REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT EMBU

E.L.C. APPEAL NO. 35 OF 2019

MARY MUTHONI NYAGA.....1ST APPELLANT

JANET WAMBETI NYAGA.....2ND APPELLANT

PETER MURIITHI NYAGA.....3RD APPELLANT

LYDIA NJOKI NYAGA.....4TH APPELLANT

JAMES NJAGA NYAGA.....5TH APPELLANT

LEONARD MUCIRA NYAGA.....6TH APPELLANT

VERSUS

MORRIS RUTERE NJIRU.....RESPONDENT

(Being an appeal against the Ruling and order of Hon. H. Nyakweba (Principal Magistrate) dated 20th August 2019 in Embu CMCC Case No. 57 of 2018)

JUDGEMENT

A. INTRODUCTION AND BACKGROUND

1. This is an appeal against the ruling and order of Hon. H. Nyakweba (Principal Magistrate) dated 20th August 2019 in *Embu CMCC No. 57 of 2018 – Morris Rutere Njiru V Mary Muthoni Nyaga & 5 Others.* By the said ruling, the trial court dismissed the Appellants' application for leave to amend their defence and introduce a counterclaim with costs to the Respondent.

2. The material on record indicates that vide a notice of motion dated 12th April 2019 expressed to be brought under **Order 8 Rule 3** of the **Civil Procedure Rules** (*the Rules*), the Defendants sought leave of court to amend their statement of defence and to include a counterclaim. The said application was based upon the grounds set out on the face of the motion the gist of which was that the failure to include the counterclaim in the first instance was due to inadvertence and that the amendment was necessary to enable the court to determine the real issues in controversy.

3. The Respondent filed a replying affidavit sworn on 13th May 2019 in opposition to the said application. It was contended that the application was bad in law, incompetent and an abuse of the court process. The Respondent contended that the proposed amendments offended **Order 7 Rules 7 and 8** of the **Rules.** It was contended that the Appellants were intending to raise totally new matters after the close of pleadings. It was further contended that the matter sought to be introduced had been adjudicated upon in previous proceedings hence the Appellants were seeking a review of the earlier decision through the back door. Consequently, the court was asked to dismiss the said application.

4. By a ruling dated 20th August 2019, the trial court found that the Appellants had not complied with the format of a counterclaim in that the draft counterclaim did not include a further title similar to the title of the plaint as required under **Order 7 Rule 7** of the **Rules** hence the application was not tenable. The court also found that the intended amendment was *res judicata* in that it raised issues which had been canvassed and determined in *Embu CMCC No. 293 of 2010 Morris Rutere Njiru V Nyaga M'Mbaro & John Muchangi Nyaga (the previous suit).*

5. The trial court further found that the proposed amendment offended **Order 2 Rule 6** of the **Rules** in that it raised a new ground or claim inconsistent with previous pleadings. In the end, the court found the application for leave to amend untenable and accordingly dismissed the same with costs to the Respondent.

B. THE GROUNDS OF APPEAL

6. Being aggrieved by the said ruling the Appellants filed a memorandum of appeal dated 18th November 2019 raising the following eight (8) grounds of appeal:

a) That the learned trial magistrate misdirected himself in law and fact by disallowing the Appellants' application on the grounds that the Appellants should have added a further title similar to the title in the Plaint.

b) The learned trial magistrate erred in law and fact in holding that the issues raised by the Appellants were res judicata and had been determined in Embu CMCC No. 293 of 2010 yet the said suit was dismissed for want of prosecution.

c) The learned magistrate erred in law by misinterpreting and misapplying the provision of ***Order 2 Rule 6*** *of the* ***Civil Procedure Rules.***

d) The learned trial magistrate erred in law and fact by failing to appreciate that the Appellants had approached the court in the manner provided for under the law.

e) The learned trial magistrate erred in law and fact by failing to consider the application placed before him with an open and judicial mind.

f) The learned trial magistrate erred in law and in fact by dismissing the Appellants' application.

g) The learned magistrate has failed to exercise his discretion in determining the matter before him.

h) The learned magistrate erred in law by failing to allow the Appellants an opportunity to have all their pleadings before the court.

C. DIRECTIONS ON THE HEARING OF THE APPEAL

7. When the said appeal was listed for directions on 14th May 2020 it was directed that the appeal shall be canvassed through written submissions only. The Appellants were directed to file and serve their record of appeal within 30 days and to file their written submissions within 14 days thereafter. The Respondents were to file and serve their written submissions within 14 days upon the lapse of the Appellants' period with liberty to the Appellants to file a reply thereto on points of law only within 7 days upon service. The record, however, shows that none of the parties had filed their submissions by the time of preparation of judgement.

