



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NYERI

ELC CASE NO. 120 OF 2016

**NANCY NJERI NDICHU (*Suing as the administratrix of the estate of*
FRANCIS NDICHU THAIYA).....**PLAINTIFF****

-VERSUS-

CHARLES MATHENGE GITONGA.....DEFENDANT

RULING

1. By a plaint dated **13th June, 2016** the plaintiff instituted this suit seeking judgment against the defendant for *inter alia* eviction of the defendant from the parcel of land known as **Euwaso Nyiro/Suguroi Block VIII/461** (suit property); an order of injunction to restrain the defendant by himself, his servants, agents or family or anyone claiming under him from trespassing or interfering with the suit property.
2. The plaintiff accuses the defendant of having trespassed into a portion of the suit property and effected developments thereon.
3. Upon being served with summons to enter appearance, the defendant entered appearance and thereafter filed the statement of defence and counter-claim dated **29th June, 2016**. Through the statement of defence, the defendant denies all the allegations levelled against him and through the counter-claim, contends that he has become entitled to the portion of the suit property he occupies by adverse possession; that the plaintiff's suit is time barred and that he bought the portion he occupies from Peter Miaraho Muriuki.
4. The defendant's counter-claim is expressed as a fresh suit to wit Nyeri ELC No.120 of 2016(O.S) through which the defendant *inter alia* requires the plaintiff to enter appearance to the summons for determination of the issues listed therein.
5. In reply to the defendant's statement of defence and counter-claim, the plaintiff filed the reply to defence and counter-claim dated **7th July, 2016** through which she reiterates her claim against the defendant and contends that the counter-claim is incompetent and fatally defective.
6. Owing to the alleged defect in the counter-claim, the plaintiff gave notice of her intention to raise a preliminary objection to the counter-claim.
7. The notice of preliminary objection, contained in the reply to defence and counter-claim, was disposed of by way of written submissions.

Plaintiff's submissions

8. In the plaintiff's submissions, it is pointed out that the defendant's counter-claim is in the form of an originating summons and submitted that the counter-claim offends the provisions of **Order 37** of the Civil Procedure Rules, 2010 which provides for situations when a party may take out originating summons. In particular, the counter-claim is said to have offended **Rule 15 of Order 37** which requires that the originating summons be entered in the register of suits.
9. Arguing that an Originating Summons is a special suit which must be filed independent of other suits, based on the decisions in the cases of **Jackson Inziani Khayumbi v. Patrick Amakobe (2016) e KLR** and **Cyril J. Haroo & Another v. Uchumi Services Limited & 3 Others (2014) e KLR**, it is submitted that the counter-claim filed in this suit is fatally defective for want of form and the court urged to dismiss it with costs to the plaintiff.
10. In the case of **Jackson Inziani Khayumbi v. Patrick Amakobe supra** it was observed:-

“15. the originating summons before court, has been filed in an existing miscellaneous file contrary to order 37 rule 15 of the Civil Procedure Rules. It is not an ordinary application and cannot therefore be heard in an existing file taking the number of the earlier suit.

16. Without going into the merit or otherwise of the originating summons, I find that the originating summons was improperly filed and therefore incompetent before court. The preliminary objection succeeds to that extent.”

11. In the case of **Cyril J. Haroo & Another v. Uchumi Services Limited & 3 Others** supra, it was observed:-

“41. Where a party, whether intentionally or by mistake, moves the court contrary to the provisions of the law, the court may call upon such a party to move the court appropriately by nullifying what was filed contra-statute in the first place. A proper suit may be filed again.

42. A suit filed contra-statute cannot be saved by the oxygen principle or the provisions of article 159 of the Constitution. In the case of **Siasa Pasua & 2 Others vs Mbaruk Khamis Mohamed & Another (2012) e KLR Ojwang J. (as he then was) had this to say about the provisions of Article 159(2)(d) of the Constitution.**

‘the obligation placed upon the courts by the constitution’s requirement (article 159(2)(d), that they render justice without undue regard to procedural technicalities, does not, in my opinion, negate the orderly scheme of litigation provided for by the Civil Procedure Rules; and the law in respect of Originating Summons is by no means nullified.’

