



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MACHAKOS
ELC PETITION NO.313 OF 2009

SIMON NGAO MBITHIPLAINTIFF

VERSUS

DANIEL KIILU NGOMO.....DEFENDANT

RULING

1. By a **Notice of Motion dated 28.5.2014** and filed on the same date, the Applicant seeks the following reliefs:

1. That the Honourable Court be pleased to grant the Defendant/Applicant leave to amend the statement of defence and to include counterclaim.
2. That the Amended statement of defence and counterclaim be deemed as duly filed upon payment of the requisite filing fees.
3. That the costs of this Application be in the cause.

The motion is based on the following grounds:

- a. That the Defendant is desirous of amending the statement of defence and to include a counterclaim in the suit.
- b. That the Plaintiff sold a portion of the parcel of land described as **MUPUTI/KIMUTWA/1820** (hereinafter “the suit land”) to the Defendant/Applicant vide an Agreement made on 30th December, 2000 or thereabouts.
- c. That the Plaintiff/Respondent had in fact executed an Application for subdivision of the said parcel to the Land Control Board to enable the land be sub-divided and each party to take its respective share of the portion land.
- d. That in a total disregard of the agreement and in an unexpected turn of events, the Plaintiff filed this suit in a bid to derail the transfer and making allegations that the Defendant/Applicant has been trespassing upon the suit land whereas it is indeed the Defendant’s property.
- e. That the amendments to the pleadings are necessary so as to enable this honourable court to accurately determine the issues before it.

f. That no prejudice whatsoever shall be suffered by the Plaintiff by the proposed amendments.

g. That it is in the interests of justice that this Application be allowed.

2. The motion is supported by the Affidavit of Daniel Kiilu Ngomo sworn on 28.5.2014. The Notice of Motion is brought principally under Order 8 Rule 3 Civil Procedure Rules 2010. The application is opposed and the Plaintiff/Respondent has sworn an Affidavit on 21.10.2014 filed on 21.10.2014.

3. The Applicant filed defence on 16.11.2010 and averred that the Plaintiff upon execution of Sale Agreement with the Defendant, he divided suit land into two between the Defendant and Makilu Christian Church ACC (EA). The Defendant now seeks to amend the same defence and include a counterclaim to get land he bought for himself and the Church transferred as he alleges to have paid all the consideration.

4. The Agreement was entered into sometimes in 2000. The Plaintiff/Respondent deny any sale transaction as alleged nor giving possession to the Defendant. He alleges that the agreement and application for consent to subdivide land are all forgeries. He alternatively states that even if there was sale same is time barred as the same was executed over 14 years ago. He also avers that since there was no Land Board consent, the alleged sale is null and void.

5. The Respondent acknowledges that the Applicant is in some possession of the subject land and thus the prayers in the plaint and motion dated 16.10.2014. The court has noted that if the Applicant is in possession the circumstances have to be established via trial. If it was pursuant to an agreement the Court could investigate whether the resulting trust has crystalized notwithstanding the lapses of the sale agreement via lapse of time and want of Land Board Consent in line with **Nyeri Civil Appeal No.6/2010 MWANGI KAGIRI & OTHERS VS. NGUNJIRI & OTHERS.**

6. Order 8 Rule 3 Civil Procedure Rules 2010, states that;

.... "The court may at any stage of proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings".

7. In the circumstances of the instant case, the court is inclined to allow amendment in the interest of determining all issues pertaining to parties' interest. The court thus makes the following orders:

1. The defence and counterclaim be amended and served within 7 days.

2. The Plaintiff is at liberty to reply within 14 days of service.

3. Costs to the Plaintiff/Respondent in any event.

Signed and Delivered at Machakos, this 11th day of December, 2014.

CHARLES KARIUKI

JUDGE