



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)
Civil Suit 713 of 1996

JAMES NJOROGE KARUGAPLAINTIF/RESPONDENT

VERSUS

HANNAH NJOKIDEFENDANT/APPLICANT

R U L I N G

This Ruling relates to chamber summons dated 02.09.05, brought under Order VIA rules 3(1), 5 and 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act, Cap 21, in which the applicant applied for the following orders:-

1. That leave be granted to the defendant/applicant herein to amend the defence in terms of the draft amended defence herein.
2. That the costs be provided for.

The grounds upon which the application is based are:-

- (a) That it is necessary for the purpose of determination of the real question in controversy between the parties that the defendant be allowed to amend the defence in the manner proposed.
- (b) That the defendant has a cross-claim that needs to be canvassed together with the plaintiff's claim herein.
- (c) That the plaintiff stands to suffer no conceivable damage or prejudice should the orders sought be granted.
- (d) That it is only fair and in the interest of justice that the orders sought be granted.

The application is supported by the affidavit of the defendant/applicant, Hannah Njoki sworn on 02.09.05. The affidavit is to the effect that the defendant/applicant bought the suit land from one Peter K. Kabura on or about 09.10.95 and made part-payment of Kshs.120,000/= for it.

The parties are represented in these proceedings by learned counsel, Mr. L.M. Nyang'au and J.M. Thiga.

On 19.12.05 the plaintiff/respondent filed grounds of opposition dated 08.12.05 under Order L rule 16 of the Civil Procedure Rules as follows:-

1. That the delay in making the application (for amendment) is inordinate and inexcusable.
2. That no explanation has been offered why the amendment sought was not contained in the original plaint or why the same was not made earlier.
3. That the application is misconceived as the person respecting whom the amendment is sought is not a party actually before court.
4. That the proposed amendment envisages the presence before the court of one Peter K. Kabura who allegedly sold the suit land to the defendant but who neither had any proprietary interest over the land nor was the plaintiff's agent.
5. That there is no jurisdiction to grant the order affecting a party who is not before the court and respecting whom a third party has been issued (sic) though not served.
6. That were the order to be granted and judgment entered in favour of the defendant, the same would be illegal as it would fly in the face of the provisions of the Land Control Act regarding Land Control Board Consent.
7. That the said Peter K. Kabura did not have any privity of estate to enter into any agreement and grant possession of the suit land to the defendant.
8. That the application is otherwise an abuse of the process of the court.

When the chamber summons application dated 02.09.05 came up for hearing before me on 22.11.06, the defendant/applicant was represented by learned counsel, Mr. J.M. Thiga while learned counsel, Mr. J. Makumi held brief for Mr. Nyang'au for plaintiff/respondent.

Defendant's/applicant's counsel elaborated that in her said chamber summons, his client was seeking a declaration that she purchased the suit property as per sale agreement of 09.10.95 and that she is equitable owner of the property. Defendant's/applicant's counsel said of grounds of opposition filed by the plaintiff/respondent that they touch on matters of evidence, to be addressed at the full hearing of the suit. He relied on Standard Chartered Bank Kenya Ltd. -vs- Malindi General Engineering Works Ltd. & Others, Mombasa HCCC No.22 of 1993 (Wambilyanga, J – unreported) for the basic proposition that the amendment sought by the defendant/applicant should be granted however negligent or careless the defendant/applicant may have been by not including in the original defence or bringing earlier the material sought to be brought on board vide the amended defence, provided no injustice would be done to the opposing side and the opposing side can be compensated by costs. Defendant's/applicant's counsel also relied on a passage in Bullen and Leake and Jacob's Precedents of Pleadings, 12th Edition at page 1196 that a counter-claim is deemed to be a separate action and to have been commenced on the same date as the action in which it is pleaded. He urged the court to allow the application.

