



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MACHAKOS

CIVIL SUIT NO. 208 OF 2011

GABRIELLE OUGA 30 OTHERSPLAINTIFFS/RESPONDENTS

VERSUS

MBURONI HOLDINGS LTD.1ST DEFENDANT/RESPONDENT

ANGELA KITOSI 2ND DEFENDANT/APPLICANT

MULI KOLI 3RD DEFENDANT/RESPONDENT

R U L I N G

1. The Motion filed on 23rd September 2013 undated seeks prayers:

- a. That the applicant be granted leave to amend her defence and file a counterclaim against the plaintiffs and the 1st and 2nd defendants herein.
- b. That the amended defence and counterclaim be deemed duly filed upon payment of requisite fees.
- c. That costs of this application be provided for;

and it is based on the provisions of Section 3, 3A, and 5 of Civil Procedure Code Cap 21, Order 8 Rule 3, Order 51 Rule 1 of Civil Procedure Rules 2010.

2. The same motion is supported by the Affidavit sworn by **SenteuMarianyiEliud** undated but filed on 23rd September 2013. It has an annexure styled as Amended 2nd Defendant's Statement of Defence and counterclaim and marked SME 1.

3. The application is opposed by the Plaintiffs/Respondents who have filed grounds of opposition dated 14th February 2014. The grounds anchored to oppose the application are essentially:

1. That the application is misconceived and ill-advised.
2. That the application is frivolous, vexatious and an abuse of the court process.
3. That the application lacks merit as it does not provide compelling grounds for granting of the relief sought and is an afterthought.
4. That the Plaintiffs/Respondents are most likely to suffer prejudice if the applicant's application is allowed to amend her plaint.
5. That the sought amendment is of no consequence in adjudication on the issues in dispute and is a waste of the court's time.

4. The 1st and the 3rd Defendants have been served but they have not filed any reply to the application.

They are deemed to have conceded the same.

5. The Applicants' Advocates have filed written submissions dated 28th August 2014 and the Plaintiff/Respondent have put their submissions dated 22nd September 2014. The two rivaling sides consented to the matter being disposed on the basis of the written submissions.

6. The Applicants submit that:

- a. Though the right to amend the pleadings is donated by statute under **Order 8 Rule 3 of the Civil Procedure Rules 2010**, the same is not an outright right but is subject to leave being granted by the court. The need for leave is of paramount importance since the operational words are that the party may and not must or shall.
- b. Further **rule 5** of the said Order provides that the purpose of the amendments is that of determining the real question in controversy which necessitated the suit in the first place and not introducing matters which are not related to or connected to the real issue in dispute and under consideration.
- c. It is important to note that the real purpose and intention of allowing the amendment of pleadings is reinforced by the provisions of Section 100 of the **Civil Procedure Act** (Hereinafter referred to as **CPA**) which is specific that the same should be to amend any defect or error in a suit but not to institute an entirely new suit through an amendment.
- d. The object is to enable parties to state through their pleadings their positions and facts related to the suit and allow the court to adjudicate on the same based on the correct hypothesis borne out of the facts which necessitated the suit in the first place but not as an averment to have a multiplicity of suits within one suit in the name of exercising the right to amend the pleadings.
- e. Knowing the complexity of matters involved in suits brought forth by the parties that is why the right to amend is not absolute and indeed it exclusively depends on the discretion of the Court seized of the application seeking leave to amend the pleadings. Indeed Section 100 CPA and **Order 8 Rule 5 of the CPC** provides the guidance to the Court to ensure that the exercise of the discretion by the Court is done judiciously and must be done with a keen concern for the other parties and must not be done to their detriment by fundamentally altering the suit before the Court.

7. The Applicants cited the following Authorities:

1. **Central Kenya Ltd versus Trust Bank Ltd and 4 Others Appeal No. 222/98.**
2. **Cropper versus Smith (1884) 26 E Ch.D 700,**

though the same were not attached. The court can only assume the same exists and are correctly cited and content precisely extracted.