Defendant’s submission

12. In the defendant’s submissions, based on the decisions in the cases of **Gulam Miriam Noordin vs. Julius Charo Karisa (2015) e KLR** and the case of **Teresiah Wachika vs Joseph Mwangi CA 325/2003** to the effect that a party can in his counter-claim raise a case for declaration that the suit land on which a plaintiff has founded his claim is his by virtue of the doctrine of adverse possession and there being no prescribed form of a counter-claim raising the issue of adverse possession, it is submitted that the defendant cannot be faulted for having brought his counter-claim under **Order 37** of the Civil Procedure Rules (CPR) which addresses how a claim for adverse possession ought to be raised. The reason for bringing the counter-claim in the form of an O.S is said to have been a bid to comply with the provisions of **Order 37 Rule 7** of the CPR which requires that an application under **Section 38** of the Limitation of Actions Act (LAA), be made by way of originating summons.

13. In the case of **Gulam Miriam Noordin vs. Julius Charo Karisa** supra the Court of Appeal stated:-

“The appellant contended that for the court to find for the respondent the claim ought to have been brought by way of originating summons. That contention is based on the provisions of Order 37 Rule 7 of the Civil Procedure Rules. It has been held that is the procedural requirement, a party is not precluded articulating his claim by a plaint....where a party like the respondent in this appeal is sued for vacant possession, he can raise a defence of statute of limitation by filing a defence or a defence and counter-claim. It is only when the party applies to be registered as the proprietor of land by adverse possession that Order 37 Rule 7 requires such a claim to be brought by originating summons...”

14. Terming the plaintiff’s preliminary objection as erecting technical barriers to the determination of the suit, based on the decision in the case of **Musiane Tinina v. James Ondeng & Another (2017) eKLR** where it was observed:-

“...the 1st defendant seeks to rely on technicalities and this offends the provisions of section 19(1) of the environment and Land Act which stipulates that in any proceedings to which this Act applies, the court shall act expeditiously, without undue regard to technicalities of procedure and shall not be strictly bound by rules of evidence. Further article 159(2)(d) of the constitution states that ‘in exercising judicial authority, the courts and tribunals shall be guided by the following principles.....(d) justice shall be administered without undue regard to procedural technicalities; ’, it is submitted that no law has been cited to demonstrate that the counter-claim as filed is incompetent.

15. According to the defendant, the procedure used does not in any way go against the law and does not prejudice the just determination of the issues in the main suit between the parties.

Analysis and determination

16. As pointed out in paragraph 4 above, the defendant’s counter-claim is expressed as a fresh suit to wit Nyeri ELC No.120 of 2016(O.S) through which the defendant *inter alia* requires the plaintiff to enter appearance to the summons for determination of the issues listed therein.

17. Whilst the defendant contends that there was nothing the matter in crafting his counter-claim as such and that no prejudice will be occasioned on the parties by the manner in which the counter-claim is formulated, given the fact that the counter-claim requires the plaintiff to enter appearance to the summons within 15 days of service of the summons for determination of the issues raised therein, that requirement, in essence makes the suit by the defendant a suit within a suit. It also presupposes that the hearing and determination of the counter-claim will be governed by the procedure stipulated by **Order 37** of the Civil Procedure Rules as opposed to the normal procedure of hearing suits.

18. Whereas the defendant has offered an explanation for crafting his counter-claim in the manner he did, being of the view that his explanation is not supported by the cases he cited and in particular the case of **Gulam Miriam Noordin vs. Julius Charo Karisa** supra,

which merely shows that it is possible to raise a defence or defence and counter-claim claiming entitlement to the suit property by adverse possession and cognizant of the fact that the procedure of hearing and determination of a suit instituted by a plaintiff is different from the procedure of hearing and determination of a suit commenced by way of an originating summons, in as far as the defendant's counter-claim is expressed as a fresh suit (O.S) requiring the plaintiff to enter appearance for determination of the issues raised therein, I am of the considered view that the counter-claim is fatally defective in form. Consequently, I strike out of the counter-claim from the court record.

19. As the issues raised in the counter-claim have not been determined on their merit, in exercise of the powers conferred on this court under **Sections 1A, 1B, 3A, 100** of the Civil Procedure Act and Article **159(2)(d)** of the Constitution, I grant leave to the defendant to amend his defence and raise a proper counter-claim, if need be. The amendment shall be filed within 15 days of delivery of this ruling. The plaintiff is granted corresponding leave of 15 days from the date of service of the amended defence and counter-claim to file and serve an amended reply to defence and counter-claim, if need be.

20. As the applicant has succeeded in his preliminary objection, I award him the costs of the objection.

Orders accordingly.

Dated, Signed and Delivered in open court at Nyeri this 3rd day of July, 2018.

L N WAITHAKA

JUDGE

Coram:

Ms. Wangare h/b for Muchiri wa Gathoni for the plaintiff

Ms. Muthoni h/b for Mr. Nderi for the defendant

Court assistant - Esther