



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT ELDORET

E & L CASE NO. 44 OF 2015

PETER MWANGI KIARIE.....PLAINTIFF

VERSUS

ELIJAH KIPLAGAT SANG.....1ST DEFENDANT

MICAH KIPTABUT KOSGEI.....2ND DEFENDANT

ISAAC KIPTAKAM MAGUT.....3RD DEFENDANT

ELIJAH KIPLANGAT SANG.....4TH DEFENDANT

CHEPOR TABSERKA.....5TH DEFENDANT

AND

MONICAH JEPTOO.....1ST INTERESTED PARTY

METHUSELAH KIPKURGAT KIRWA.....2ND INTERESTED PARTY

RULING

(NOTICE OF MOTION DATED 7TH DECEMBER, 2020)

1. The Defendants and Interested Parties filed the Notice of Motion dated the 7th December, 2020, seeking for leave to amend their joint statement of Defence and Counterclaim dated the 28th April, 2015 and 26th October, 2018 respectively in terms of the Draft Amended Defence and Counterclaim annexed to the application. The application is based on the eleven (11) grounds marked (a) to (k) on its face, and supported by the affidavit sworn by Micah Kiptabut Kosgei, the 2nd Defendant on the 7th December, 2020. It is the Defendants' and Interested Parties' case that they had bought portions of land parcel L. R. No. 9360, the suit land, that originally belonged to the late **John Geoffrey Kiarie**, father to the Plaintiff, from **Jane Wangui Kiarie**, his widow and co-administrator of the estate, who was a third party in this proceedings. That the said Jane Wangui Kiarie has since died and there is need to amend their pleadings to clarify the position, and include valuation reports to enable the Court effectually and completely adjudicate upon the issues herein. That the Third Party had conceded selling the parcel to them but offered to refund the purchase price on the basis that she had no capacity to sell the same. That the Plaintiff has undertaken to take the Third Party's position and there was no need to substitute her as a party.

2. The application is opposed by the Plaintiff through his replying affidavit sworn on the 21st December, 2020. The Plaintiff's case is that the application is fatally and incurably defective and introduces a new cause of action through the proposed amendments. That the defence and counterclaim on record is incurably defective and cannot be cured by the belated amendment. That the amendment is time barred as their claim is against the Third Party who passed on the 17th August, 2017 and the claim against her was terminated with the Applicants' consent. That the amendment will prejudice the Plaintiff's case.

3. That directions on filing and exchanging written submissions were given on the 21st December, 2020. That during the subsequent mention on the 15th April, 2021, only the learned Counsel for the Plaintiff had filed their submissions dated the 12th April, 2021.

4. The following are the issues for the Court's determinations;

(a) Whether the Defendants and Interested Parties have made out a reasonable case for amendment of their statement of defence and counterclaim.

(b) Whether the proposed amendment is likely to prejudice the Plaintiff's case.

(c) Who pays the costs?

5. The Court has considered the grounds on the application, the affidavit evidence, the learned Counsel's submission, the superior court's decisions cited thereon, and come to the following determinations;

(a) That this suit was commenced through the Plaint dated and filed on the 17th February, 2015 against the six **(6)** Defendants. The prayers sought are permanent injunction against L. R. No. 9360, eviction of the Defendants, mesne profits or general damages for trespass and costs.

(b) That the defendants opposed the Plaintiff's claim through their joint statement of Defendant and Counterclaim dated and filed on the 28th April, 2015. The Defendants averred that they had bought portions of the land from Jane Wangui Kiarie, a co-administrator of the estate of the late John Geoffrey Kiarie Mwangi who had put them in possession. They prayed for permanent injunction against the Plaintiff and Jane Wangui Kiarie, declaration that the land belongs to them, or alternatively refund of the current market rate and costs of improvement on the land, and that the Plaintiff's claim be dismissed with costs.

(c) The Plaintiff filed his Reply to the Defence and Defence to the Counterclaim dated the 5th May, 2015 and filed on the 6th May, 2015. The Plaintiff disputes the Defendants' claim averring that Jane Wangui Kiarie had no capacity to enter into sale agreement with the Defendants as the Estate of the late John Kiarie had been distributed by then. That the Defendants made developments on land that had not been transferred to them, and their prayers should be rejected and his claim allowed.

(d) That the Defendants moved the Court vide the Notice of Motion dated 25th May, 2015 to enjoin Jane Wangui Kiarie as a Third Party. The application was granted and the Jane Wangui Kiarie filed the Third-Party Statement of Defence and Defence to Counterclaim dated the 29th November, 2015 among others, denying the Defendants' claim that she sold the land to them. That if she had sold the land to the Defendants as alleged, *she "is ready and willing to refund the purchase price of the alleged parcels of land."*

(e) That through the Motion dated 19th October, 2018, **Monicah Jeptoo** and **Methuselah Kipkurgat Kirwa** applied to be enjoined in the proceedings as Interested Parties claiming that they own portions of 5 and 2½ acres respectively of the suit land. The application was allowed and the two applicants filed the 1st and 2nd Interested Parties Statement of Defence and Counterclaim dated 26th October, 2018. That the Plaintiff responded by filing the Reply to Defence and Defence to Counterclaim of the 1st and 2nd Interested Parties dated 21st November, 2018.

