



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 11 OF 2015

COSMAS N.E. KATHUNGU.....PLAINTIFF

VERSUS

NJUE KIARIE.....1ST DEFENDANT

JANET WAIHUNE NJUE.....2ND DEFENDANT

AND

THE NATIONAL LAND COMMISSION.....1ST NECESSARY PARTY

THE CHIEF LAND REGISTRAR.....2ND NECESSARY PARTY

THE DIRECTOR OF PHYSICAL PLANNING....3RD NECESSARY PARTY

DIRECTOR OF SURVEY.....4TH NECESSARY PARTY

EMBU COUNTY GOVERNMENT.....5TH NECESSARY PARTY

THE HONOURABLE ATTORNEY GENERAL..6TH NECESSARY PARTY

RULING

1. By a notice of motion dated 13th December 2018 brought under the provisions of **section 3A, 1A and 1B of the Civil Procedure Act, Order 8 Rule 3 & Order 8 Rule 5(1) of the Civil Procedure Rules 2010**, the 5th necessary party sought the following orders;

- a. *That the application herein be certified as urgent and service hereof be dispensed with in the first instance.*
- b. *That this court be and is hereby pleased to allow the 5th Necessary Party to amend its defence dated 17th September 2018, file and serve the same within 7 days from the date of issue of order herein.*
- c. *That the costs of this application be in the cause.*

2. The said application was based upon the grounds set out on the face of the motion the gist of which was that the amendment was necessary for the purpose of determining the real issues in controversy in this suit.

3. The application was supported by an affidavit sworn by Johnson Nyaga who described himself as the County Secretary of the 5th necessary party. It was stated that the original defence was hurriedly filed by their advocates on record without the benefit of full instructions and documents. They, therefore, desired to amend their defence and to include a counterclaim against the Plaintiff. A copy of the draft amended defence and counterclaim was annexed to the supporting affidavit.

4. The said application was opposed by the Plaintiff who filed a replying affidavit thereto sworn on 17th January 2019. It was contended that the intended counterclaim was already the subject of *Embu ELC Case No. 41 of 2018* which the 5th necessary party had filed; that it was *sub judice*; that it was statute barred and that it would occasion undue delay in the conclusion of the suit.

5. When the said application was listed for hearing on 21st January 2019 Mr Kigen for the 5th necessary party prosecuted the application on the basis of the grounds set out in the notice of motion and the supporting affidavit. The Plaintiff's counsel, Mr Okwaro, opposed the said application on the basis of the replying affidavit sworn by the Plaintiff.

6. The principles to be considered in granting or refusing an application for leave to amend pleadings were re-stated in the case of **Eastern Bakery Vs Castellino [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...”

7. Similarly, in the case of **Central Kenya Ltd Vs Trust Bank Ltd & 5 Others [2000] eKLR**, the Court of Appeal stated as follows;

“...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 properly be compensated for in costs.”

8. The court has considered the application for leave to amend in light of the above principles. The court is inclined to allow the application for leave to amend the defence and to include a counterclaim. It is not patently clear whether or not the intended counterclaim is statute-barred. The allegation of fraudulent acquisition of the suit property can only be properly tested at the trial. The issue of whether or not the alleged fraud falls within the exceptions stipulated in part III of the **Limitation of Actions Act (Cap 22)** can only be conclusively resolved at the trial.

9. The court is, therefore, not satisfied that the Plaintiff shall suffer any prejudice which cannot be compensated by an award of costs. The Plaintiff shall still be at liberty to respond to the intended counterclaim and plead that it is statute-barred and ventilate that issue at the trial hereof. The fact that this suit is already part-heard cannot be a legitimate reason to deny an application for leave to amend. The overriding principle is whether or not the amendment would bring out the real issues in controversy.

10. The upshot of the foregoing is that the court finds merit in the notice of motion dated 13th December 2018. The court consequently makes the following orders;

- a. The 5th necessary party shall file and serve its amended defence and counterclaim within five (5) days from the date hereof in default of which the leave granted shall lapse.
- b. The Plaintiff shall file and serve a reply to the amended defence and defence to counterclaim within five (5) days from the date of service of the amended pleading.
- c. The 5th necessary party shall pay the Plaintiff costs of the application in the sum of Kshs 15,000/- within 30 days from the date hereof.
- d. The 5th necessary party shall file and serve its bundle of documents and witness statements, if any, at least three (3) clear days before the hearing date of 18th February 2019.

11. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 31ST day of JANUARY, 2019.

In the presence of the Mr. Okwaro for the Plaintiff and in the absence of the Defendants and necessary parties.

Court clerk Muinde.

Y.M. ANGIMA

JUDGE

31.01.19