



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC.CASE NO. 203 OF 2009

THOMAS GATURA GATHU.....1 ST PLAINTIFF

VERSUS

JORETH LIMITED.....1 ST DEFENDANT

KENNETH MBOGO MARARO.....2 ND DEFENDANT

RULING

1. The plaintiff instituted this suit on 4/5/2009 through a plaint dated 30/4/2009. He alleges that on 13/2/2008 he entered into a sale agreement with the 1st defendant and the 1st defendant sold to him Land Reference Number 13330/275 in Thome No 5 Estate. Despite discharging his obligations, the 1st defendant failed to convey the suit property to him, and instead sought to illegally rescind the sale agreement and sell the suit property to the 2nd and 3rd defendants. Consequently, he sought an order of specific performance against the 1st defendant and an order compelling the 2nd and 3rd defendants to remove their building materials from the suit property, among other orders.

2. The defendants filed defences contesting the plaintiff's claim. The 1st defendant specifically denied selling the suit property to the plaintiff and contended that if there existed any sale agreement, the same was fraudulent. Subsequently, the plaintiff and the 1st defendant entered into a consent which compromised the plaintiff's suit against the 1st defendant. Through the consent, the 1st defendant recognised the plaintiff as the *bonafide* purchaser for value of the suit property. The 2nd and 3rd defendants objected to the consent but in a ruling delivered on 16/5/2014, Mutungi J adopted the consent. A subsequent application by the 2nd and 3rd defendants seeking a review of Judge Mutungi's ruling was declined by myself. I held that the 2nd and 3rd defendants had not satisfied the criteria for review and that their redress lay in an appeal to the Court of Appeal. Soon after I rendered the ruling and gave pre-trial directions, learned counsel for the 2nd and 3rd defendants intimated to the court that there was a pending application bearing the same date as the already determined application, 29/5/2014. He sought to be granted the opportunity to argue the second application of even date. The said application of even date, 29/5/2014, seeks grant of leave to the 2nd and 3rd defendants to amend their defence and bring a counter-claim against the plaintiff, the 1st defendant and Thome Farmers No 5 Limited. The application is the subject of this ruling.

3. The application is supported by an affidavit sworn on 29/5/2014 by the 2nd defendant. He deposes that, together with the 3rd defendant, they purchased the suit property from Thome Farmers No 5 Limited. He adds that subsequent to the filing of defences, the 1st defendant, without consulting the 2nd and 3rd defendants, changed its position and entered into a consent with the plaintiff. Through the consent, the 1st defendant now recognizes the plaintiff as the *bonafide* purchaser of the suit property, a position which prejudices the interest of the 2nd and 3rd defendant in the suit property. He further deposes that, it was hitherto not necessary for them to file a counterclaim because the 1st defendant was supporting their case. They fear that the plaintiff and the 1st defendant having entered into a consent which amounts to a recant of its earlier case, the plaintiff is intent on withdrawing the present suit, to their detriment.

4. In a replying affidavit sworn by the plaintiff's advocate on 8/4/2019, he opposes the application. He deposes that the 2nd and 3rd defendant's application is an abuse of the court process because the issues raised in the application have been determined by the court in rulings rendered on 5/2/2010, 16/5/2014 and on 31/10/2017. He deposes that Honorable Justice Nambuye delivered a ruling on 5/2/2010 in which she held that the 1st defendant was the duly registered owner of the suit property; that the 2nd and 3rd defendants had not exhibited the alleged agreement of sale between them and Thome Farmers No 5 Limited to prove their claim; the 2nd and 3rd defendants had not exhibited proof of ownership of the suit property by Thome Farmers No 5 Limited. It was further contended that this position was settled vide a consent dated 28/2/2013 and adopted as an order of the court on 16/5/2014. He deposed that the 2nd and 3rd defendants' claim lay against Thome Farmers No 5 Limited and not against any of the other parties to this suit. He further deposed that in the ruling of 31/10/2017, the court found that there was no nexus established between the parties to this suit and the intended third party, Thome Farmers No 5 Limited. He added that the 2nd and 3rd defendants filed two notices of appeal challenging the rulings of 5/2/2010 and 16/5/2014 but no action has been taken. Lastly, he deposed that this application is an after-thought and is meant to delay the conclusion of this suit.

5. On 17/6/2014, the 1st defendant filed the following verbatim grounds of opposition:

1. That the said application is totally incompetent, bad in law, misconceived and an abuse of this honourable court's process.

2. That the orders sought by the 2nd and 3rd defendants/applicants are without any basis in law or in fact and thus cannot be issued.

3. That the application is not brought in good faith and is merely meant to delay the conclusion of this matter between the plaintiff and the 1st defendant.

4. That the said application is frivolous and vexatious as the draft amended defence and counterclaim does not raise any claim as against the proposed third party.

5. That the said application is an attempt by the 2nd and 3rd defendants to have this court sit on an appeal on its own decision as the issues raised now were issues that were raised before the court leading to the orders issued on 16/5/2014.

6. That the application is otherwise misconceived, unfounded, has no merit and is an abuse of the due process of this honourable court.

