



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISII

ELC CASE NO. 187 OF 2015

RICHARD OMARE MOREKA (Suing as

the Administrator of the estate of the late

ERESTA MONG'INA MOREKA).....PLAINTIFF

-VERSUS-

PETER MABUKA alias ORUCHO OSUGO.....1ST DEFENDANT

CHARLES NYANTABIGA.....2ND DEFENDANT

OMARE CHRISANTO.....3RD DEFENDANT

FRANCIS OKEMWA.....4TH DEFENDANT

JEREMIAH ORENGE.....5TH DEFENDANT

PETER MOKORA MAGEMBE.....6TH DEFENDANT

JAMES OMARE OBURE.....7TH DEFENDANT

GODFREY OKEMWA.....8TH DEFENDANT

MARUBE OBURE.....9TH DEFENDANT

CHARLES OMWERI ORAO.....10TH DEFENDANT

RULING

1. On 19th May 2015, the Plaintiff filed a suit vide a plaint dated 18th May, 2015 seeking the following orders:-

(i) An order of permanent injunction restraining the Defendants jointly and severally, their agents, servants and/or any person acting on their behalf and in their name from encroaching upon, interfering with, taking possession, developing the land parcel known as BASSI BOGETAORIO II/2036 (hereinafter referred to as the 'suit property') situate within Sameta Sub County, Kisii county within the republic of Kenya.

(ii) A declaration that the suit property is a private property within the meaning of Article 64 of the constitution registered in the name of the late Eresta Mong'ina Moreka in favor of the Plaintiff, his mother and sibling in succession.

2. In the plaint, the Plaintiff alleges that on or about the month of February 2015, the Defendant invaded the suit property in an attempt to superimpose or coerce the Plaintiff and his siblings to cede a portion of the suit property for purposes of housing and accommodating the 1st Defendant, who had sold off his land neighboring the suit property to the rest to the defendants many years back.

3. The Defendants opposed the Plaint vide a joint statement of Defence and Counterclaim dated 15th July, 2015. In the Counterclaim, the 1st Defendant prayed that pending institution of succession proceedings with respect to the estate of the late Eresta Mongina Moreka, an injunction do issue restraining the Plaintiff either by himself, his agents or any other person acting under his authority whatsoever from

interfering with his quiet enjoyment and use of the suit property.

4. In support of his Counterclaim, the 1st Defendant alleged that the suit property was ancestral land and the registration of the late Eresta Mongina Moreka as the proprietor did not extinguish his right to half share thereof.

5. He further alleged that the late Eresta was married to his deceased brother, Moreka Orucho who passed away in Tanzania together with their biological parents. He stated that after the demise of his parents and brother, he returned to Kenya together with Eresta and together resided in the suit property for some time before he moved to Bura. He also alleged that before he moved to Bura no land adjudication had taken place and neither him nor the late Eresta had a registered interest in it. It was also his averment that he had agreed with Eresta that she was going to manage the suit property while he was away only to return and find that she had registered the suit property in her name to his exclusion.

6. The matter came up for hearing on 14th July, 2020 and the Plaintiff, testified in support of his case. However, after the testimony of the Plaintiff learned counsel for the Plaintiff sought for adjournment to call another witness on another day as he needed to file supplementary documents which prayer was granted and the matter was adjourned to 1st March, 2021.

7. However, the matter did not proceed for further hearing on 1st March 2021, since that the 1st Defendant had filed an application dated 18th January, 2021 seeking leave to amend the counter claim which application is the subject of this Ruling.

8. In support of his application, the 1st Defendant/Applicant averred that he was desirous of amending his Counterclaim to ensure that it was in line with the facts of the case, as they are and to set out the reliefs he desires clearly. He also averred that litigation on the Counterclaim as it is will be sterile and a waste of judicial time. He averred that the Application was well within the law because it is trite law that an application for leave to amend pleadings can be brought at any stage of the proceedings. It was also his averment that the main suit not having been heard to completion, the instant application should be entertained as the amendments will not prejudice any party. He contended that the Plaintiff shall have ample opportunity to reasonably defend themselves. He also contended that allowing the application would give effect to constitutional right to access justice.

9. The application was opposed by the Plaintiff/Respondent vide a Reply Affidavit sworn by himself on 1st March, 2021 and filed in court on 2nd March, 2021. In his Affidavit, the Plaintiff/Respondent deponed that the matter had substantially progressed since it was part heard and this application was intended to scuttle the further hearing that was scheduled on 1st March, 2021. He averred that during the last hearing the inadequacy of the Defendant's claim to the suit came to the fore and the amendment sought herein was thus an afterthought, belated and intended to entrench mischief on the part of the Defendants. He further averred that the matter went through pre-trial and that the Defendants had ample time to bring on board all the issues they deemed necessary for adjudication by the court without disruption given that this was an old matter filed in 2015. He contended that there was no basis for the application as the issues proposed in the draft Amended Counterclaim could be tackled by the evidence on record.

