



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**ENVIRONMENT AND LAND COURTS**  
**ELC NO. 232 OF 2010**

**ROSEMARY NJERI KARIITHI.....1<sup>ST</sup> PLAINTIFF**

**FRANCIS MBUGUA KAMAU.....2<sup>ND</sup> PLAINTIFF**

**VERSUS**

**JOSEPH MWAURA NJAU.....1<sup>ST</sup> DEFENDANT**

**WANJIRU MATHERI**

**TABITHA WANGUI CHOMBA**

**TERESIA WANJIRA WAMAE**

**KANYI KURIA (SUED AS TRUSTEES FOR AN ON BEHALF OF**

**MWICOKANIRIRIA WOMEN GROUP.....2<sup>ND</sup> DEFENDANT**

**RULING**

The Defendants filed an application dated 29/10/2013 seeking orders that:

1. *Spent*
2. *The court be pleased to grant leave to further amend their defence in order to put a counterclaim and that the draft amended defence and counterclaim annexed to the application be deemed as duly filed and served upon payment of filing fees.*
3. *Subsequent to grating Prayer No.2, the court be pleased to issue an order of injunction restraining the 2<sup>nd</sup> Plaintiff from erecting any building or from proceeding with the construction of the building being erected on Plot No. 1 excised from L.R. No. 8226/21 until the hearing and determination of the suit.*
4. *The court be pleased to grant an injunction restraining the 2<sup>nd</sup> Plaintiff from presenting for registration or any other way of dealing with the deed plans relating to LR 8226/21 until the hearing and determination of suit.*

5. *Costs of the application be in the cause.*

The application is premised on ground outlined in the application and is supported by an affidavit sworn by Joseph Mwaura Njau, the secretary of the 2<sup>nd</sup> Defendant. It is their averment that there is a status quo arising from an application of injunction made by the Plaintiffs against the Defendant from interfering with the Plaintiff's quiet possession, occupation and or use of Plot 1 excised from L.R. No. 8226/21. The Defendants aver that the 2<sup>nd</sup> Plaintiff illegally appointed surveyors who took up the task of sub-dividing the land without their consent. As a result, the matter was reported to the Assistant County Commissioner's office in Ruiru where they learnt that the 2<sup>nd</sup> Plaintiff was in possession of the deed plans for the plots. The Defendants aver that the 2<sup>nd</sup> Plaintiff has declined to have any form of arbitration with the county commissioner and it is therefore imperative that an order of injunction do issue to restrain the 2<sup>nd</sup> Plaintiff from putting up the building and from dealing with the deed plans for LR 8226/21. The Defendants also state that the amendment is necessary for the adjudication of all the issues.

The application was opposed by the 2<sup>nd</sup> Plaintiff who filed a Replying Affidavit on 9/12/2013. The 2<sup>nd</sup> Plaintiff deposed that the application refers to a group known as Mwicokaniriria Women Self Help Group whereas the genuine group is known as Mwicokaniriria Women Group which according to its constitution consists of women members. Thus, the male members are beneficiaries or purchasers of the plots and cannot claim to have been appointed to represent the group. The deponent stated that the Applicant forged the minutes as evidence that he was appointed as secretary as his intention is to defraud the aging women members of the group. It was his disposition that the 2<sup>nd</sup> Defendant had successfully distributed the land among its members and the sub-division was approved and done in 1999 when after each member obtained her share. The 2<sup>nd</sup> Plaintiff deposed that it is the 1<sup>st</sup> Defendant who is in possession of the original title against the will of the majority members who desire to have their individual titles. He refuted the claim that he had been stopped from developing his plot by the women group and deposed that he had obtained the requisite approvals from the County Council of Ruiru. The 2<sup>nd</sup> Plaintiff deposed further that the dispute forwarded to the Gender officer for resolution was irregular since the said office could not solve a dispute over issuance of title. It was his disposition that the proposed amendments are unnecessary and that the orders sought cannot be granted to the 1<sup>st</sup> Defendant as he is not a member of the women group and therefore has no authority to act on their behalf.