8. The Respondents have opposed the application and submitted that;

- i. It is a right donated by statute, under **Order 8 rule 3 of the Civil Procedure Rules 2010** (hereinafter referred to as the CPR), that a party subject to leave being granted by the court may amend its pleadings at any stage of the proceedings. Further at **rule 5** of the said order, the Rules provide as a guiding principle and of cardinal importance that the purpose of amendments is that of determining the real question in controversy between the parties or correcting any defect or error in their pleadings. (**See also Section 100 of the Civil Procedure Act**) (Hereinafter referred to as CPA).
- ii. The object therefore of such amendments is to enable parties to alter their pleadings so as to ensure that litigation between parties is not conducted on the false hypothesis of the facts already laid on paper or otherwise pleaded but on the true state of facts, relief or remedy which parties passionately and truly intend to rely on or claim.
- iii. Albeit this right not being absolute, for it is dependent upon the discretion of the court, **Section 100 CPA** and **Order 8 rule 5 CPR** provides guidance on what the court observes in exercise of its discretion to grant leave for amendments of pleading i.e. the purpose of the amendment should be that of determining the real question between the parties or the issues the parties are raising and

that in so doing, it will be just and not prejudicial to do so.

They have cited the following authorities:

1. **Central Kenya Ltd. versus Trust Bank Ltd & 4 Others.**
2. **Steward versus North Metropolitan Train ways Co. (1886) 16 QBD 556.**

Issues for determination:

1. Has 2nd Defendant/Applicant demonstrated a case for grant of leave to amend the Defence and mount a counterclaim in terms of the provisions of Order 8 Rule 3 Civil Procedure Rules Cap 21?
2. Will the Plaintiff/Respondent suffer any prejudice?
3. What are the orders as to costs?

9. The 2nd Defendant/applicant's case is to the effect that:

- i. In particular, the 3rd defendant was at all times responsible in processing title for KAVOKO TOWN BLOCK 12/58. (Hereinafter to be referred to as the property). The said property is owned by JOHN KITOSI KIBONDO (now deceased and husband to the 2nd defendant). The 2nd defendant contends that she has never received the said title from the 3rd defendant and shall be seeking appropriate orders for the 3rd defendant to produce the same.
- ii. The plaintiffs have since erected structures on the said property and prevented the 2nd defendant the quiet and vacant possession of the said property.
- iii. Therefore, the 2nd defendant intends to claim particulars of fraud against the 1st and 3rd defendants and shall be seeking for orders that they be compelled to release the original title of the property to the 2nd defendant.
- iv. The 2nd defendant further intends to claim negligence on the part of the plaintiffs for not ascertaining the authenticity of the proprietor of the title and fraudulently purchasing the property from disguised vendors and shall be seeking for orders to compel the plaintiffs to demolish the unlawfully erected structures and vacate from the property.
- v. The 2nd defendant also intends to seek damages jointly against the plaintiff, 1st and 3rd defendants for the loss of use and the enjoyment of rights over the property.

10. The Plaintiff/Respondents contends that:

- i. Contrary to the 2nd Defendant's contention the Plaintiffs have a straightforward claim which has necessitated their bringing the instant suit and the facts which the 2nd Defendants has been party to and cannot attempt to run away from them and play victim through an intended amendment to her earlier pleadings.
- ii. The 1st, 2nd and 3rd Defendant's actively participated in the process of selling land known as **MAVOKO TOWN/BLOCK 12/58**(Hereinafter referred to as the property) and eventually the Plaintiffs have settled on the said property and developed residential houses on the same.
- iii. The 2nd Defendant and her family sold the property to the 3rd Defendant who in turn sold the same as a beneficial owner to the 1st Defendant a land buying company. Pending transfer of a title to it, the 1st Defendant by the very nature of its business as a purchaser for value and without notice proceeded to subdivide the land and sold the resultant sub-division plots to the Plaintiffs who have developed permanent homes on their respective plots and have been in quiet occupation and possession with the knowledge of the entire family of the **2nd Defendant for the last 12 years.**
- iv. By way of this suit the Plaintiffs are seeking to have the 1st, 2nd and 3rd formerly transfer the property they bought to them so that they may continue their quiet occupation and possession but this title round with title documents.