10. By consent parties agreed to dispose of the application by way of written submissions. The Applicant filed his submissions on 8th April, 2021 while the Respondent filed his on 18th March, 2021 which submissions I have considered.

ISSUES FOR DETERMINATION

11. Having considered the application, the response by the Respondent and the submissions filed by both parties, I deduce that there is only one issue for determination which is whether this court should grant the 1st Defendant leave to amend the counter claim.

ANALYSIS AND DETERMINATION

Whether the 1st Defendant should be granted leave to amend the Counterclaim.

12. Order 8 Rule 3 of the Civil Procedure Rules gives this court a wide discretion to allow amendments to pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just. As a general rule, the court will freely allow amendments of pleadings sought before the hearing provided they can be made without occasioning prejudice or injustice to the other party. In the case of **Shah -vs- Aperit Investments S. A & Another [2002] 1KLR 130** the appellate judges stated thus: -

“We are in agreement with the learned judge that amendments to pleadings 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 side can be compensated by costs.”

13. It is trite law that the court's discretion must be exercised judicially. The principles to be considered in an application for amendments are the ones set out in the case of **Eastern Baker Vs Castelino (1958) EA 461**, wherein the Court held that”-

i. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.

ii. There is no injustice caused to the other side if it can be compensated with costs.

iii. The court will not refuse an amendment simply because it introduces a new case.

iv. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the

subject matter of the suit.

v. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment eg. By depriving him a defence of limitation.

vi. *The principles applicable to amendments of Plaints are equally applicable to amendments of written statements of defence.*

vii. *A Judge has discretion to allow amendment to the statement of defence to introduce a counter-claim provided that such an amendment does not transgress any of the aforesaid principles.*

viii. *Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.*

14. Further in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 others (2000) eKLR**, the court held that: -

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

15. Taking into account the above principles and juxtaposing them against the facts of the case herein, has the 1st Defendant satisfied this court that he deserves the orders for amendment?

16. In the original Counterclaim, the 1st Defendant sought an injunction restraining the Plaintiff either by himself, his agents or any other person acting under his authority whatsoever from interfering with his quiet enjoyment and use of the suit property pending institution of succession proceedings with respect to the estate of the late Eresta Mongina Moreka.

17. In his draft Amended Counterclaim, the 1st Defendant intends to remove the above prayer and introduce new payers to the effect that he now seeks that a declaration do issue that the 1st Defendant holds ½ share of the suit property and an order compelling the Plaintiff to execute all requisite documentations for transfer of ½ of the suit property in default of which the Deputy Registrar do execute the same to facilitate the transfer. It is unfortunate that the 1st Defendant has not given an explanation as to why the said amendment were not made during the pretrial process that had been ongoing since 2015, when the matter was first filed and had to wait for the Plaintiff to testify to see the need of amending his Counterclaim.

18. Order 11 of the civil procedure requires all parties to settle all pretrial issues before a suit is set down for hearing. The 1st Defendant alleges that he intends to amend his Counter claim to ensure that it is in line with the facts of the case as they are and to set out the reliefs he desires clearly. I am persuaded by this argument as he was aware of the facts of the case from the moment he was served with plaint and he did not have to wait for the Plaintiff to testify for him to think of amending the Plaintiff.

19. In my view, what the 1st Defendant is attempting to do is to fill the gaps that have become evident in his case after hearing the evidence of the Plaintiff. The new amendment to me appear to be issues that were well within the knowledge of the 1st Defendant when he raised the Counterclaim.

20. The 1st Defendant cannot seek to clarify the Counterclaim and prayers therein this late when the Plaintiff has already testified. I am not persuaded that this is a genuine mistake or inadvertence on the part of the advocate.

21. I am constrained to agree with the Plaintiff that the 1st Defendant had ample time to bring on board all the issues he deemed necessary for adjudication by the court. I take cognisance of the fact that this is an old matter filed in 2015 and that the same is part heard. It is clear in the minds of all parties to the suit that the Plaintiff proceeded with the case and gave evidence on the basis of the Counterclaim as is. If I allow the application at this stage, it would mean that the Plaintiff would have to discard his evidence since he would have to file an Amended Defence to the Counterclaim. In my view, allowing the 1st Defendant's application would prejudice the Plaintiff and would occasion him injustice which cannot be compensated by an award of costs.

22. Consequently, I find no merit in the 1st Defendant's application dated 18th January, 2021 and the same is hereby dismissed with costs to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT KISII THIS 28TH DAY OF JULY, 2021.

J.M ONYANGO

JUDGE