



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC NO. 200 OF 2016

PRISCILLA WANJA KIBUI PLAINTIFF

-VERSUS-

JAMES KIONGO KIBUI 1ST DEFENDANT

CHARLES WAMBUGU GITONGA 2ND DEFENDANT

THE LAND REGISTRAR, NYERI.....3RD DEFENDANT

THE HON. ATTORNEY GENERAL..... 4TH DEFENDANT

ECOBANK KENYA LIMITED5TH DEFENDANT

RULING

1. By the Notice of Motion dated 30th July, 2021 as filed herein on 2nd August, 2021, Ecobank Kenya Limited (*the 5th Defendant/Applicant*) prays for orders that:

1. *Leave be granted to the 5th Defendant to amend its Defence as set out in the draft Amended Defence annexed thereto;*
2. *Leave be granted to the 5th Defendant to issue a Notice of Claim against the 2nd, 3rd and 4th Defendants;*
3. *The Honourable Court (be) pleased to re-open the case and allow the parties to file their pleadings in response to the Amended Defence and Notice of Claim against the Co-Defendants; and*
4. *The costs of this application be in cause.*

2. The Motion which is supported by an Affidavit sworn by the 5th Defendant's Advocate on record Eric Thige Muchiri is premised on the grounds *inter alia* that:

- (i) *The 2nd Defendant is the registered proprietor of the suit property having been issued with a title therefore by the 3rd and 4th Defendants;*
- (ii) *Upon due diligence on the title with the 3rd Defendant, the 5th Defendant accepted the suit property as security for a loan of Kshs.26,000,000/- that it advanced to the 2nd Defendant;*
- (iii) *The 5th Defendant having innocently relied on documents issued by the 2nd and 3rd Defendants and for a valuable consideration has a legitimate claim for indemnity against the 2nd and 3rd Defendants for any claim made by the Plaintiff or the 1st Defendant;*
- (iv) *The Defendant's Defence dated 27th March, 2017 omitted the claim for indemnity and the 5th Defendant craves for leave to issue a Notice of Claim against the Co-Defendants;*

(v) *The Amendment is necessary to enable the Court determine the real question in controversy between the parties;*

(vi) *On 21st February 2019, the case proceeded to hearing in absence of the 5th Defendant who had not been served with a Hearing Notice and the 1st and 2nd Defendants closed their respective cases;*

(vii) *The 5th Defendant's evidence is of vital importance for a just and fair disposal of the suit and if the application is not allowed, Judgment will be delivered without the 5th Defendant being heard and thereby occasioning a grave injustice.*

3. The application is opposed. In her Replying Affidavit sworn and filed herein on 9th September 2021, Priscilla Wanja Kibui (*the Plaintiff*) avers that the 5th Defendant's Advocates were at all times aware of the hearing dates for this matter. The Plaintiff asserts that the matter came up for hearing on 6th March, 2018 during which the 5th Defendant was represented by a Mr. Gichangi Advocate. The matter did not proceed then and was instead re-scheduled for hearing on 12th April, 2018.

4. The Plaintiff avers that on the said 12th April 2018, the 5th Defendant was represented by a Mr. Wambugu Advocate and the Court took the Plaintiff's testimony before adjourning the matter to 5th July, 2018. On the said 5th July, 2018 however, the 5th Defendants' Advocates failed to attend Court for hearing despite having been there when the date was fixed. The case was adjourned however at the instance of the 4th Defendant and it was then fixed for mention on 6th November 2018 for purposes of fixing a hearing date.

5. The Plaintiff avers that the Court was not sitting on the said 6th November, 2018 and parties moved to the Registry where they fixed the matter for hearing on 21st February, 2019. At the Registry, the 5th Defendant was represented by a clerk named Harrison who indicated he had been sent by Mr. Gichangi Advocate. However on 21st February 2019, the 5th Respondent's Advocates were not in Court and the Court proceeded to close the case after hearing the testimony of the Plaintiff and the 1st Defendant as the other parties had no witnesses in Court.

6. The Plaintiff further avers that the 2nd Defendant had made a similar application seeking to re-open the case but the same was declined. When the 2nd Defendant's said application came up for hearing on 28th March 2019, the 5th Defendant was present and participated but failed to make a similar application to re-open their case. The 5th Defendant then waited for another two and a half years before making the present application.

7. James Kiongo Kibui (*the 1st Defendant*) is equally opposed to the application. In his Replying Affidavit sworn and filed herein on 10th September 2021, the 1st Defendant avers that the application is unmerited, frivolous, vexatious, an abuse of the Court process and made in bad faith. Contrary to the allegations made in the Supporting Affidavit to the application, the 1st Defendant avers that the date for hearing was fixed in the presence of a representative of the 5th Defendant and that they were therefore aware when the suit was coming for hearing but failed to avail themselves in Court.

8. I have carefully considered the 5th Defendant's application as well as the respective responses thereto by the Plaintiff and the 1st Defendant. I have equally perused and considered the oral submissions by the Learned Advocates acting for the said parties. The 2nd, 3rd and 4th Defendants had no objection to the application.

