



REPUBLIC OF KENYA

IN THE ELC COURT OF KENYA AT MIGORI

ELC CASE NO. 464 OF 2017

(Formerly Kisii ELC No. 154 of 2009(O.S))

THOMA MOOROGA MAKURU.....1ST PLAINTIFF/RESPONDENT

JOSEPH MAKURU CHACHA NICHOLAS.....2ND PLAINTIFF/RESPONDENT

VERSUS

MRS NYAGUGWA NYAHIRI.....DEFENDANT/APPLICANT

PETER CHACHA NYAHIRI..... DEFENDANT/APPLICANT

RULING

1. On 29th March 2019, the defendants (applicants herein) through M/s Ochillo and Company Advocates mounted an application by way of Notice of Motion dated 21st March 2019 pursuant to Order 8 Rule 3 & 5 of the Civil Procedure Rules 2010 and Section 3A, 1A and 1B of the Civil Procedure Act, Laws of Kenya. They are seeking orders infra:

- a) That the defendants/applicants be granted leave to amend the defence to include counter-claim in terms of the annexed draft amended defence.
- b) That upon granting order 1 as hereinabove, the court be pleased to re-open the proceedings as in this case for further directions.
- c) That costs of this application be in the course.

2. The application is anchored on 2nd applicant's supporting affidavit sworn on even date accompanied by a draft amended statement of defence and counter claim. The same is also based on grounds 1 to 5 stated on its face and they include:

That defendants/applicants intend to plead counter-claim raising the issue of the plaintiffs/respondents holding title Bukira/Bwaisaboka/6 in trust for the applicants.

3. The plaintiffs (the respondents) through M/s Bosire Gichana and Company Advocates, filed grounds of opposition dated 17th September 2019. The six (6) grounds are:

- a) **The application is utterly misconceived.**
- b) **The application lacks merit.**
- c) **The application is an afterthought.**
- d) **The application is bad in law.**
- e) **The application is otherwise an abuse of the court machinery.**
- f) **The plaintiff shall rely on a replying affidavit to be filed hereinafter.**

4. The Respondents, too, filed a seven paragraphed replying affidavit sworn by the 1st Respondent on 2nd December, 2019 and filed in this

court on 3rd December 2019. The Respondents stated that the applicants seek to introduced a new claim which is statute barred and no reasonable explanation is given thereof. They termed the application res judicata by virtue of the applicants' suits namely Kisii HCC No. 247 of 1995 and Kisii HCC Succession Cause and 154 of 2009 touching on the same matter as per copies of pleadings (TMM1(a) and (b)). That the application be dismissed with costs.

5. The application was canvassed by way of written submissions further to this court's orders and directions given on 22nd March 2021. Consequently, learned counsel for the applicants filed a three (3) paged submissions dated 18th October 2019 while the respondent's counsel filed a five (5) paged submissions dated 23rd April, 2021.

6. In the submissions, Learned Counsel for the applicants provided a brief background of the matter, framed and analysed three issues for determination which include; whether the application has been made in time and whether the applicants deserve the orders sought in the application. Counsel urged the court to allow the application and relied on Order 8 Rule 5 of the Civil Procedure Rules, 2010, the case of **Bosire Ogero =vs= Royal Media Services (2015) eKLR** and the decision in **Institute for Social Accountability =vs= Parliament of Kenya & 3 Others (2014) eKLR** on the court's discretion to allow amendment of pleadings at any stage of the proceedings

7. On their part, learned counsel for the Respondent made reference to the orders sought in the application, gave the brief facts of the case, identified twin issues for determination inclusive of whether the application should be allowed and analysed the same in favour of the applicants. Counsel cited **Section 26(1) of the Land Registration Act 2016 (2021)** as well as persuasive decisions in **Samwel Kiti Lewa =vs= Housing Finance Co of Kenya Ltd and another (2015) eKLR** and **Hannah Wairimu Ngethe =vs= Francis Ng'ang'a & Another (2016) eKLR**, in support of the submissions.

8. I have carefully, studied the entire application, the replying affidavit and the parties respective submissions including all the authorities cited therein. So, is the instant application merited?

9. The amendment of pleadings is anchored on Order 8 Rule 5 (supra) to the effect that the same may be done within the discretion of the court at any stage of the proceedings; see also **Bosire Ogero case (supra)** which is hereby endorsed.

10. The discretion of the court is exercised judiciously as held in **Kiti Lewa a case (supra)** which I hereby approve. That the court cannot allow the reopening of a case to enable a party to fill the gaps in his or her evidence to the prejudice of the opposing party in the amendment of pleadings.

11. On that account, the reopening of a case, can only be done, inter alia, on discovery of some new and important evidence which after exercise of due diligence was not within the Knowledge of that party; See **Kaiza =vs= Kaiza (2009) KLR 499 and Hannah Ngethe Case (supra)**.

12. The present application is initiated under various provisions of the land which include Section 3A (supra) on inherent powers of this court and exercised always for the purposes of upholding the law as far as is possible on a factual situation as observed in **Oraro =vs= Mbaya (2005) 1KLR 142 at 149 and 150**. The target is to meet the overriding objective of the court as stipulated under Sections 1A, 1B (supra) and Section 3 of the Environment and Land Court Act 2015 (2011) in order to resolve the real question in controversy.

13. It is noteworthy that the court (Makhandia now JA) gave directions on 5th October 2010. The suit was transferred to this court upon its establishment, on 29th March 2017. The hearing of this suit is yet to start as the same alongside Kisii HCC No. 109 of 2009 had been ordered stayed and subsequently were delinked from Kisii HCC No. 109 of 2009 as shown in the proceedings herein of 7th December, 2016.

14. In view of the foregone, the present suit pleads for its hearing on merits as I subscribe to the decision in the case of **Philip Chemwolo and another =vs= Augustine Kubende (1982-88) KAR 103**. The applicants and the respondents are all entitled to access to justice, fair hearing and determination of this suit without delay as stipulated under Articles 48, 50 (1) and 159 (2) (b) and (e) of the Constitution of Kenya respectively.

15. Indeed, the main concern of the court is to do justice for all persons as recognized in the case of **Patel v East African Cargo Handling Services Ltd (1974) EA 76**. In the obtaining scenario, the orders sought in the application are merited.

16. Wherefore, the application by way of Notice of Motion dated 21st March 2019 and duly filed in this court on 29th March 2019, is hereby determined on terms infra:

- a) Orders 1, 2 and 3 sought therein granted accordingly.
- b) The plaintiffs/respondents shall file and serve their amended pleadings if any, within the next 30 days from this date.
- c) The defendants/applicants shall file and serve reply to amended statement of defence, and a defence to the counter claim, if any, within 30 days from the service by the plaintiffs/respondents.
- d) Further mention to confirm compliance and for directions on 6/10/2021

Orders accordingly

DELIVERED DATED AND SIGNED IN MIGORI THIS 28TH DAY OF JULY 2021.

G.M.A. ONGONDO

JUDGE

In presence of :-

Mr. B. Mulisa holding brief for Bosire Gichana learned counsel for

Defendants/respondents

Tom Maurice – Court Assistant