



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NYERI

ELC NO.250 OF 2014

PRISCILLA WANJA KIBUI..... PLAINTIFF (RESPONDENT)

VERSUS

JAMES KIONGO KIBUI.....1ST DEFENDANT (APPLICANT)

**CHARLES WAMBUGU GITONGA.....2ND DEFENDANT
(RESPONDENT)**

RULING

1. By a plaint dated **21st November, 2011** and filed on the same day, the plaintiff filed the suit herein against **James Kiongo Kibui** (hereinafter the applicant) and **Charles Wambugu Gitonga** (hereinafter the respondent) seeking to, *inter alia*, annul or cancel the sale agreement executed between the applicant and the respondent.
2. It is the plaintiff's case that following the demise of their father, **John Babtista Kabui** (deceased) the parcel of land known as **Nyeri Municipality/Block 2/224** comprising 0.1444 hectares (hereinafter **the suit property**) was inherited by their mother, **Mary Wangeci Kibui** (also deceased) and the applicant to hold in trust for herself and her other siblings.
3. The plaintiff contends that on or about late 2009 and early 2010 the applicant without her knowledge and/or consent or consent of her siblings sold the suit property to the respondent. The plaintiff also contends that the sale agreement executed between the applicant and the respondent was entered into without following the necessary formalities concerning the interest of their mother therein thereby alienating their interest in the suit property.
4. The plaintiff blames the respondent for entering into the impugned transaction with the applicant when he knew or ought to have known of their interest in the suit property.
5. Upon being served with summons to enter appearance the applicant filed the statement of defence dated **20th December, 2011**.
6. Being of the view that the said defence does not properly capture his intended defence, the applicant brought the notice of motion dated **2nd October, 2014** seeking leave to amend his statement of defence out of time.
7. The application is premised on the grounds that the applicant was not represented by an advocate when drawing the defence he seeks to amend; that the defence does not bring out all his defences to the plaintiff's claim; that the defence he seeks to amend was a holding defence and that the amendment sought is necessary for the purpose of bringing out the real issues in controversy and for proper

adjudication of the dispute. Further that no prejudice would be occasioned to the other parties if the application is allowed.

8. In support of the application, the applicant swore the affidavit of even date (2nd October, 2012) where he has reiterated the grounds on the face of the application and annexed the draft amended statement of defence, marked **JKK1**.

9. In reply and opposition to the application, the respondent swore the affidavit sworn on **2nd december, 2014** and filed on **3rd December, 2014**. In that affidavit the respondent has, *inter alia*, deposed that the intended defence will amount to a suit against him; that the sale agreement signed between himself and the applicant clearly shows that he was selling the whole of the suit property to him; that the 1st defendant has raised issues of fraud against him without joining the land officers concerned in the suit. Further that the 1st applicant, who never applied to defend the suit as a pauper, seems to be working in cahoots with the plaintiff to harass him.

10. The plaintiff did not file any response.

11. When the matter came up for hearing on **3rd February, 2015**, counsel for the applicant, **Mr. Thiongo**, informed the court that the applicant entirely relied on the grounds on the face of the application and the affidavit the applicant swore in support of the application.

12. Counsel for the plaintiff/respondent, **Mr. Muhoho** did not oppose the application.

13. On his part, the respondent relied on his replying affidavit.

Law applicable to the application

14. The law applicable to the application has been set down in numerous decided cases, to name but a few:-

In the case of **Central Kenya Ltd -vs- Trust Bank Ltd & others (2000)2 EA 365** the Court of Appeal held:-

“All amendments should be freely allowed and at any stage of the proceedings, provided the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”

15. Similar sentiments were expressed in the case of **Mehta -vs- Shah (1965) EA 321** where it was held that leave to amend will be refused where the character of the suit is changed or where it would be prejudicial to the rights of the parties existing at the date of the proposed amendment.