On the other hand, plaintiff's/respondent's counsel opposed the application along the lines of the written grounds of opposition filed on 19.12.05. He pointed out that the suit was filed in 1996 and that the matter has proceeded for trial before this court. He noted that no explanation had been given for the amendment application being brought so late and why the material to be introduced in the proposed amendment was left out of the original defence. Plaintiff's/respondent's counsel complained that the defendant/applicant was vide the proposed amended defence trying to enjoin a 3rd party, Peter K. Kabura but had chosen not to proceed against him or his estate. In plaintiff's/respondent's view, the relief sought to be introduced by the proposed amendment can only be enforced against Peter K. Kabura. Counsel pointed out that the plaintiff/respondent is not a party to the purported sale agreement between Peter K.

Kabura and the defendant/applicant and that it had not been alleged that Peter K. Kabura was an agent of the plaintiff/respondent. While acknowledging that under Order VIA rule 3(1) an amendment can be made at any stage of the proceedings, he pointed out that hearing of the suit had commenced and the plaintiff had testified in-chief and was cross-examined and that, therefore, the defendant/applicant had to advance good reasons why the proposed amendment should be allowed. Plaintiff's/respondent's counsel was clearly of the view that no good reasons had been advanced for the proposed amendment and urged that the chamber summons application dated 02.09.05 be dismissed.

I have given due consideration to the arguments and counter-arguments of the parties.

The action in this case was initiated by plaint filed on 21.03.96. Defence was filed on 18.02.97. Hearing commenced before me on 13.07.05 when the plaintiff/respondent gave and concluded his evidence in-chief. Defendant's/applicant's counsel then embarked upon cross-examining him. At some stage in the cross-examination, defendant's/applicant's counsel indicated he intended to eventually produce a copy of extract from the property and proprietorship sections of the Register and that for that reason he intended to put questions to the plaintiff/respondent relating to that extract.

Plaintiff's/respondent's counsel objected on the ground that the extract alluded to was not among the documents disclosed during discovery of documents. Plaintiff's/respondent's counsel urged this court to shut out any reference to the alleged extract. Defendant's/applicant's counsel urged the court to allow introduction of the contract as in his view it touches directly on the matters the plaintiff/respondent had testified on. In a short ruling that day allowing the use of the alleged extract in the cross-examination of the plaintiff/respondent, I ordered adjournment of the hearing to enable discovery to be made regarding the subject extract before cross-examination of the plaintiff thereon proceeded.

Thereafter I was transferred out of the Civil Division from where I had started hearing the suit. On 15.03.06 the matter came to me for mention for me to indicate whether I wanted to continue hearing it although I was no longer in the Civil Division. I directed that a Judge in the Civil Division should continue with the hearing to conclusion. However, the Civil Division referred the suit back to me for me to continue hearing it to conclusion.

In the meantime the defendant/applicant filed the chamber summons dated 02.09.05 now under consideration. No mention of the discovery I ordered on 13.07.05 has been made by the defendant/applicant. Instead, the defendant/applicant has sought leave to amend her defence to bring in a purported sale agreement allegedly relating to the suit land. The said sale agreement purports to be between one Peter K. Kabura and Hannah Njoki Kamuya. I shall assume for now that Hannah Njoki Kamuya is the defendant/applicant. The proposed amended defence does not seek to enjoin Peter K. Kabura as a party to the suit. The court record shows that among the documents filed in this suit is a title deed for the suit land showing it to have been registered in the plaintiff's/respondent's name on 03.04.92 under the Registered Land Act, Cap.300. No reference to Peter K. Kabura is made in the title deed and, as already indicated, the defendant/applicant has not sought to enjoin him as a party to the suit. The purported sale agreement dated 09.10.95 is hanging in the air as far as the suit is concerned, while in the pleadings as they stand there is no semblance of its linkage to the suit.

I find that the defendant/applicant has not made out any case to warrant being granted leave to amend her defence. The proposed amended defence appears to be an afterthought and an abuse of the court process. Accordingly, the chamber summons application dated 02.09.05 is hereby dismissed.

Costs shall be in the cause.

Delivered at Nairobi this 18th day of December 2006.

B.P. KUBO

JUDGE