(f) The application dated 7th December, 2020 invokes **Order 8 Rules 3 and 5 of the Civil Procedure Rules** that states as follows:

"3.(1) Subject to Order 1, Rules 9 and 10, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so do so.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

4. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint."

"5.(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order."

That the provisions of **Order 1 Rule 10 (2) and Order 8 Rules 3 and 5 of the Civil Procedure Rules** that are set out above leaves

no doubt that the Court may on its own Motion, and on good cause order the striking out and or addition of a party and direct amendments as is necessary to effectually and completely determine the real questions between the parties. That from the pleadings already filed by the Plaintiff, Defendants, Interested Parties and the Third Party, it is clear the dispute in this suit revolves around land parcel L. R. No. 9360, the suit land. That the Plaintiff want the defendants and Interested Parties evicted and permanently enjoined among other prayers. The Defendants and the Interested Parties who claim to have bought portions of the suit land from the Third Party seeks for the Plaintiff and Third Party to be enjoined from their portions of the land, declaration that the portions belong to them or alternatively be compensated at market rates. That the view of the court is that what the Defendants and Interested Parties seek is to amend their separate filed pleadings to bring in the averments relating to the Third Party whose case has been marked discontinued as the Plaintiff is now the administrator of her estate.

(g) The record confirms that during the proceedings of 4th October, 2017, the court was informed that the Third Party had passed on. That during the subsequent proceedings of 22nd October 2018, the Court was informed that the Plaintiff had taken out letters of administration in respect of the estate of the Third Party. That the Court proceeded to order that ***“The 3rd Party having died and the Plaintiff having taken out letter of administration, I do find that the suit against the 3rd Parties is discontinued. The Defendants are allowed to file further statement within 5 days.”***

(h) That the above summary of the pleadings filed and steps so far taken are necessary in appreciating whether or not the Defendants, and Interested Parties’ application to amend their statement of defence and counterclaim has merit or not. That **Order 1 Rule 10 of the Civil Procedure Rules** provides for substitution and addition of parties. That **Rule 10 (2) of the said Order** provides as follows;

“(2) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added”

That the Defendants and Interested Parties seek to amend their Defence and Counterclaim to add the market price of their portions of land which has already been alluded to in their already filed pleadings. That the Court finds their prayer reasonable and will not result to any prejudice to the Plaintiff as he will have the opportunity to file a Reply to the Amended Defence and Defence to the amended Counterclaim after service.

i. That so as to have clear and straight forward pleadings that capture well the capacity of the Plaintiff who is now also the administrator of the estate of the Third Party, against whom some of the prayers by the Defendants and or Interested Parties were directed, the court finds it reasonable to give the Plaintiff an opportunity to file and serve an amended plaint within a reasonable period to be determined hereinbelow. That further, the pleadings filed by the Defendants and Interested Parties show that they have a common defence and counterclaim in respect of their specific portions. It is therefore unnecessary to have them continue participating in the proceedings in different capacities. The Court is of the view that the Interested Parties should indeed be added in the Amended Plaint as Defendants. That in case the plaintiff opts not to amend his plaint, the Defendants and Interested Parties are at liberty to include the Interested Parties as Defendants when filing their Amended Defence and Amended Counterclaim.

(j) That in view of the circumstances in this case, the Court is of the view that costs in respect of the application be in the cause.

7. That in view of the foregoing, the Court finds merit in the application dated the 7th December, 2020 and the same is allowed in the following terms;

(a) That the Plaintiff is directed to file and serve an amended plaint in 21 days to reflect his role as the administrator of the estate of the late Jane Wangui Kiarie, whose case as a Third Party has been discontinued. That in filing the Amended Plaint, the Interested Parties be added among the Defendants. That upon service of the Amended Plaint, the Defendants, including the Interested Parties, do file and serve the Amended Defence and Amended Counterclaim within 21 days after service.

(b) That should the Plaintiff fail to act as directed in (a) above within 21 days, the Defendants and Interested Parties be at liberty to file and serve their Amended Defence and Amended Counterclaim within 21 days. That the Interested Parties be added to the Defendants in filing the said amendment. That upon service, the Plaintiff be at liberty to file and serve an Amended Reply to the Amended Defence and Amended Defence to the Amended Counterclaim within 21 days after service.

(c) That the costs in the application be in the cause.

Orders accordingly.

Delivered virtually and dated at Eldoret this 19th day of May, 2021.

S. M. KIBUNJA

JUDGE

In the presence of:

Plaintiff: Absent.

Defendants: Absent.

Interested Parties: Absent.

Counsel: Mr. Muhoro for the Plaintiff.

Mr. Magut for the Defendants and Interested Parties.

Court Assistant: Christine

and the Ruling is to be transmitted digitally by the Deputy Registrar to the Counsel on record through their e-mail addresses.