



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 23 OF 2018

RACHAEL WANJIKU TONUL.....PLAINTIFF

VERSUS

ENES SHITACHI WEKESA.....1ST DEFENDANT

AGNES NAFULA WAFULA.....2ND DEFENDANT

FRANKLINE WAFULA.....3RD DEFENDANT

WILLIAM WEKESA MUCHELE.....4TH DEFENDANT

MAURICE WANJALA WEKESA.....5TH DEFENDANT

JOHN WEKESA WABUKE.....6TH DEFENDANT

RULING

1. The application dated 2/8/2018 which was filed in court on 3/8/2018 has been brought by the defendants seeking the following orders:-

(1) That leave be granted to the defendants to amend their defence to plead a counterclaim in terms of the amended defence and counterclaim annexed to the supporting affidavit hereto.

(2) That the amended defence and counterclaim annexed to the supporting affidavit hereto be deemed as duly filed and served upon payment of the requisite court filing fees.

(3) That costs of this application be in the cause.

2. The applicant has brought the application under the provisions of **Section 3A** of the **Civil Procedure Act, Order 8 Rule 3 of the Civil Procedure Rules 2010**.

3. The grounds upon which the application is made are that the plaintiff's claim is for, inter alia, eviction of the defendants from the suit land; that the suit land was allotted to one **Jackson Wekesa Namisiko** (deceased) by the Settlement Fund Trustee in the year **1983** and the deceased took possession of the same forthwith and duly paid for the same but passed away on **30/7/2013** before obtaining a title deed for the same; that the defendants are beneficiaries of the estate of the said Jackson Wekesa Namisiko (deceased); that the plaintiff claims ownership of the suit land without colour of right and has a title deed which she irregularly and/or illegally obtained in the year **2012** in respect of the suit land; that at the time of filing their joint statement of defence on 19/6/2018, the defendants had not taken out a grant of representation for the estate of the said Jackson Wekesa Namisiko (deceased) and could not, therefore, counterclaim for a declaration that the suit land belongs to the estate of the said Jackson Wekesa Namisiko (deceased) and not to the plaintiff; that the defendants now have a grant of letters of administration *ad litem* for the estate of the said Jackson Wekesa Namisiko (deceased) which was issued by the High Court of Kenya at Kitale at **16/7/2018** to **William Wekesa Muchele** the 4th defendant herein; that the defendants now desire to counterclaim, through William Wekesa Muchele the 4th defendant herein, for a declaration that the estate of the deceased is the true owner of the suit land and for an order of cancellation of the title deed which was irregularly and/or illegally issued to the plaintiff; that the intended amended defence will enable the court effectually and completely adjudicate and settle all questions in controversy in this suit and will not occasion any prejudice to the plaintiff.

4. The application is supported by an affidavit of the 4th defendant sworn on 2/8/2018, on his behalf and on behalf of his co-defendants.

5. The plaintiff only filed grounds of opposition to the application and stated that it lacks merit and it is an abuse of the process; that the

amendment will not allow the court to determine the true and substantive merits of the case but will convolute the whole process; that there has been inordinate delay in prosecuting the application; that the application introduces new cause of action not related to the plaintiff since the plaintiff has no power to issue titles and is therefore in contravention of **Order 8 Rule 5** of the Civil Procedure Rules; that there is no counterclaim of being allowed in the application and that if allowed the amendments will not be in furtherance of affair and expeditious trial or in furtherance of **Section 1A** of the Civil Procedure Act or **Order 8 Rule 2** of the Civil Procedure Rules.

6. Both the plaintiff and the defendants file submissions on **8/10/2019**. I have considered those application, the response including the submissions.

Determination

7. The issues for determination is whether the defendants should be allowed to raise a counterclaim in this suit against the plaintiff. The plaintiff is of the view that the application was belatedly filed and prosecuted; that the same seeks to introduce a new cause of action and that the same is not in compliance with the Civil Procedure Rules.

8. Regarding whether the application was belatedly filed I observe that the main suit was filed on **1/3/2018** and the application was filed on **3/8/2018**. It would appear that the defendants had not taken out letters of administration to the deceased's estate because on 14/6/2018 when the matter came up for directions Mr. Bisonga informed the court that he needed time to apply for and obtain a grant of letters of administration in respect of the deceased's estate as the defendants were beneficiaries to the deceased's estate. The application was filed on **3/8/2018** and I consider that that was reasonable and explained delay considering that obtainance of grant involved filing proceedings in a different court and that it had to go undergo all requisite procedures. The only question that would be whether the applicant after filing the application unduly delayed in prosecuting it. It is true that there was some delay in prosecuting the application and that the plaintiff appears to have fixed the matter for hearing on 3/4/2019 and 25/7/2019 on which dates the plaintiff's counsel sought an adjournment for want of preparedness or other reason and this court ordered that notice of motion be heard on 19/9/2019. Between the time of filing and 19/9/2019 no application was ever made to strike out the application for want of prosecution. Besides the defendants complied with the order of court and filed their submissions though very scanty on 8/10/2019. In my view the defendants acted with reasonable expedition after the court ordered that the motion be heard and they cannot be faulted.