D. THE ISSUES FOR DETERMINATION

8. The court has perused the grounds set out in the memorandum of appeal as well as the material on record. Although the Appellants raised 8 grounds of appeal the court is of the opinion that resolution of the following 5 issues would effectively determine the appeal:

a) Whether the trial court erred in law in disallowing the application due to the Appellants' omission to include an appropriate title to the counterclaim.

b) Whether the trial court erred in law and fact in the application of ***Order 2 Rule 6*** *of the* ***Rules.***

c) Whether the trial court erred in law and fact in holding that the proposed amendments were res judicata by reason of the previous suit.

d) Whether in the totality of the circumstances, the trial court erred in dismissing the application for amendment.

e) Who shall bear the costs of the appeal.

E. THE APPLICABLE LEGAL PRINCIPLES

9. The court is aware that in disallowing the Applicants' application for amendment, the trial court was exercising judicial discretion. The court is further aware that an appellate court should not lightly interfere with the exercise of such discretion unless the trial court misdirected itself or acted upon wrong principles or unless it is manifest from the case as a whole that such discretion was not exercised judicially.

10. The applicable principles were summarized in the case of **Mbogo & Another V Shah [1968] E.A. 93** by Sir Charles Newbold P as follows:

"We now come to the second matter which arises on this appeal, and that is the circumstances in which this court can upset the exercise of a discretion of a trial judge where his discretion, as in this case, was completely unfettered. There are different ways of enunciating the principles which have been followed in this court, although I think they all more or less arrive at the same ultimate result. For myself, I like to put it in the words that, a Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision; or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and as a result there has been misjustice."

F. ANALYSIS AND DETERMINATIONS

a) Whether the trial court erred in disallowing the application on account of the Appellants' omission to include an appropriate title to the counterclaim

11. The court has considered the material on record on this issue. **Order 7 Rule 8** of the **Rules** stipulates as follows:

> **"Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a 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."** (emphasis added)

12. A plain reading of that rule makes it clear that the same is applicable at the time of presentation or filing of the amended defence and counterclaim and not at the time of application for leave to amend. It is evident from the material on record that the trial court was dealing with an application for leave to amend pleadings under **Order 8** of the **Rules** and not the propriety of an amended defence and counterclaim which had already been filed under **Order 7 Rule 8** of the **Rules.**

13. The court is thus of the opinion that the trial court erred in law and committed an error of principle in declining leave on account of the alleged violation. It must be remembered that what was before the trial court was merely a **draft** amended defence and counterclaim which was an **annexure** to the application for leave to amend. At any rate and as shall be demonstrated later in the judgement the alleged violation of **Order 7 Rule 8** of the **Rules** could not be one of the factors to be considered in an application for leave to amend a pleading.

b) Whether the trial court erred in law and fact in the application of Order 2 Rule 6 of the Rules

14. The material on record indicates that the trial court declined the Appellants' application for leave to amend on the ground that the proposed amendments were inconsistent with the Appellants' averments in their previous pleading. **Order 2 Rule 6** of the **Rules** stipulates as follows:

> **"(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.**
>
> **(2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative."**

15. The court has carefully perused the ruling of the trial court on the issue of inconsistency. Apart from quoting the provisions of **Order 2 Rule 6,** the trial court did not point out even a single inconsistency between the Appellants' original pleading and the proposed amendments. The court has perused the documents on record and is unable to find any inconsistency in violation of the rules of pleading. It is evident from the material on record that the counterclaim was sought to be introduced for the first time and that there was no inconsistency between the defence on record and the proposed counterclaim. The court finds no evidence of violation of **Order 2 Rule 6** of the **Rules** hence the court finds and holds that the trial court erred in disallowing the Appellants' application on that ground.

c) Whether the trial court erred in law in holding that the proposed amendments were res judicata

16. The court has considered the material on record on this issue. The trial court held that the proposed amendments sought to introduce matters which had already been adjudicated and determined in the previous suit. The matters and issues which arose in the previous suit were, however, not set out in the ruling and there was no demonstration that the matters raised in the draft counterclaim were *res judicata.*

17. The requirements of *res judicata* are codified in **Section 7** of the **Civil Procedure Act (Cap. 21)** as follows:

> **"No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court."**

18. The court has perused the pleadings in *Embu CMCC No. 293 of 2010 – Morris Rutere Njiru Vs Nyaga M'Mbaro & John Muchangi Nyaga.* That was a suit by the Respondent seeking removal of the caution registered against *Title No. Gaturi/Weru/1206 (parcel 1206)* and for specific performance of a sale agreement for a portion of parcel 1206. The 1st Defendant in that suit was the father of the Appellants whereas the 2nd Defendant appears to have been his brother.

