



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAKURU

LAND CASE NO. 286 OF 2018

FRANCIS NDIRANGU MWANGI.....PLAINTIFF/APPLICANT

VERSUS

WILLIAM KIPLANGT SIGILAI.....1ST DEFENDANT

SAMWEL SANG.....2ND DEFENDANT

KEVIN SANG.....3RD DEFENDANT

RULING

1. By an application by the 3rd defendant dated **10th March 2021** seeks the following orders:

1. THAT the 3rd defendant /applicant be granted leave to amend his defence and counterclaim as set out in the annexed draft amended defence and counterclaim.

2. THAT the costs of the application be in the cause.

2. The application is supported by the sworn affidavit of the 3rd defendant who states, to summarize, that he inadvertently failed to particularize the elements of fraud and illegalities in the sale and transfer of the suit land in his defence; that the Land Registrar has informed him that there is no letter of consent to transfer of the suit land in his records and that this information should now be reflected in the defence and counterclaim so as to enable this court to determine the real question or issues raised by the parties with finality.

3. The plaintiff respondent's opposition to the application is contained in his sworn affidavit dated **9/4/2021** in which he states as follows: that the alleged particulars of the plaintiffs alleged fraud were particularized in the counterclaim and that the 3rd defendant has admitted so; that the 3rd defendant has been ready to proceed with the suit with the pleadings as they were before the application was filed; that the plaintiff's documents were served on the 3rd defendant long ago and the 3rd defendant has been guilty of inordinate delay and that the 3rd defendant has not demonstrated that he stands to suffer any prejudice if the orders sought are not granted by this court in the instant application. The plaintiff avers that this being a partly heard suit, the application amounts to a trial by ambush and that the same should be not allowed by this court.

4. In his submissions the plaintiff states that the application is premised on **Order 8 Rule 3**. He further states that **Order 8 5(1)** grants the court a wide discretion in amendment of pleadings which should be exercised in accordance with sound legal principles. He cites the case of **Kakamega Paper Converters Ltd Vs Mohanlal Arora & 4 Others 2015 eKLR** and quotes it as follows:

“[19] The cumulative effect of all the foregoing is that the amendments offend the law, impinges on the rights of the other party and prejudices the general adjudication of cases as the court cannot also conclude this case despite its deliberate orders that the case be set down for hearing on the basis of priority. It is not, therefore, possible to allow the amendments without prejudicing fair trial of the case and the other party. For those reasons, I refuse the amendments sought and dismiss the applications dated 8th April 2014 with costs to the Plaintiff.”

5. The plaintiff submits that the applicant having delayed in bringing the instant application for **2 years and 5 months** since the close of pleadings, and parties having been ready on various occasions to proceed with the hearing of the main suit with the pleadings on the record

as they were, is allegedly guilty of inordinate delay and the application is made in bad faith. The second argument that the plaintiff raises is that the particulars proposed to be included in the amendment are already set out in the counterclaim. He further states that the particulars can be presented at the trial in any event, as evidence. For this proposal he again cites the case of **Kakamega Paper Converters Ltd (supra)** as follows:

“[14] Ordinarily, courts should freely allow a party to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits. Provided that; 1) the application to amend is made without undue delay; 2) the amendments do not introduce new or inconsistent cause of action or abrogate or affect vested interest or accrued legal right or defence; and 3) the amendment does not cause injustice or prejudice to the other side which cannot be compensated in cost.”

6. The plaintiff submits that the proposed amendment if allowed will occasion him injustice. He cites **Article 159(2)(b)** of the **Constitution Of Kenya** and **Section 1A** of the **Civil Procedure Act** to support the principle that justice shall not be delayed. He cites the case of **Teachers Service Commission Vs Simon P Kamau & 19 Others 2015 eKLR** in which the court stated as follows:

“[67] Thus, the standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame.”

7. The plaintiff states that the intent of the 3rd defendant as evidenced by his actions is to delay the conclusion of the suit by filing the instant “*frivolous*” application and that the steady pace of this litigation can only be ensured by the dismissal of the application.

8. This court has observed that the plaintiff is correct in stating that particulars now sought to be included through the proposed amendments were pleaded in the counterclaim.

9. In the light of the fact that it is customary to issue directions that the main suit be tried alongside the counterclaim and that the evidence tendered at the hearing do apply to both the suit and counterclaim, the proposed amendments should be considered inconsequential in the light of the fact that the counterclaim already contains the proposed particulars save particulars **nos (f), (g) and (i)** which were not included in the counterclaim.

10. Despite their non-inclusion in the defence, and though they may amount to offences under the law especially in the eyes of law enforcement and tax collection agencies, and further though they also amount to irregularities that can also be present in an otherwise consensually executed transfer, they do not in this court’s view amount to clear and independent particulars of fraud specifically targeted at deprivation of the applicant of his legal rights. The 3rd defendant would not in my view sustain any prejudice if the proposed amendments were disallowed.

11. However, even perchance I may be wrong in taking the foregoing view, I have looked at the paragraphs such as **paragraph 18** which reflects exactly what is contained in the proposed **paragraph 11**. **Paragraph 12** is a general claim that there were irregularities and procedural inequities and fraud which in any event form the backbone of the un-amended defence and counterclaim. **Paragraph 13** is a mere conclusion drawn by the plaintiff in the counterclaim yet only facts and not conclusions ought to be pleaded and is therefore unfit for a pleading.

12. It would appear from the foregoing analysis that the applicant may not lose anything if the application is not granted. The remarkable thing is that the said application has already taken the much valued judicial time of this court which would have been spent better otherwise. I also agree with the plaintiff that there was ominous and inordinate delay in bringing the application which in my view did not propose any drastic changes to the existing pleadings but sought to replicate content. It is an application that should not have been brought in the first place.

13. The application dated **10/3/2021** seeking amendment of the defence and counterclaim therefore lacks merit and the same is hereby dismissed with costs to the respondents. This suit shall be mentioned on **10/11/2021** for the fixing of a hearing date.

DATED, SIGNED AND ISSUED AT NAKURU VIA ELECTRONIC MAIL ON THIS 19TH DAY OF OCTOBER, 2021.

MWANGI NJOROGE

JUDGE, ELC, NAKURU