9. On the last two issues the plaintiff submits that a new cause of action that has nothing to do with the plaintiff's claim is sought to be introduced. The alleged ground for raising this argument is that the plaintiff has no power to issue titles and that it alludes to a new cause of action that lies in fraud. She cites the case of **Ochieng and Others -vs- the First National Bank of Chicago** for the principles upon which the court may grant leave to amend pleadings. However, it emerges from those principles that the general rule is that the power to amend can be exercised by the court at any stage of the proceedings and that as a general rule, however, late the amendments is sought to be made it should be allowed if made in good faith provided costs can compensate the other side. It also emerges that another major principle is that the power of the court to allow amendments is intended to determine the true and substantive merit of the case. However, the plaintiff would not be allowed to reframe his claim if by the amendment of the plaintiff the defendant would be deprived of his rights to rely on his limitation. However the court is granted discretion to allow the proposed amendment notwithstanding that any current period of limitation has expired.

10. In this case the plaintiff sought an order that the defendants do vacate land parcel Trans-Nzoia/Gidea/71, an order of eviction and a permanent injunction as well as general damages. The plaintiff's claim lies in trespass. The defendants filed a defence on 3/4/2016 denying the claim. They denied that the plaintiff is absolute proprietor of the suit land and that she is entitled to possession thereof. They denied that they do not have right to occupy the land and alleged that the land was allotted to Jackson Wekesa Namisiko by the Settlement Fund Trustees in the year 1983 and that the said allottee died on 30/7/2013. They further aver that the 1st and 2nd defendants are widows of the deceased while the rest of the defendants are his sons. They add that they entered the suit land alongside the deceased during his life time in 1983 and have been in possession since. Their further claim in that defence is that they are beneficiaries of the estate of the deceased who are entitled to ownership and possession of the suit land. The alternative defence is that if the plaintiff was indeed registered as owner of the suit land she holds the title to the same in trust for the defendants and other beneficiaries of the deceased's estate. No fraud was expressly claimed in the defence.

11. A draft amended joint statement of defence and counterclaim is attached to the supporting affidavit. It contains a counterclaim seeking inter alia that the suit land having been allotted to the deceased in 1983 was not available for allotment to Robert Kipkoech Kirui in 1986; a declaration that the registration of the plaintiff was illegal and irregular; an order of cancellation of the title deed in the name of the plaintiff; a declaration that the deceased's estate is entitled to be registered as owner of the land upon the clearance of the outstanding balance of the purchase price if any owed to the Settlement Fund Trustees and the costs of the counterclaim.

12. Does the above introduce a new cause of action? In my view the answer is no. The plaintiff claims title to the land. The defendants are entitled to raise a defence to the plaintiff's claim.

13. The defendants are in possession of the land. How the defendants came into possession of the suit land is relevant to their defence. They aver that they came into possession by virtue of their patriarch's entitlement to the land by virtue of an allotment by the settlement fund trustees.

14. The plaintiff's interest is that the defendants be evicted. If they are evicted without the counterclaim being heard their possession would be terminated without them being accorded an opportunity to lay claim on the land on the grounds they have put forward. The grounds they have put forward in their defence are the same that they rely on in the counterclaim. They amount to an explanation of their presence on the land and are in opposition to the plaintiff's claim that they are guilty of trespass on the suit land. The facts that they would rely on to prosecute their defence are the same facts that they would rely on for their counterclaim. At the time of the filing of the application for amendments no attempt had been made to strike out that defence on any ground. In my view the above facts do not reveal the presence of a new cause of action.

15. I am not satisfied that, as the plaintiff claims, the grant of leave to amend the defence to include counterclaim will delay or prejudice the

hearing of the suit.

16. The case that the respondent cites, that is, **Omwoyo -vs- African Highlands and Produce Co. Ltd [2002] 1 KLR** is not relevant to the issues at hand. To comment of case of **Kassam -vs- Bank of Baroda [2002] eKLR** this court observes that it does not really see any kind of wrong doing on the part of the defendants that may be deemed as turning “*the defence into gamble at the opponent’s expense.*”

17. For the above reasons I find that the application dated **2/8/2018** has merit and the same is allowed in terms of prayer No. **(1)** and **(2)**. The costs of the motion shall be in the cause.

Dated, signed and delivered at Kitale on this 4th day of November, 2019.

MWANGI NJOROGE

JUDGE

4/11/2019

Coram:

Before - Mwangi Njoroge, Judge

Court Assistant - Picoty

Mr. Nyakundi holding brief for Mr. Bisonga for the defendants

N/A for the plaintiff

COURT

Ruling delivered in open court at 3.30 p.m.

MWANGI NJOROGE

JUDGE

4/11/2019.