Dorcas Kanyi Wairimu alias Kanyi Kuria swore a Supplementary Affidavit on 14/1/2014 in response to the 2<sup>nd</sup> Plaintiff's Replying Affidavit. It was her disposition that she is the chairlady of the Mwicokaniriria Women Self Help Group as well as one of the registered trustees. She deposed that Mwicokaniriria Women Group is a creation of the Plaintiffs in an effort to validate their transactions relating to the suit premises. The deponent contended that Mwicokaniriria Women Self Help Group is the owner of the land in dispute. Further that the 2<sup>nd</sup> Defendant is not a member of the group and therefore has no basis to make averments. She also deposed that the group is open to both male and female members as is stated in the constitution and that they elected the 1<sup>st</sup> Defendant as their secretary. The deponent reiterated that the 2<sup>nd</sup> Plaintiff illegally instructed a surveyor to sub-divide the land that does not belong to him and therefore it is only fair the amendments be allowed to enable the court determine the lawful owner of the land in dispute.

The application was canvassed by way of written submissions. Maira & Ndegwa Advocates for the Defendants filed submissions dated 21/1/2014 wherein counsel submitted that the Plaintiff had demonstrated that there was need to amend their defence to file a counter claim. Counsel referred to the provision of Order 8 Rule 3 of the Civil Procedure Rules which allows for amendment of pleadings at any time of the proceedings. It was submitted for the Applicant that the counter-claim establishes a prima facie case with chances of success by demonstrating that it owns the land in L.R. 8226/21 and also that the 2<sup>nd</sup> Plaintiff has hijacked the process of sub-division of the land and is currently holding 60 deed plans, which has not been denied. Counsel submitted that it is only fair and in the interest of justice that the orders sought be granted, else the defendants will suffer irreparable harm.

Mbichire & Co. Advocates for the Plaintiffs filed submissions dated 26/3/2014. Counsel submitted that

the proposed counterclaim reveals that there is a blatant attempt by the Applicant to claim what they do not own, and therefore the same has no basis. Additionally, counsel submitted that the injunction order had no basis since the Applicant nor the entity he purports to represent has advanced any rights of ownership to the suit property. Further that nine of the Applicants is a trustee but are officials of a separate and distinct entity. It was submitted for the Plaintiffs that the two entities are different and that only the registered trustees of the lawful entity could pray for orders as sought in the application. In respect to the deed plans, counsel submitted that the same did not belong to Mwicokaniriria Women Self Help Group but to individual plot owners. Further that the deeds were in possession of the trustees of Mwicokaniriria Women Group awaiting distribution to plot owners. Counsel also submitted that the plots had undergone several purchases and transfers and that the current owners' residual interest is the processing of titles in their names. Counsel urged the court dismiss the application.

Having now considered the pleadings generally and the written submissions, the court finds that in prayer No.2 on the amendment of pleadings. Order 8 Rule 3(1) of the civil procedure rules allows for amendment of pleadings. The provision expressly states that such amendment may be allowed at any stage during the proceedings. An application such as this is a matter of discretion which as a matter of principle must be exercised rationally. I am guided by the decision in **Eastern Bakery and Castalino [1958] E. A. 461 at page 462** where the Court held:

**It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.....**

From the foregoing decision, the salient point in determining an application for amendment is that such amendment will not occasion injustice to the adverse party. I am also guided by Order 8 Rule 5 which allows amendments for purposes of determining the real question in controversy between the parties.

