



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MERU

ELC SUIT NO. 14 OF 2018

OLLIN SAVINGS & CREDIT CO-OP SOCIETY LTD....PLAINTIFF

VERSUS

PATRICK NJIRU KURIA.....DEFENDANT

RULING

1. In this suit, the Plaintiff, a Co-operative Society duly registered under the Co-operative Societies Act sued the Defendant for trespassing onto its property, which property is held on leasehold terms, being Title No. Wanguru/Township/160 (hereinafter referred to as the suit land), demolishing buildings and other properties thereon valued at Seven Million Five Hundred Thousand Shillings (Ksh. 7,500,000) and illegally and without the Plaintiff's consent, erecting a fence around the suit property. Vide the Plaint dated 3rd June 2017, the Plaintiff sought orders for a declaration of the Plaintiff as the lawful owner of the leasehold suit property; general damages for trespass; special damages calculated at Seven Million Five Hundred Thousand Shillings (Ksh. 7,500,000); damages for loss of future rental income at the rate of Two Hundred Thousand Shillings (Ksh. 200,000) per month from 26th February 2018; interest at court rates and a perpetual injunction barring the Defendant from entering, being present or in any way interfering with the suit land.

2. The Defendant filed his defence on 28th June 2017 and denied the averments made by the Plaintiff in its plaint. The Defendant averred that the transfer of lease of the suit land to the Plaintiff was tainted by fraud and proceeded to trace the previous lessees of the suit land, including himself, in a bid to demonstrate that the leasehold interest held by the Plaintiff was null and void.

3. Through an application dated 5th June 2020, the Defendant herein sought orders for leave to amend his statement of defence on the basis that the proposed amendments were crucial to the determination of the real question in controversy between the parties. Annexed to the application is a copy of the proposed amended statement of defence and counterclaim. The amendments principally involve the introduction of a counterclaim in the statement of defence and the introduction of 5 new parties to the suit as Defendants in the counterclaim: John Baptista Kanga; Mark and Bills Holding Ltd; Purity Njambi Muriithi; Mercy Wairimu Muriithi and the County Government of Kirinyaga as the 2nd to 6th Defendants respectively alongside the Plaintiff as the 1st Defendant. Further, the 2nd and 3rd Defendant in the counterclaim are accused of fraud in their manner of dealing with the suit land. The proposed amendments also include Purity Njambi Muriithi and Mercy Wairimu Muriithi as interested parties to the suit.

4. The Plaintiff vehemently opposes the application. Vide the submissions filed on 21st January 2021, the Plaintiff takes issue with the addition of Purity Njambi Muriithi and Mercy Wairimu Muriithi as interested parties in the case, in light of the court orders handed down on 3rd July 2019 striking out the two names from the suit. Secondly, the Plaintiff contends that the amendments ought not to be allowed given that they have been filed about three years after the plaint and defence were filed. Thirdly, the Plaintiff submits that allowing the amendments will complicate the suit further by introducing strangers, whose cause of action is different from that of the Plaintiff thereby clouding the issues for determination. The Plaintiff further challenges the introduction of fraud in the counterclaim as being statute barred. Overall, the Plaintiff asserts that leave ought not to be granted to the Defendant as the proposed amendments are not brought in good faith. Reliance is placed on the following cases to buttress the Plaintiff's position: **Mohammed & Muigai Advocates v Kang'ethe & Co Advocates Civil Appeal No.19 of 2004**; **Stanley & Sons Ltd v DT Dobie & Co (T) Ltd and Another [1975] E.A. 84**; **Atieno v Omoro [1985]KLR 677**; **Eastern Bakery v Castelino [1958] EA. 461**; **Kenya Ports Authority v East African Power and Lightning Company Limited [1982] KLR. 410**.

5. The Defendant vide his submissions filed on 17th November 2020 urges the court to grant the leave sought for amendment of the statement of defence, insisting that the intended amendments do not introduce any new cause of action and that the amendments are captured in the original defence, albeit not as a counterclaim. He cites Orders 100, 7 and 8 of the Civil Procedure Code, 2010 as well as the following cases in support of his application: **Joseph s. Wafula v Elen Chepkurgat Talam [2019] e KLR**; **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365**; **Kampala Coach Limited v First Community Bank Limited & Another [2016] e KLR**; **Twin Bufallo Safaris Limited v Business Partners International Limited (2015) e KLR**

6. The Court has considered the Defendant's application, the parties' rival affidavits and submissions. The question for consideration is whether the court ought to grant leave to the Defendant to amend his statement of defence in the fashion presented in the amended statement of defence and counterclaim.

7. The general power to amend pleadings is governed by **Section 100 of the Civil Procedure Act (Cap 21)**.

'The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.'

Further guidance is found under **Order 8 Rule 5 of the Civil Procedure Rules, 2010**:

'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.'

The provisions of **Order 8 Rule 3 (1 and 2)** are also instructive to the present application:

(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 to do.'

