



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 9 OF 2003

FRACIA WANJIRU MWANGI.....PLAINTIFF
VERSUS
JAMES NJUGUNA GITHINJI.....DEFENDANT

RULING

This suit was filed by Fracia Wanjiru Mwangi against James Njuguna Githinji on 11/2/2003. The plaintiff sought a permanent injunction to restrain the defendant from entering or interfering in any way with the plaintiff's property Title No. SOLAI/ARUTANI BLOCK 2/197 (MARIGU A) and an order for vacant possession or eviction therefrom. The plaintiff claimed to have bought the land from Marigu Farmers Company Limited in the 1970s. By a Chamber Summons application dated 7/2/2003, the court granted a temporary injunction to the plaintiff/applicant restraining the defendant/respondent from entering or interfering with the suit land. A defence was filed by Waiganjo Advocate on behalf of the respondent on 16/4/2003 in which the respondent claimed to be the registered proprietor of parcel number SOLAI/ARUTANI/BLOCK 2/198 (MARIGU A) which he has occupied since 1978 without any interruption. He claimed to be owner or alternately that he had acquired proprietary rights by way of adverse possession. The hearing of the suit commenced on 12/2/09 before J. Maraga and the plaintiff closed her case on 28/4/09.

After two adjournments, Mr. Waiganjo filed a Chamber Summons dated 4/10/2011, under certificate of urgency. It is the application now before me for consideration. The respondent/applicant seeks leave of this court to amend his defence. The application was brought pursuant to **Order VIA Rule 3(2), 3, 5** of the **Civil Procedure Rules** and **Sections 1A** and **3A** of the **Civil Procedure Rules**. The applicant in his affidavit in support of the Chamber Summons avers that he has formed the opinion that it is necessary to amend the defence to enable him include a counter claim to his defence. That the land had been allocated to him as Plot No. 395 and that it was subdivided without his authority, in order to create the suit land. He has exhibited a draft defence and contends that it will not be prejudicial to the plaintiff/respondent.

Mr. Waiganjo also submitted that the applicant will be seeking cancellation of the plaintiff's title which cannot be done without the court being asked to do so and that the court has discretion to order amendment of the defence at any stage of the proceedings to enable the court determine the issues in contention once and for all. Counsel urged that the defendant had not yet started giving evidence and that if it will be necessary to recall the plaintiff, they will be at liberty to do so. As regards Plot 395, counsel submitted that it was alluded to in PEX.6, the judgment of the **Tribunal No. 48/2000 FRACIA WANJIRU V JAMES NJUGUNA GITHINJI**, produced by the plaintiff and therefore no prejudice will be occasioned by the amendment.

The plaintiff/respondent swore an affidavit in opposing the application. It is dated 15/10/2010. she avers that this application is meant to delay the determination of this suit and that there is no evidence that the defendant/applicant ever owned Plot No. 395 and that the plaintiff/respondent being a member of Marigu

Farmers Company Ltd, could not have had any role to play in the changes if any, to the physical and survey plans.

Ms Omwenyo, counsel for the respondent added that there is no evidence that Plot 395 which the respondent claims to have been subdivided without his authority, ever existed and the counter claim will not be based on any documents.

Order VI Rule 2(3), 4 and 5 of the **Civil Procedure Rules** (old rules) do give the court a wide discretion to allow an amendment of pleadings in order to do justice to the parties without prejudicing either of the parties. So, in exercise of the discretion the court will ask itself whether the amendment will occasion any injustice to the plaintiff. In the instant case, this case was filed in 2003, about 8 years ago. The defence was filed in 2003 by Mr. Waiganjo who is still on record. The plaintiff's case was heard and determined in 2009 and it took the defendant 1½ years from the time the plaintiff closed her case to file the instant application seeking an amendment. The same counsel having been on record, there is no reason why the amendment was not sought earlier.

The applicant introduces a new angle to the dispute. He claims that this plot was initially 395 but was subdivided without his authority to form 197 and 198. In the statement of defence he states that his plot is 198 while the respondent claims plot 197. The defendant has not himself produced any document to support the allegation that he had been allocated Plot 395 which was subdivided to make Plots 197 and 198. Mr. Waiganjo, however, referred the court to the proceedings before the Tribunal produced by the plaintiff as EX.6 in which reference is made to Plot 395 by the defendant/applicant as the plot that he was allocated by the land buying company to which he belonged. Even though the defendant/applicant has not exhibited any document to support the allegation that he was allocated Plot 395 that was later subdivided, this being a land matter I would allow the amendment so that the matter is heard and all issues relating to the disputed land be determined at once. The defendant had not filed the list of documents and the court cannot tell what list they have. It would have been proper that the defendant/applicant file his list so that the plaintiff is not ambushed. He should have borrowed a leaf from the plaintiff who filed the list of documents and even witnesses. Since the defendant/applicant has yet to start his case. It is my view, that the plaintiff will not be prejudiced save for the prolonged delay. I will allow the application and direct that:-

- (1) The defendant/applicant be and is hereby allowed to amend his defence in terms of the draft amended defence and the same should be filed and served upon payment of requisite court fees within 5 days hereof;
- (2) The defendant/applicant to file and serve the list of documents with the amended defence;
- (3) Upon filing the amended defence, the plaintiff will be at liberty to file a defence to the counter claim within 14 days of service;
- (4) The plaintiff be at liberty to call further evidence in view of the amendment;
- (5) The matter be set down for further hearing within the next three months;
- (6) The defendant/applicant will bear any thrown away costs that may be incurred by the respondent and also the costs of this application. It is so ordered.

DATED and DELIVERED this 30th day of September 2011.

R.P.V. WENDOH
JUDGE

PRESENT:

N/A for the plaintiff.

Ms Wachira holding brief for Mr. Waiganjo the defendant.
Kennedy - Court Clerk.