6. The 2nd and 3rd defendants filed their submissions on 15/11/2018. They filed supplementary submissions on 6/8/2019. It was their submission that Order 8 rule 3 allows for amendment of pleadings at any stage. They submitted that amendment of pleadings should be allowed if the amendment does not cause injustice to the other party; if the other party can be compensated by an award of costs; and if the amendment does not introduce a new cause of action. It was further argued that an amendment will only be declined where the rights of the other party will be prejudiced. Reliance was placed on the case of **Coffee Board of Kenya v Thika Coffee Mills Limited and others, Civil Appeal No 94 of 2003** and **St Patrick's Hill School v Bank of Africa Kenya Limited [2018]**. It was further submitted that amendment of pleadings makes the function of the court more effective in determining the substantive merits of the case. Reliance was placed on the case of **Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014]**.

7. Counsel for the plaintiff submitted that the 2nd and 3rd defendants have not convinced the court that the intended interested party is a necessary party to this suit. Counsel added that the applicants have not demonstrated that the property they claim is the suit property. It was further submitted that the applicants have not established any nexus between the parties. Reliance was placed on the case of **Kenneth Chege Kamau & 2 others v Thome Farmers No 5 Ltd & 2 others [2019] eKLR** and **Thayu Kamau Mukugi v Francis Kibaru Karanja & 5 others [2018] eKLR**. It was further argued that the issues raised in this suit are *res judicata* and offend Section 7 of the Civil Procedure Act. Reliance was placed on the case of **Omondi & Anor v National Bank of Kenya & 2 others [2001]KLR 579**.

8. The 1st defendant filed submissions through its counsel, Nyiha, Mukoma & Company Advocates. It was submitted that allowing the 2nd and 3rd defendants to amend their pleadings amounts to setting aside the consent order adopted on 16/5/2014. He further submitted that a consent can only be set aside on the basis of illegality. He added that the 2nd and 3rd defendants had failed to prove any illegality. Reliance was placed on **Purcell v F C Triggell Ltd [1970] 2 All ER 671**, **Kenya Commercial Bank Ltd v Specialised Engineering Co Ltd [1982] KLR 485** where the court held that a consent is binding on all parties and should not be liberally set aside.

9. I have given careful consideration to the arguments advanced both for and against the application. I have also considered the affidavits on record and the grounds of opposition. I have similarly taken into account the legal framework and the relevant jurisprudence on the subject of amendment of pleadings. The unique facts of this case have also been taken into account. The single question falling for determination in this application is whether the applicants (2nd and 3rd defendants) have satisfied the criteria for grant of leave to amend pleadings.

10. The discretion of the court to allow amendment of pleadings flows from Order 8 rule 3 which permits this court, at any stage of the proceedings, on such terms as to costs or otherwise as may be just, to allow any party to amend his pleadings. Courts have termed this discretion as wide and unfettered save that the discretion must be exercised judiciously. The guiding criteria upon which the discretion is exercised was summarized by the Court of Appeal in **Central Kenya Ltd – v - Trust Bank Ltd Appeal No. 222 of 1998 (2000) 2 EA page 365**. **The Court of Appeal listed the following as some of the scenarios where leave should be granted : (i) where the intended amendments are necessary for the determination of the real questions in controversy; (ii) where the intended amendments serve to cure the likeliness of a multiplicity of suits; (iii) where no new or inconsistent cause of action is sought to be introduced; (iv) where vested interests or accrued legal rights of the other side are not affected by the intended amendments; and (v) where the intended amendments do not expose the other side to injustice or prejudice. The Court of Appeal added that the application for leave should always be made promptly.**

11. In the application under consideration, it is contended that the contemplated amendments were triggered by a consent which the plaintiff and the 1st defendant entered into, whose effect is that the 1st defendant who hitherto denied ever selling the suit property to the plaintiff and contended that the plaintiff's claim was fraudulent (see paragraphs 3 and 6 of the 1st defendant's defence) recanted its position through the consent and now recognizes the plaintiff as a legitimate purchaser of the suit property. It is not in contest that the plaintiff on one part and the 2nd and 3rd defendants on the other part lay claim of ownership to the suit property. The key issue in this dispute is therefore the ownership of the suit property. Thome Farmers No 5 Limited whom the applicants wish to join in this suit were a key player in the transaction(s) giving rise to this dispute and are a necessary party in the full and effectual determination of this issue.

12. In light of the above circumstances, it is my view that the intended amendments and joinder are necessary for the full and effectual determination of the key question in this dispute. It is therefore my finding that the 2nd and 3rd defendants have satisfied the criteria for the court's exercise of discretion to grant leave to amend pleadings. The notice of motion dated 29/5/2014, seeking leave to amend the defence and bring a counter-claim, is allowed in terms of prayers 1 and 2 save that Thome Farmers No 5 Limited shall be joined as a defendant in the counterclaim and not as a third party. The amended defence and counter-claim shall be filed and served within 14 days. Each Party shall bear own costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 23RD DAY OF JANUARY 2020.

B M EBOSO

JUDGE

In the presence of:-

Mr Gichuki for the plaintiff

Mr Katee holding brief for Mr Chigit for the 2nd and 3rd defendant

June Nafula - Court Clerk