



REPUBLIC OF KENYA



KENYA LAW
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**Kariuki & another v Mugo (Environment & Land Case 27 of 2017)
[2022] KEELC 13269 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13269 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU

ENVIRONMENT & LAND CASE 27 OF 2017

YM ANGIMA, J

SEPTEMBER 29, 2022

CONSOLIDATED WITH ELC 28 OF 2017 (FORMERLY NAKURU ELC 219 OF 2012)

BETWEEN

PETER WAKIAMA KARIUKI 1ST PLAINTIFF

TARASISHIO NDIRANGU THUITA 2ND PLAINTIFF

AND

SAMUEL MUNIA MUGO DEFENDANT

RULING

A. The Defendant's Application

1. By a notice of motion dated 14.03.2022 expressed to be based upon Article 159 of *the Constitution* of Kenya 2010, Sections 1A, 1B, & 3A of the *Civil Procedure Act* (Cap.21), Sections 3 & 13(7) of the *Environment & Land Court Act* No.19 of 2011, Order 7 rules 8, Order 8 Rules 3 & 5, Order 50 rule 1 of the *Civil Procedure Rules*, 2010 (the Rules) and all other enabling provisions of the law, the Defendant sought the following orders:
 - a. That this Honourable court be pleased to grant leave to the Defendant to file a further defence and plead a counterclaim.
 - b. That the annexed Defendant's further defence and counterclaim be deemed as duly filed upon payment of the requisite fees.
 - c. That the costs of this application be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the Defendant, Samuel Muniu Mugo on 14.03.2022. The gist of the application was that the Defendant intends to file a further defence and counterclaim for the purpose of



enabling the court to effectually and completely adjudicate and settle all question between the parties. It was contended by the Defendant that proposed further defence and counterclaim shall not introduce any new facts hence the Plaintiff shall not suffer any prejudice if the application is allowed.

B. The Plaintiffs' Response

3. The Plaintiffs filed a replying affidavit sworn by the 2nd Plaintiff, Tarashisio Ndirangu Thuita on 05.05.2022 in opposition to the application. The Plaintiff contended that the application was misconceived, incompetent, bad in law and an abuse of the court process. The Plaintiffs contended that since the instant suit was filed as an originating summons there was no room under Order 37 of the Rules for filing a defence and counterclaim. It was contended that the instant suit was filed about 20 years ago hence there was inordinate delay on the part of the Defendant in seeking the amendment. It was further contended that the instant suit was already part-heard hence allowing the application shall necessitate the adduction of further evidence by the Plaintiffs thereby unduly delaying the conclusion of the suit.
4. The Plaintiffs further opposed the application on the basis that the Defendants were seeking to introduce a new case; that they have been employing delaying tactics in the past to delay the hearing of the suit; and that the Plaintiffs herein were advanced in age hence there was a risk that they may die before the conclusion of the suit. The court was consequently urged to disallow the application for amendment of pleadings with costs to the Plaintiffs.

C. Direction On Submissions

5. When the application was listed for inter partes hearing it was directed that it shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their respective submissions. However, by the time of preparation of the ruling none of the parties had filed submissions.

D. The Issues For Determination

6. The court has considered the notice of motion dated 14.03.2022, the replying affidavit sworn on 05.05.2022 in response thereto as well as the material on record. The court is of the opinion that the following issues arise for determination herein:
 - a. Whether the Defendant has made out a case for the grant of the orders sought.
 - b. Who shall bear costs of the application.

E. Analysis And Determination

Whether the Defendant has made out a case for the grant of the orders sought

7. The principles to be considered in granting or refusing an application for leave to amend pleadings were restated in the case of *Eastern Bakery –vs- Castellino* [1958] E.A. 461 at page 462 as follows:

“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 can be no injustice if the other side can be compensated by costs: *Tildesley –vs- Harper* (1) [1878], 10 Ch. D. 398; *Clarapede –vs- Commercial Union Association* (2) [1975], 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya –vs- Maung Po Hnaung* (4) [1921], 43 I.A; 48 Cal. 832.



