



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KISII

ELC CASE NO 232 OF 2014

JOYCE SARANGE KENYATA.....PLAINTIFF/RESPONDENT

VERSUS

LUCAS NYAMBEGERA NYANGWESO.....DEFENDANT/APPLICANT

RULING

INTRODUCTION

1. This Ruling is with respect to the Defendant's application dated 23rd October, 2020 wherein the Applicant sought leave to amend its Counterclaim filed together with the statement of Defence on 19th May 2016. Allowing the application would result in the County Government of Kisii and the Land Registrar Kisii County being joined as Defendants in the Counterclaim. The second prayer is therefore for joinder of the said parties.
2. In his Supporting Affidavit, the Applicant explained why he seeks to amend the Counterclaim. He states that although he was ready for the hearing of the matter that was slated for hearing 28th October 2020, he had discovered that necessary parties (Land Registrar Kisii County, and the Kisii County Government) had inadvertently been left out and therefore the real issues in dispute could not be determined.
3. He believes that the proposed amendment does not intend to introduce any new cause of action at all. Further, he believes that the proposed amendments will enable the Honourable Court to determine all the issues in dispute once and for all and that the proposed amendments will be not be prejudicial to the Respondent.
4. In response to the Defendant/Applicant's application, The Plaintiff/Respondent filed a Replying Affidavit sworn on 10th May, 2021. She averred that the Counterclaim and the intended amendment did not disclose any reasonable cause of action since.
5. She contended that even though the Applicant alleged that the Unsurveyed Plot No. "U" has since been duly registered in his favor as land parcel No. KISII MUNICIPALITY/BLOCK 1/1022, he has not demonstrated that land parcel No. KISII MUNICIPALITY/BLOCK 1/595 belonging to the Respondent has been superimposed on land parcel No. KISII MUNICIPALITY/BLOCK /1022.
6. It is the Respondent's contention that the Applicant has never been allocated unsurveyed plots No. V, W, X and Y which plots were surveyed and duly registered in the names of other persons. She further contended that the Applicant has not sought to add as parties to the suit other persons whose names were entered in the register prior to the Respondent.
7. The Respondent argued that since the Applicant indicated that he discovered the alleged fraud in the year 2006, the Counterclaim and the intended amendments are statutorily time barred.
8. The Respondent deponed that the Plot formerly known as "48 G" is not in existence as the same was re-surveyed and several other persons registered as leaseholders. The said leaseholders in turn sold their leases to third parties like the Respondent who had no knowledge of any fraud alleged to have been committed during resurveying of the said PLOT 48 G and the creation of the new titles.
9. He deponed further that there is no connection between him and the intended 2nd and 3rd Defendants in relation to the purported Plot No. "48 G" or Plot No. "U". It is his contention that the reliefs sought in the Counterclaim or in the intended amendments cannot be available without including the initial first and second registered owners of land parcel No. KISII MUNICIPALITY/BLOCK 1/595.
10. The court directed that the application be disposed of by way of written submissions and both parties filed their written submissions.

