



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT KERICHO**

**ENVIRONMENTAL AND LAND CASE NO. 34 OF 2008**

JONATHAN KIPYEGON MAINA.....PLAINTIFF/RESPONDENT

**VERSUS**

JOHN MATINGWONY

& 3 OTHERS.....DEFENDANTS/APPLICANTS

**RULING**

***(Application to amend defence to include a counterclaim; application allowed)***

The application before me is that dated 22nd April, 2015 filed by the 3rd defendant seeking leave to amend his defence to include a counterclaim. There is a similar application filed by the 2nd defendant dated 3<sup>rd</sup> August, 2015 and this ruling will cover that application as well.

In this suit, the plaintiff sued five defendants. The gist of his case is that he is the registered proprietor of the land parcel Kericho/Kapsoit/355 and that the defendants have started laying claim on portions of it, on the basis that the said portions of land have been sold to them by the plaintiff's son, one Josphat Biegon. The defendants filed defences and the core of their defence is that they legally purchased the portions that they claim and that they are entitled to the same. I have looked at what the defendants propose to add and I note that they wish to add a counterclaim for the several portions that they purchased from Josphat Biegon. They have also proposed to add Josphat Biegon as a defendant in the counterclaim and they claim from him general and special damages in the event that they cannot have the land that they have sued for.

I directed that Josphat Biegon be served with the applications and he filed an affidavit stating that he has no objection to being enjoined in the suit.

The plaintiff has however opposed the application. It is his view that the application is an afterthought and a scheme to delay the matter. It is also averred that the intended counterclaim is time barred and unenforceable under the Limitation of Actions Act. It is also contended that the averments in the counterclaim are not supported by evidence.

I have considered the application and the submissions of counsel. Courts are generally liberal when it comes to allowing a party to amend unless the other party will be occasioned great prejudice which cannot be compensated by an award of costs. I on my part would be slow to deny a party to plead his case as he wishes. If the defendants want to plead a counterclaim against the plaintiff and Josphat Biegon, I do not see what prejudice the plaintiff will suffer as he will have a chance to defend the said counterclaim. I have considered the arguments that the claim in the counterclaim is time barred and that there is no evidence to support it. These to me are matters that can be canvassed at the trial of the suit. In any event,

the said Josphat Biegon has no problem being enjoined in the suit and he is ready to defend the counterclaim in so far as the same is against him. To me the objections of the plaintiff are misplaced.

I therefore allow the application to amend defence. I direct the defendants to file and serve their amended defence and counterclaim within 7 days from the date hereof. Upon service, the plaintiff and Josphat Biegon may respond to the same by filing the appropriate pleadings within 14 days. The applicants will however shoulder the costs of their applications for they had opportunity to properly plead their case in the first instance.

It is so ordered.

**DELIVERED, DATED AND SIGNED THIS 2ND DAY OF OCTOBER, 2015.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT AND LAND COURT**

**In the presence of:**

Mr. Siele Sigira for 2<sup>nd</sup> & 3<sup>rd</sup> defendants/applicants

Mr. Obondo Koko for plaintiff/respondent

1<sup>st</sup> & 5<sup>th</sup> defendants in person- present

4<sup>th</sup> defendant-absent

Josphat Biegon- (Intended defendant in counterclaim)- absent