The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Releigh –vs- Goshen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon –vs- Neal* (6) [1887], 19 Q.B.D. 394; *Hilton –vs- Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. *Chitaley* p. 1313.”

8. Similarly, in the case of *Central Kenya Ltd –vs- Trust Bank Ltd & 5 others* [2000] eKLR, the Court of Appeal stated as follows on amendment of pleadings:
 - a.the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot be properly be compensated for in costs.”
9. The court does not agree with the Plaintiffs’ contention that since Order 37 of the Rules does not specifically provide for amendment of pleadings then a pleading filed under that Order is incapable of amendment. There is no doubt in the court’s mind that an originating summons is a pleading within the meaning of Section 2 of the *Civil Procedure Act* and any response or answer thereto similarly qualifies as a pleading. The court is of the opinion that unless otherwise specified by specific legislation, amendment of pleadings generally can be dealt with under Order 8 of the Rules which deals with amendment of pleadings.
10. The court is further of the opinion that a Defendant sued under Order 37 is entitled to file a counterclaim just like a Defendant who has been sued by plaint, petition or other pleading. It would be contrary to the overriding objectives of the *Civil Procedure Act* to require a Defendant or Respondent in an originating summons to file a separate suit for determination of any cross-claim or counterclaim he may have against the Plaintiff. The court is satisfied that the Defendant’s intended defence and counter-claim is closely intertwined with the Plaintiff’s claim for adverse possession hence the two claims may conveniently be tried together.
11. Whereas it is true that there has been considerable delay on the part of the Defendant in seeking an amendment, delay alone cannot be a legitimate reason to refuse the application. The Defendant can be penalized in costs for such delay but the overriding objective of amendment of pleadings ought to be upheld. The court is not persuaded that the fact that the suit is already part heard should disentitle the Defendant to the leave sought. The court is empowered under the Rules to allow an amendment of pleadings at any stage of the proceedings before delivery of judgment. The material on record indicates that although the Plaintiffs have testified in the suit, they have not yet closed their case. The suit is still part-heard. Accordingly, the court is satisfied that there is no valid justification to deny the Defendant leave to file a further defence and to introduce a counter-claim against the Plaintiffs during the pendency of the suit.
 - b. Who shall bear costs of the application
12. Although costs are at the discretion of the court, the general rule is that costs shall follow the event unless the court, for good reason, directs otherwise. See Section 27 of the *Civil Procedure Act*. Although the Defendant is the successful party in the instant application, the court is of the opinion that he is



not entitled to any costs because he filed the application so late in the day when the suit was already part-heard. Accordingly, the Defendant shall bear the costs of the application.

F. Conclusion And Disposal

13. The upshot of the foregoing is that the court finds merit in the Defendant's application for leave to file a further defence and to file a counterclaim. Accordingly, the court makes the following orders for disposal of the notice of motion dated 14.03.2022:
- a. The Defendant is hereby granted leave to file a further defence and counterclaim within 14 days from the date hereof.
 - b. The Plaintiff shall be at liberty to file a reply and defence to counterclaim within 14 days upon service.
 - c. The Defendant shall be at liberty to file a reply to defence, if need be, within 7 days upon service of defence to counterclaim.
 - d. The suit shall be mentioned on 07.11.2022 for further orders on the hearing of the suit and counter-claim.
 - e. The Defendant shall pay the Plaintiffs costs of the application in the sum of Kshs.20,000/= within 30 days with effect from the date hereof in default of which the Plaintiffs shall be at liberty to execute for recovery thereof.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 29TH DAY OF SEPTEMBER, 2022
AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

In the presence of:

Ms. Wambui holding brief for Mr. Kariuki Mwangi for the Defendant

Mr. Wahome Gikonyo for the plaintiffs

C/A - Carol

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Y. M. ANGIMA

JUDGE