BACKGROUND OF THE CASE

11. In order to effectively determine this application, it is necessary to outline the background of the suit between the parties herein prior to the filing of this application.
12. The case presented by the Plaintiff briefly, is that at all material the Plaintiff was the sole registered owner of the suit property which measures approximately 0.02 hectares. She became the owner of the suit property by way of assignment of lease on 11th day of November ,2013 after purchasing the same from one Petro Ongwacho Ongwacho at a total consideration of Kshs 1,400,000/= and upon obtaining a clearance certificate from the Kisii County Government.
13. It is the Plaintiff/Respondent's averment that subsequent to the said purchase, the suit property was transferred to her on 24th November 2013 and she was issued with certificate of lease by the County Government.
14. It is the Plaintiff/Respondent's further deposition that sometime in the month of March, 2014 after all development plans had been approved by the relevant Government Departments, she commenced building a permanent structure on the land.
15. She lamented that on the 29th May, 2014 the Applicant in company of his agents and Police Officers from the Kisii Police Station led by Deputy OCS from Kisii Police Station went to the site and chased away her workers and confiscated all her working tools without justifiable cause or lawful excuse. This is what prompted her to file this suit against the Defendant/Applicant.
16. The Plaintiff/Respondent proceeded to file an application dated 17th June, 2014 seeking a temporary injunction restraining the Defendant by himself, his agents and/or servant from entering or in any way whatsoever trespassing on to the suit property pending the hearing and determination of this suit. The application was allowed vide a Ruling of this court delivered on 14th November, 2014.
17. The Defendant thereafter filed another application on 3rd December, 2014 seeking to review, set aside, and/or vary the order made on 14th November, 2014 or in the alternative that the court be pleased to issue an order preserving the suit property pending the hearing and determination of the suit. In its ruling dated 24th April, 2015, the court declined to vary or set aside the order made on 14th November, 2014 but went ahead to make an order preserving the suit property wherein the Plaintiff/Respondent was barred from selling, transferring, charging the suit property.
18. On the 19th May 2016, the Defendant/Applicant filed statement of Defence and Counterclaim in which he claimed that on 24th February, 1990, he purchased all that parcel of land known as plot No. "48G" situate within Nubian village from Nelson Gichana at a consideration of Kshs 200,000/=.
19. He further claimed that immediately upon purchasing of the said plot he took possession thereof and continued enjoying quiet and peaceful possession, until 2006 when he discovered that some unknown, people had fraudulently purported to subdivide the said parcel into five (5) portions namely Y, U, V, W, and X.
20. He further deponed that vide a letter dated 23rd March 2006 the land officer in charge of the then Kisii, Nyamira, Gucha, Migori and Homa Bay Districts confirmed that the Plaintiff was the owner of the original plot No. "48G"
21. The Applicant contended that he continued owning and occupying plot no. "48G' which plot had been sub-dived into plot No. "U" and plot No. "Y". The other plots No. V, W and X were found to be on a road reserve.
22. The Applicant averred that on or about 8th May 2014, the Respondent unlawfully trespassed into plot no. "48G' and commenced the construction of a permanent house. He stated that he was forced to file a suit against the Applicant's husband vide ELC Case No. 199 of 2014 which was dismissed because the Plaintiff's husband stated that he did not own the suit property.
23. In his Counterclaim, the Applicant prayed for an order of eviction against the Plaintiff or her agents, servants and /or employees from the Defendant's parcel of land known as Kisii Municipality /Block 1/1022 formerly plot No. "U" Kisii Municipality. He also prayed for a permanent injunction as against the Plaintiff restraining them from interfering with his ownership of the property.
24. The matter was eventually set down for hearing on 28th October, 2020. However, before the matter could proceed for hearing, the court's attention was drawn to this application which is the subject of this ruling.

ISSUES FOR DETERMINATION

25. The singular issue for determination is whether the Applicant should be granted leave to amend his Defence to include a Counterclaim.

ANALYSIS AND DETERMINATION

26. In applications of this nature, the court is required to establish whether the Applicant has met the principles of amendment of pleadings that were set out in the case of **Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 Others [2014]eKLR** which was quoted with approval in the cases of **Rael Moraa Ondika Vs Swanya Limited & Anor [2020]eKLR** and **Management Committee of AGC Riverside Church Vs Mosonik & Anor [2017]eKLR**. The court held as follows:

“The principles that should guide the Court in dealing with Applications for amendment are elaborated in Mulla, Code of Civil Procedure, 18th edition, Volume 2 Pages 1751-1752 which has been cited in various authorities including the case of Coffee Board of Kenya -Vs- Thika Coffee Mills Limited & 2 Others [2014]eKLR where it is stated as follows:

- I. Amendments should be allowed which are necessary for determination of the real controversies in the suit;*
- II. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;*
- III. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporated by means of amendments;*
- IV. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;*
- V. Amendments of a claim or relief barred by time should not be allowed;*
- VI. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;*
- VII. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties;*
- VIII. The delay in filing the petitions for amendments should be properly compensated by costs;*
- IX. Error or mistake which is not fraudulent, should not be made the ground for rejecting the Application for amendment of pleadings.”*

