



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MACHAKOS

ELC. CASE NO. 425 OF 2017

ALEX KYALO MUTUAPLAINTIFF

VERSUS

PHOSTINE TABWE MUSA.....DEFENDANT

RULING

1. In the Notice of Motion dated 23rd November, 2018, the Defendant is seeking for leave to amend the Defence dated 30th January, 2018 as per the draft annexed Amended Defence and Counter-claim.
2. The Application is premised on the grounds that pleadings have closed; that the Defendant intends to make a Counter-claim against the Plaintiff; that the proposed amendments are intended to effectively enable the court determine the real issues and that it is in the interest of justice that the Defendant be given an opportunity to be heard.
3. In the Replying Affidavit, the Plaintiff deponed that the issues and causes of action the proposed amended Defence seeks to prop up can only be grounds for a fresh cause of action; that the Defendant has no legal basis to seek to revoke the Title Deed to his land title number Machakos Town Block 3/698 and that the Application to amend the Defence to include the prayer for revocation of the Title Deed will occasion him prejudice because neither the seller nor the Land Registrar have impugned his Title Deed.
4. In his submissions, the Defendant's advocate submitted that the Application merely seeks to amend the Defence in order to streamline the Defence and introduce a Counter-claim; that each party has a right to plead as it wishes and that the Plaintiff's attempt to deny the Defendant a right to make a Counter-claim against him amounts to stopping the Defendant from suing him.
5. The Defendant's advocate finally submitted that whether the Defendant can sustain a cause of action against the Plaintiff is a matter that will go to full trial.
6. The Plaintiff's advocate submitted that the proposed amendment for revocation of title cannot be a Counter-claim and that the claim by the Defendant will necessitate him to pursue the persons who sold to him the various portions of land.
7. In the Plaintiff dated 17th October, 2017, the Plaintiff has averred that he is the registered proprietor of land known as Machakos Town Block 3/698 which he acquired from Katelembo Athiani Muputi Farming & Ranching Co-operative Society Limited (*the Society*). The Plaintiff is seeking for a declaration that he is the rightful owner of the land. The Plaintiff is also seeking for an order restraining the Defendant from trespassing on the suit property.
8. The Defendant filed a Defence in which he averred that he has been on the suit property for over twenty one (21) years. The Defendant has sought for a declaration that the Plaintiff obtained the Title Deed to the suit property fraudulently.
9. The Defendant is seeking to amend his Defence and introduce a Counter-claim. In the proposed Counter-claim, the Defendant is seeking for an order of revocation of the Title Deed for Machakos Town Block 3/698, which is the same title that the Plaintiff claims to be his.
10. Order 8 Rule 3(1) of the Civil Procedure Rules allows a party, with the leave of the court, to amend his pleadings. Order 8 Rule 5 of the Civil Procedure Rules allows a party to amend his pleadings notwithstanding that its effect will be to add or substitute a new cause of action, if the new cause of action arises out of the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
11. Indeed, it has been held by this court in numerous decisions that amendments should be freely allowed to enable the court determine the real question in controversy between the parties.

12. Considering that the proposed amendments to the Defence and the Counter-claim relate to the same suit property, I shall allow the said amendments. The issue of whether the amendments can be proved by the Defendant or not can only be determined by the trial court.

13. Indeed, the Counter-claim that the Defendant is proposing to introduce will go a long way in forestalling the filing of a multiplicity of suits, and will enable the court to settle all the controversies in question.

14. For those reasons, I allow the Application dated 30th November, 2018 as prayed. The Defendant to file and serve the Amended Defence and Counter-claim within twenty one (21) days of this Ruling.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 31ST DAY OF JANUARY, 2020.

O.A. ANGOTE

JUDGE