The question thus that arises is whether there is any injustice occasioned to the Plaintiffs and secondly whether the amendment sought will assist the court to determine the real questions in controversy between the parties. I have perused the proposed counterclaim annexed to the Defendants' application. The same is in respect to of LR 8226/21 which the Defendants aver that the 2<sup>nd</sup> Plaintiff is in possession of the deed plans of the sub-divided plots within the said property and that he has declined to surrender the same to the Defendants. The counterclaim is also in respect to Plot No. 1 excised from LR 8226/21 which the 2<sup>nd</sup> Plaintiff claims to have purchased from the 1<sup>st</sup> Plaintiff whereas the Defendants aver that the 1<sup>st</sup> Plaintiff had no good title to pass to the 2<sup>nd</sup> Plaintiff as she was not an of the said plot. The Defendants also aver that the 2<sup>nd</sup> Plaintiff is in the process of constructing a building thereon. To that, the 2<sup>nd</sup> Plaintiff does not dispute as he claims to be the lawful owner upon purchase of the same from the 1<sup>st</sup> Plaintiff.

The narrative outlined hereinabove demonstrates that there are matters that ought to be adjudicated upon. In my view, the counterclaim as presented by the Defendants will assist the court in getting to the bottom of the dispute between the parties. I also do not see any prejudice that shall be occasioned to the Plaintiffs if this amendment were to be allowed. The suit is yet to proceed to hearing, and the Plaintiffs will be afforded an opportunity to place a defence to the counterclaim. On prayers No.3 and 4 of the injunctive Orders.

the Defendants have asked the court to grant injunction orders restraining the 2<sup>nd</sup> Plaintiff from constructing or in any way alienating Plot No. 1 excised from LR 8226/21 pending the hearing and determination of the suit. Further they want the 2<sup>nd</sup> Plaintiff restrained from presenting for registration for registration or any other way of dealing with the deed plans relating to LR 8226/21 until the hearing and determination of suit. I have perused the documents annexed to the Defendant's affidavits including minutes of the meeting held on 11/8/2007 wherein discussion over Plot No. 1 was recorded. As regards the deed plans, it is the Defendants averment that the 2<sup>nd</sup> Plaintiff irregularly took over the sub-division of LR 8226/21 and is now in possession of the deed plans. In response, the 2<sup>nd</sup> Plaintiff avers that the sub-division exercise was long completed and each owner obtained their share within the property. Further

that the 1<sup>st</sup> Defendant in holding the mother title, continues to frustrate the efforts of the members of the group from processing individual titles to their respective plots.

From the foregoing, it is evident that the dispute over Plot No. 1 is not a matter than can be determined at this stage. It is also apparent that there is need for the matter to proceed to hearing where both parties will have an opportunity to adduce evidence and test the veracity of the evidence on cross-examination, to enable the court make a proper determination on the dispute as to the ownership of LR 8226/21 as well as Plot No. 1 thereof. It is also at this point that the court resorts to maintaining the status quo in view of the highly contested facts See the case of **Ougo & another v Otieno (1987) KLR** where the Court held:

**The general principle is that where there are serious conflicts of facts, the trial court should maintain status quo until the dispute has been decided in trial.**

The court makes the following orders:

1. ***The Defendants are hereby directed to pay the requisite fees for the Further Amended Defence and Counterclaim and serve the same within 14 days from the date of this ruling.***
2. ***The Plaintiffs shall have corresponding leave to file a response thereto within 21 days of service.***
3. ***Parties are directed to comply with the provisions of Order 11 of the Civil Procedure Rules within 30 days from the date of close of pleadings when after the Plaintiffs shall take steps to set the suit down for hearing without delay.***
4. ***Pending the hearing and determination of the suit, a status quo order is hereby entered to the effect that there shall be no further developments carried out on Plot No. 1 excised from LR 8226/21. The deed plans relating to LR 8226/21 shall not presented for registration or alienated in any way.***
5. ***Costs of this application shall be in the cause.***

Dated, signed and delivered this 25<sup>th</sup> day of July 2014.

**L.N. GACHERU**

**JUDGE**

In the Presence of:-

Mr Kago holding brief Mrs.Ndegwa for the Plaintiffs/Applicants

None attendance for the Defendants

Kamau: Court Clerk

Ruling read in open Court