27. From the material placed before the court, the question I should answer is whether the amendments are based on a claim barred by time.
28. Learned counsel for the Applicant submitted that the Counter-claim is for the recovery of the Applicant’s land from the Respondent and cancellation of the title that was fraudulently issued to the Respondent by the proposed 2nd and 3rd Defendants. He submitted that section 7 of the Limitation of Actions Act provides that a suit for recovery of land ought to be brought to court within 12 years. It is his contention that since the fraudulent title was issued in 2013, 12 years have not elapsed. It is his further contention that the Applicant’s claim is also based on dispossession of the property which happened in 2014 when he found the Respondent constructing a structure on it and therefore the Counterclaim is not time barred.
29. On his part learned counsel for the Respondent argues that the claim raised by the Applicant in the Counterclaim especially as espoused in paragraph 15 is based on fraud. In the said paragraph, it is clearly indicated the Applicant discovered the alleged fraud in the year 2006 when he noticed that unknown people had fraudulently purported to subdivide his plot No. 48G into five portions that is Y, U, V, W, and X. Counsel contended that in the context of the allegations contained in the said paragraph of the Counterclaim, the cause of action arose when the Applicant discovered the alleged illegal subdivisions which is the year 2006. It is therefore his contention that the Counterclaim and the proposed amendments offend the provisions of section 4 (2) of the Limitation of Actions Act which provides that an action for fraud should be filed within 3 years from the date when it was discovered.
30. It is not in dispute the Applicant intends to raise a claim of fraud. The reason why he seeks to have the County Government and the Land Registrar made parties to this suit is because he believes that they actively participated in fraudulently allocating the suit property to the Plaintiff. It goes without saying that the court cannot order the cancellation of the Plaintiff’s titles unless it is proved that they were acquired fraudulently.
31. Having established that the cause of action is that of fraud, it will be necessary to establish when the said fraud was discovered for me to determine whether the claim is time barred. The Plaintiff alleges that he became the owner of the suit property by way of assignment of lease on 11th day of November, 2013 after purchasing the same from one Petro Ongwacho Ongwacho and upon obtaining a clearance certificate from the Kisii County Government.
32. However, the Applicant would wish this court to assume that the fraud was discovered when the Plaintiff started the construction on the suit property. At paragraph 15 of his Counterclaim he has narrated that after buying plot no. 48G in 1990 and after he was issued with an allotment certificate, he continued to peacefully occupy the said plot until 2006 when unknown persons fraudulently caused the property to be sub-divided into 5 namely U, V, W, X and Y.
33. The Applicant annexed to his supporting affidavit a letter dated 23rd March 2006 in which the land officer in charge of the then Kisii Nyamira, Gucha, Migori and Homabay District confirmed that he was the owner of the original plot No. "48G". He also annexed a letter from the town clerk to the then Gusii Municipal Council dated 29th March, 2007 that indicates he was the original owner of the plot 48G.
34. It is clear from the evidence before me that after the Applicant discovered the alleged fraud on the part of the “unknown parties” who had caused such sub-divisions, and even with the evidence highlighted above, he never took any legal action against any of them until he was dragged into this court by the Plaintiff after he forcefully and without a court order attempted to evict her in 2014, exactly 7 years later.
35. One would wonder why he, after the discovery of the fraud and with all such evidence, never took any action against the parties he

alleged to have fraudulently carried out the subdivisions of his property into the said 5 sub-divisions way back in the year 2006.

36. The Applicant would also wish this court to ignore such an elaborate account in his Counterclaim and move to admit the two parties whom he will eventually want to answer to alleged fraudulent sub-divisions that he discovered in 2006. Such a move would be unjust to the Plaintiff who according to her unchallenged evidence took possession of the suit property in 2013 after the same was transferred to him by one Petro Ongwacho Ongwacho whom the Defendant/Applicant has not sought to be made a party to this suit.

37. From the foregoing, I find that the Applicant's proposed amendments seek to introduce a claim which is time barred and as such there is no basis for this court to allow the same.

38. The upshot is that the application lacks merit and it is hereby dismissed in its entirety with costs to the Respondents.

DATED, SIGNED AND DELIVERED AT KISII THIS 30TH DAY OF NOVEMBER, 2021.

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J.M ONYANGO

JUDGE