16. In the case of **Tulip Properties Ltd v Mohammed Koriow & 6 others [2013] eKLR P. Nyamweya J.** stated as follows:-

“The provisions of Order 8 Rule 3 of the Civil Procedure Rules grant the court wide discretion to grant leave to amend pleadings at any stage of the proceedings notwithstanding that the effect may be to add a new party, or change the capacity in which a party is suing or to add or substitute a new cause of action provided such action arises out of the same facts. I am also guided in this respect by all the judicial authorities cited by the parties, and particularly by the decision of the Court of Appeal in Central Kenya Limited –v- Trust Bank Limited (2000)2 EA 365 that the overriding consideration in circumstances as arise in this case is whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

The amendment sought by the 1st Defendants seeks certain relief from the Plaintiff herein and

other Defendants in the proposed counterclaim. It is my view that the 1st Defendant should be allowed their day in court in this respect, even though their action to amend their pleading is coming late in the day. This is because the prejudice solely caused by delay can be adequately addressed by way of costs. The real prejudice that is likely to be caused by the proposed amendment however not only arises from the delay in bringing the application, but also from the fact that the suit herein is part heard and the Plaintiff closed its case on 19th October 2010 after calling two witnesses who testified in court.

The counterclaim also seeks to join a new party, the 2nd Defendant in the Counterclaim, who has not had the benefit of participating in the trial and cross-examining witnesses called so far and will be prejudiced in this respect. There is also the aspect of abuse of process of court to be considered as the 1st Defendant have also sued the Defendants in the proposed counterclaim in Nairobi High Court Petition No. 277 of 2012 (now Nairobi High Court ELC Case 73 of 2013) – Mohammed Koriow Nur and 3 Others vs Retired President Daniel arap Moi and 3 Others.

The court is in this regard granted the discretion under Order 8 Rule 3(1) to grant amendments of pleadings on such terms as to costs or otherwise as may be just and in such manner as it may direct. In the circumstances of the present application this court is faced with two actions that it can undertake. The first is to disallow the amendment sought by the 1st Defendant in light of the prejudice alluded to that will be caused to the Plaintiff herein and the proposed 2nd Defendant in the counterclaim. The alternative course of action available to the court is to allow the amendment, and mitigate the prejudice that it may cause by allowing the Plaintiff herein to reopen its case to recall its witnesses and bring any further evidence which will be subjected to further cross-examination.

It is my considered opinion that as the overriding principles of section 1A and 1B of the Civil Procedure Act requires just, expeditious, proportionate and affordable resolution of civil disputes, it would be more prudent to allow the Defendant's application to amend their pleadings in order to forestall further delays and expedite the hearing of the suit herein."

17. The authorities cited above succinctly capture the principles which guide courts in determining applications for leave to amend pleading out of time. In applying those principles to the instant application, I note that the amendment sought to be introduced is challenged on, among other grounds, the ground that it would amount to a fresh suit against the respondent.

18. Despite the contention by the respondent that he will be prejudiced if the applicant is allowed to amend his defence in the manner proposed, upon review of the pleadings filed in this suit, I find that the intended defence will not in any way prejudice the respondent's defence or boost the plaintiff's case. I say this because the law imposes an obligation on the person who desires any court to give judgment as to any legal right or liability dependent on the existence of facts which he asserts to prove that those facts exist. See **Section 107 of the Law of Evidence Act**.

19. Although the applicant's intended amended defence seems to be in support of the plaintiff's case, to some extent, it in no way prejudices the respondent's case as the legal burden to prove those allegations will be on him and not the respondent.

20. The upshot of the foregoing is that the applicant has made up a case for being granted the order sought. Consequently, I grant him leave to, within Seven (7) days from the date of this ruling to amend his defence in the manner proposed in the draft amended statement of defence.

21. Costs of the application shall be in cause.

Dated, signed and delivered at Nyeri this 10th day of March, 2015

L.N. WAITHAKA

JUDGE

In the presence of:

James Kiongo Kibui – 1st defendant for the plaintiff

No appearance for the plaintiff and 2nd defendant

Lydia – Court Assistant