9. The 5th Defendant Bank asks for leave to amend its Defence and to issue a Notice of Claim against the 2nd, 3rd and 4th Defendants. It also urges the Court to re-open the case and allow the parties to file their pleadings in response to the amended Defence.

10. The general rule on the subject of amendments of pleadings is that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs (*See Eastern Bakery -vs- Castelino (1958) EA 461*). The main principle is that an amendment should not be allowed if it causes an injustice to the other side.

11. In **Ochieng & Others -vs- First National Bank of Chicago, Civil Appeal No. 147 of 1991** (unreported) [as cited with approval in **St Patrick's Hill School Ltd -vs- Bank of Africa Kenya Ltd (2018) eKLR**] the Court of Appeal set out the principles governing the amendment of pleadings as follows:

(a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.

(b) The amendments should be timeously applied for;

(c) Power to amend can be exercised by the Court at any stage of the proceedings;

(d) That as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; and

(e) The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the defendant would be deprived of his right to rely on the Limitations Act subject however to the powers of the Court to still allow an amendment notwithstanding the expiry of the current period of limitation.

12. In the matter before me, the 5th Defendant did file its Statement of Defence herein on 29th March, 2017. It is the 5th Defendant's case that as at that time they omitted to include a claim for indemnity against the 2nd, 3rd and 4th Defendants and that it is fair that they be allowed

to file a Notice of Claim against them as they are entitled to do so under **Sections 81, 82 and 83 of the Land Registration Act, 2012.**

13. While that may be so, it was not clear to me why the 5th Defendant did not bring that claim earlier. A perusal of the record herein reveals that the matter was set down for hearing and that the 5th Defendants took part in the proceedings except on 21st February, 2019 when the matter proceeded in their absence.

14. According to the 5th Defendant, they were unaware and had not been served with a Hearing Notice indicating that the suit was coming up for hearing on the said 21st February, 2019. The 5th Defendant asserts that on 6th November, 2018 when the parties appeared in the Court Registry and fixed the matter for hearing, its representative was not in Court.

15. As it were, on the said date, the matter was scheduled for hearing but the Court was not sitting. From the record, one Harrison appeared on behalf of "Gichangi & Company Advocates" for the 5th Defendant and the date was fixed by the consent of the parties. Subsequently when the matter came up for hearing on 21st February 2019, the Honourable Justice L. N. Waithaka allowed the hearing to proceed in the absence of the 5th Defendant noting that the 5th Defendant's representative was present when the hearing date was taken in the Registry.

16. While the 5th Defendant is right to point out that the firm on record was Muri, Mwaniki & Wamuti Advocates and not the said Gichangi & Company Advocates, I note from the record that the 5th Defendant was at various times represented herein by one Mr. Gichangi Advocate. At any rate, if at all the finding by the Learned Judge was erroneous, the 5th Defendant has to-date not made an application for the orders of 21st February 2019 to be set aside and/or varied.

17. Again on the said date, the Learned Judge proceeded to close the cases for the 2nd, 3rd, 4th and 5th Defendants after finding that there was no sufficient reason why their witnesses were not in Court. Subsequently and by an application dated 2nd March 2019, the 2nd Defendant sought orders of review and the setting aside of the orders closing their case before they could be heard.

18. From the record, the said application was served upon other parties including the 5th Defendant. When the same came up for hearing on 28th March 2019, Mr. Gichangi Advocate for the 5th Defendant was represented by one Mr. Kinuthia Advocate who addressed the Court as follows:

"Mr. Kinuthia:

Mr. Gichangi was served with the application on 19th March, 2019. He is yet to receive instructions from his client to enable him respond to the application. He prays for 7 days."

19. The Court was however not satisfied with the reasons given seeking for the adjournment of the application and ordered the same to proceed. By a Ruling delivered on 4th April 2019, the Learned Judge dismissed the 2nd Defendant's application and directed the parties to file and serve their closing submissions within 14 days.

20. The 5th Defendant did not file any submissions. Instead, it waited for more than 2 years to lodge the application presently before me seeking to re-open the case to enable all parties to take part in the proceedings. I have looked at the Supporting Affidavit of Eric Thige Muchiri Advocate in support of the application and there is absolutely no explanation given for the two – years delay in filing the application and/or why they did not join the 2nd Defendant's application seeking near similar orders dated 2nd March 2019. No such explanation is offered either in the same Advocate's further Affidavit sworn and filed herein on 5th October, 2021.

21. For the foregoing reasons, I was persuaded that the Motion dated 30th July, 2021 is brought in bad faith and meant to abuse the Court process. I find no basis for the same. It is dismissed with costs to the Plaintiff and the 1st Defendant.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT NYERI THIS 3RD DAY OF FEBRUARY, 2022.

In the presence of:

Ms. Wambui Mwai for 2nd Defendant

Mr. Kaiuki holding brief for Thige for the 5th Defendant

Mr. James Thiongo - 1st Defendant in person

No appearance for Attorney General for 3rd and 4th Defendants

No appearance for the Plaintiff

Court assistant - Mugambi

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J. O. Olola

JUDGE