11. The Draft Defence and counterclaim is based on alleged fraud perpetrated by the 1st and 3rd

Defendants vide paragraphs:

3. The 3rd Defendant Muli Koli, at all material times before the demise of **John Kitosi Kibondo**(Deceased) was the deceased lawyer in respect of various matters that he was handling for and on his behalf, at the time he was lawfully authorized to practice as an Advocate of the High Court of Kenya and the deceased was his mechanic.
4. That among the matters the 3rd defendant was handling is the processing of the deceased title number Mavoko Town Block 12/58 which title was issued on 20th May 1999 and was collected by himself and or his authorized agent.
5. That the 3rd Defendant has never handed over the aforesaid title to the 2nd defendant and she shall apply to this honourable court for appropriate orders to produce the same and or deposit the same in court.
6. That about 2001 and soon thereafter the 1st and 3rd Defendants purporting to be the registered owners of the suit property fraudulently and unlawfully subdivided the deceased's parcel of land and further unlawfully sold the portions to the plaintiffs.

12. The Plaintiffs/Respondents in their plaint dated 12th August 2011 avers that:

5. During the period April, 2001 and December, 2004, the defendants purporting to be the owners of plot known as LR. No. Mavoko town Block 12/58 (hereinafter referred to as the suit land) caused the same to be sub-divided and sold to the plaintiffs hereinabove for consideration of Kenya shillings Twenty Five Thousand (Kshs.25,000/=) per plot.
7. The defendants and specifically the first defendant undertook to process the title documents for each of the plaintiffs within a period of six (6) months from the date of completion of the respective payment for the various plots.
9. That in breach of the promise/agreement and/or undertaking to process the titles in respect of the plaintiffs hereinabove by the defendants it has emerged that the defendants clandestinely and fraudulently intend to disown the earlier sale and sell the suit plot to new and unsuspecting members of the public without due regard to the previous sale and without consideration that the plaintiffs are the legitimate owners of the suit land.

13. The claim by the plaintiff is also founded on the foundation of elements of fraud.

It must be noted at this stage that the title of the subject herein has not yet passed to the plaintiff via transfer.

14. The fraudulent issues being raised by the rivaling parties requires investigations through hearing parties in the matter on merit on their respective claims to enable court make an informal decision and do justice to all parties.

15. Order 8 Rule 3 Civil Procedure Rules mandates court to sanction amendment of the pleadings at any stage before the judgment.

16. I agree with the authority of Central Kenya Ltd. Versus Trust Bank Ltd. & 4 Others that there should be necessity in determining the real question in controversy...to avoid multiplicity of suits as between parties.

... Not to produce or occasion injustice to the other side which cannot be compensated for in costs.

17. Section 1A Civil Procedure Act is to the effect that the overriding objective of the Civil Procedure Act and the Rules made thereof is to facilitate:

- Just,expeditious,proportionate, and affordable

Resolution of civil disputes governed by the Act.

Court is to do justice to all parties without undue regard to procedural technicalities. Refer to Article 159 (2), (a) and (d), Constitution of Kenya.

The Plaintiffs/Respondents have not demonstrated the prejudice or injustice they are likely to be inflicted which cannot be compensated for in costs in event the amendment sought is effected.

18. The court thus holds that the application has merit and grants the orders sought in the following terms:

1. Leave is granted to effect the amendment sought.
2. The same amended Defence and counterclaim to be served within 7 days.
3. The Plaintiffs at liberty to amend plaint and/or reply to the amended pleadings within 14 days of service.
4. Costs to the Plaintiffs/Respondents in any event.

DATED, SIGNED and DELIVERED this **10TH** day of **OCTOBER, 2014**.

CHARLES KARIUKI

JUDGE