19. It is thus evident that none of the Appellants were party to the previous suit. It is also evident that in *CMCC No. 57 of 2018* they were not sued as representatives of the two Defendants in the previous suit. The material on record further shows that *Embu CMCC No. 57 of 2018 Morris Rutere Njiru V Mary Muthoni Nyaga & 5 Others* was filed by the Plaintiff seeking enforcement of his property rights by seeking various declarations and orders against the Appellants over the portion of land he had bought. It is, therefore, difficult to see how the requirements of *res judicata* as set out in **Section 7** of the **Civil Procedure Act** could have been satisfied when the Appellants were litigating with the Respondent for the first time. It has been held that it is not sufficient merely for some of the issues or parties in the two suits to be same. All the requirements set out in **Section 7** must be satisfied for *res judicata* to apply.

20. The test of *res judicata* was summarized in the case of **Kamunye & Others Vs The Pioneer Assurance Society Ltd [1971] EA 263** as follows;

> **"The test whether or not a suit is barred by *res judicata* seems to me to be-is the Plaintiff in the second suit trying to bring before the court, in another way and in form of a new cause of action, a transaction which he has already put before court of competent jurisdiction and which has been adjudicated upon. If so, the plea of *res judicata* applies not only to points upon which the first court was actually required to adjudicate but to every point which properly belonged to the subject of and which the parties, exercising due diligence, might have brought forward at time."**

21. Since the Appellants were not even parties in the previous suit, it could not be said that they were trying to relitigate matters which they were privy to in the previous suit or that they had squandered their opportunity to raise those issues in the previous suit by failing to exercise due diligence. The court is thus of the opinion that the trial court did not correctly apply the doctrine of *res judicata* in the circumstances and as a consequence arrived at an erroneous decision.

d) Whether in the totality of the circumstances the trial court erred in dismissing the application for amendment

22. The Appellants' application for amendment of pleadings was based upon **Order 8 Rule 3** of the **Rules** which stipulates as follows:

> **"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."**

23. The principles to be considered in granting or refusing an application for leave to amend a pleading are now fairly well settled. They were summarized in the case of **Eastern Bakery Vs Castelino [1958] EA 461 at p. 462** as follows:

> **"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (1) (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R 262. The case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. Chitaley p. 1313".** (emphasis added)

24. Those principles were reiterated in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 others [2000] eKLR** where the Court of Appeal of Kenya held, *inter alia*, that:

> **"…the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot be properly be compensated for in costs."**

25. The court is of the opinion that the Appellants had made out a case for leave to amend their pleading to be granted. The court is further of the opinion that were it not for the aforesaid errors of principle on the part of the trial court the Appellants could have been granted leave to amend their pleadings. The mere fact that some of the allegations in the proposed counterclaim purported to improperly challenge an interlocutory judgement in the previous suit could not be a legitimate ground to disallow the entire counterclaim. Similarly, failure to include particulars of fraud or illegality in a draft counterclaim is not fatal since such omission can be remedied in the actual counterclaim after the grant of leave. Accordingly, the court is of the opinion that the trial court erred in the circumstance of the case in disallowing the Appellants' application for amendment.

e) Who shall bear the costs of the appeal

26. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to **Section 27** of the **Civil Procedure Act (Cap. 21).** Accordingly, the successful party should ordinarily be awarded costs unless, for good reason, the court directs otherwise. See **Hussein Janmohammed & Sons Vs Twentsche Overseas Trading Co. Ltd [1967] EA. 287.** The court finds no good reason why the successful parties should be deprived of costs of the appeal. Accordingly, the Appellants shall be awarded costs of the appeal and costs of the notice of motion dated 12th April 2019 before the trial court.

G. CONCLUSION AND DISPOSAL ORDER

27. The upshot of the foregoing is that the court finds merit in the Appellants' appeal. The court is of the opinion that it is empowered under **Section 78** of the **Civil Procedure Act (Cap. 21)** to make an order finally disposing of the Appellants' notice of motion dated 12th April 2019. Accordingly, the court makes the following orders for disposal of the appeal:

a. The Appellants' appeal is hereby allowed.

b. The ruling and order of Hon. H. Nyakweba (Principal Magistrate) dated 20th August 2019 is hereby set aside.

c. The Appellants' notice of motion dated 12th April 2019 is hereby allowed and the Appellants are hereby granted leave to file an amended defence and counterclaim within 14 days from the date hereof whereas the Respondent shall be at liberty to file a reply to the amended defence and defence to counterclaim within 14 days upon service.

d. The Appellants are hereby awarded costs of the appeal and of the notice of motion dated 12th April 2019.

28. It is so decided.

JUDGEMENT DATED and **SIGNED** in Chambers at **EMBU** this **27TH DAY** of **JULY 2020** and delivered via Microsoft Teams platform in the presence of Ms. Mboya for the Appellants and Ms. Muthoni holding brief for Mr. Guantai for the Respondents.

Y.M. ANGIMA

JUDGE

27/07/2020