8. The import of the above provisions is that the Court ought generally to allow parties to amend their pleadings in so far as the purpose of the amendment is principally to bring out the real question in controversy between the parties or where the intended amendment is geared towards correcting any error or defect in the proceedings. The court finds succor in the numerous decisions underscoring this fact. see

The Court of Appeal in the case of **Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991** postulated thus:

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts."

In **Harrison C. Kamau vs Blue Shield Insurance Co. Ltd (2006) e KLR**, the court stated that:-

"...the amendments of pleadings is aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:

- (i) There has been no undue delay;
- (ii) No new inconsistent cause of action (is) introduced;
- (iii) No vested interest or accrued legal right (is) affected; and
- (iv) The amendment (can) be allowed without injustice to the other side....."

The Court of Appeal in **Institute for Social Accountability & Another V Parliament of Kenya and 3 Others 2014 KLR** restated the object of amendments in the following words:

"...The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action and proceedings."

9. Applying the above prescriptions to the case at hand, it is immediately noted that the proposed amendments are brought about three years

from the filing of the suit and the original defence. The Defendant has explained that the delay was occasioned in part by the movement of file from Embu ELC court to the present court as well as applications brought by the Plaintiff and the Interested Parties, prior to their being struck off from the suit. The court notes that delay in filing cannot of itself constitute a ground for refusal to grant leave, especially where the delay can be compensated in monetary terms. In **Central Kenya Ltd v Trust Bank Ltd [2000] EALR 365** the Court of Appeal held that: -

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him.” (Underline, mine).

10. On the question of whether the Defendants are allowed in law to enjoin other parties other than the plaintiff in the counterclaim, **Order 7 Rule 8 of the Civil Procedure Rules, 2010** answers the same in the affirmative. The provision is set out below:

‘Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other persons, he shall add to the title of his defence a further title similar to the title in the plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.’

In **Kabuto Contractors Ltd v David Mereka t/a Mereka & Company Advocates [2004] e KLR** the Court of Appeal interpreted the provision as follows:

‘The plain interpretation of these rules is that they clearly recognize that a defendant by his counterclaim may join to the counterclaim parties other than the plaintiff. The parties so joined, if they are not already parties to the suit with the plaintiff, must then be brought into the suit by serving them with the defence and counterclaim and allowing them time to appear and defend, if they are inclined to do so.’

11. Perhaps the greatest consideration, as already discussed above, is whether the intended amendments will have the effect of clarifying or illuminating the real issue in controversy between the parties. The Plaintiff’s claim is straightforward, that it holds a certificate of lease registered in its name to the suit land, that the Defendant has invaded the suit land and occasioned damage to the Plaintiff’s properties thereon, and that the Plaintiff wants the Defendant to compensate it for the damage and lost future earnings and to also move out of the suit land permanently. The Defendant’s amended defence and counterclaim captures a long history on the various transactions on the suit land, introduces new characters into the suit, who at one time or another dealt with the suit land, including Mark & Bill Holdings Ltd; John Baptista Kanga, an alleged Director of Mark & Bill Holdings Ltd; Joseph Njeru Macau, Wambui Njeru, Isaac Kinyua Munyi, Wathoni Mugo, Peter Gachoki Mugo, Peter Muriuki Githinji, Elizabeth Warui Muriuki, Eunice Wakaru, David Njeru Ngari, Wambua Ngari Kamanga, Jane Wambui Nyaga and David Mburu Nyaga as Vendors of the Suit land to the Defendant in 2013; Francis Gacheni Gichuki as another vendor of part of the Suit land to the Defendant; Purity Muriithi and Mercy Muriithi as the joint owners of the suit land according to County Government records, and runs into about six pages of previous dealings with the suit land. In determining the counterclaim, the Court will invariably be required to determine the question of the directorship of John Baptista as a director of Mark & Bill Holdings; iron out the validity of the sale agreement between the Defendant as purchaser as against the long list of vendors; solve the question of the authenticity of records held by the county government; hear evidence on the existence of Sath Construction Limited and its allocation of the Suit Land by the Commissioner of lands and so on.

12. In my view, the effect of the proposed amended defence and counterclaim is to obscure to a very great degree the real issue for determination between the Plaintiff and the Defendant. There are multiple causes of action injected into the suit, whose net effect is to make the matter nebulous and to occasion injustice to the Plaintiff. The Court of Appeal in **Eastern Bakery - vs - Castelino (1958) EA 461** held that:

“...leave to amend pleadings would not be granted where the amendment would prejudice the rights of the opposite party or cause injustice to them.”

13. From the observation that the intended amendment is likely to cloud the real issue for determination, the very antithesis of the purpose of amendments, it is my view that the application ought to be disallowed.

14. Consequently, the Notice of Motion dated 5th June, 2020 is hereby dismissed with costs to the Respondent/Plaintiff.

RULING READ, DELIVERED PHYSICALLY AND SIGNED IN OPEN COURT AT KERUGOYA THIS 23RD DAY OF JULY, 2021.

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E.C. CHERONO

ELC JUDGE

In the presence of:

1. Mr. Asimwe holding brief for Magee

2. Ms Wangechi Munene holding brief for Muchiri

3.

Kabuta

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Court

clerk.