of documents filed on 20<sup>th</sup> September, 2013 and allow them to form part of the court record. Counsel for the respondent raised no objection to the admission of the aforesaid documents. The same were admitted by the court. Having failed to object to the admission of the documents at that stage and being aware that the documents were duly admitted by court, I find that the current application is properly on record.

10. So is the applicant entitled to the orders sought?

**Section 100** of the Civil procedure Act as read with **Order 8(5)** of the **Civil Procedure Rules** respectively (**Chapter 21 Laws of Kenya**), for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, a 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.

11. The amendments sought to be effected are to introduce a prayer for demolition and mesne profits. The applicant avers that this will allow her demolish the buildings existing on the suit land at the Defendants costs in the event that she emerges the winner in this suit. The respondent objects on the ground that construction was already ongoing at the time of filing this suit and no further developments have been put up.

12. From the pleadings and photographs exhibited, it is common ground that there are extensive developments on the suit land put up by the respondents. It is also clear that the applicant's rights and interest to the suit property is by virtue of an allotment letter while those of the respondents are by virtue of a certificate of lease. It is the issue of ownership over the suit property that has brought the parties to court not the developments therein. The issue of ownership is an issue to be determined in the main suit. For now the issue to determine is whether the amendments sought will assist the court to fully determine issues arising in the suit and whether the plaintiff will be prejudiced in any way if the amendments

are allowed.

13. In **Mbayo and another V. Sinani (2007) EA 306**, the Court of Appeal of Uganda held:-

**“Amendment of pleadings is governed by section 100 of the Civil Procedure Act (Chapter 71). The provisions of this section give the court wide discretion to permit amendments to be made at any time of the proceedings. The purpose for the necessary amendments is to enable the court to determine the real matter in controversy between the parties. The discretion has to be exercised judicially. The application for amendment may be made orally or formally by chamber summons under the rules. Amendment of pleading is aimed at allowing a litigant to plead the whole of the claim he is entitled to make in respect of his/her cause of action.**

**Whereas the learned trial judge was right to criticise the appellant's counsel for making his application for amendment belatedly, he omitted to address his mind to the entire evidence on record and the principles that govern applications for amendment of pleadings generally.**

**The duty of the court when dealing with settlement of a dispute is to determine the rights of the parties and not to furnish them for mistakes they commit in the conduct of their cases. There is no error except a fraudulent one that cannot be corrected by the court if it can be done without causing injustice to the other party. The trial court was to disallow the proposed amendment in view of the affidavit evidence adduced and looking at the entire petition...”**

14. From the affidavit evidence, I do not see what prejudice the respondents will suffer if the amendments sought are allowed as they will not change the substratum of the suit. It is not in dispute that there are developments on the suit land. In the event that the applicant is successful in this suit she should have the liberty to choose what to do with the developments therein. I therefore find the amendments necessary in assisting the court to fully and conclusively deal with the issue(s) arising there from.

15. The upshot of the foregoing is that the application dated 18<sup>th</sup> September, 2013 has merit and is allowed. Costs to be in the cause.

**Dated, signed and delivered on this 26<sup>th</sup> day March of 2014.**

**L N WAITHAKA**

**JUDGE.**

**PRESENT**

Mr Terem holding brief for Mr Miruka for plaintiff

Mr Orina holding brief for Mr Gai for Defendant

CC:

**L N WAITHAKA**

**JUDGE**