



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA AT EMBU

E.L.C. CASE NO. 67 OF 2014

(FORMERLY KERUGOYA ELC 434 OF 2013)

NICELATE MUTITU KATHURI (*Suing as legal representative of the estate of NJERU S. KATHURI*).....PLAINTIFF

VERSUS

CYRUS NJERU IRERI.....DEFENDANT

RULING

1. By a Notice of Motion dated 14th November 2018 brought under **Order 8 of the Civil Procedure Rules** (hereinafter *the Rules*) the Defendant sought the following orders;

a. *Spent ...*

b. *The honourable court be pleased to allow the Defendant to further amend his amended defence and counter-claim dated 3rd June 2009.*

c. *The honourable court be pleased to implead the interested parties herein.*

d. *That the honourable court do inhibit the ten plots in the names of the Plaintiff and interested parties to preserve the plots till trial and disposal of this suit.*

2. The said application was based upon the grounds set out on the face of the motion. It was contended that during the pendency of the suit, the widow of the original Plaintiff (now the current Plaintiff) sub-divided the suit original property and transferred some of the resultant sub-divisions to her children. The said transferees are the proposed interested parties.

3. The Defendant further contended that the said sub-divisions and transfers took place whilst there was a subsisting order of inhibition preventing any dealings with the original suit property. It was further contended that the original greencard bearing the encumbrance was removed from the land register and a new card inserted in order to facilitate the said sub-division and transfers.

4. The said application was supported by an affidavit sworn by the Defendant on 14th November 2018 in which he reiterated and expounded upon the grounds set out in the notice of motion. It was contended that it was the said sub-divisions and transfers which had necessitated further amendment of the amended defence and counterclaim.

5. The Plaintiff filed a replying affidavit sworn on 13th March 2019 in opposition to the said application. It was contended that the Defendant had forged a certain sale agreement in connection with the original suit property; that the Defendant was subsequently charged, tried and convicted of a criminal offence in connection therewith; that the sale agreement between the Defendant and the original Plaintiff was in any event null and void for want of consent of the Land Control Board; and that there was no cause of action which survived against the original Plaintiff who is deceased.

6. It was the Plaintiff's further contention that upon being lawfully appointed the administratrix of the estate of the original Plaintiff, she lawfully distributed his estate by subdividing the original suit property and transferring portions thereof to the beneficiaries in accordance with the certificate of confirmation of grant. She denied that there were any subsisting encumbrances in the land register at the material time.

7. When the said application was listed for hearing on 11th February 2011 the advocates for the parties agreed to canvass it through written submissions. The Defendant was to file and serve his submissions within 30 days upon service of the Plaintiff's response to the application whereas the Plaintiff was to file her submissions within 30 days upon the lapse of the period granted to the Defendant to file his. The record

shows that the Plaintiff filed her submissions on 14th May 2019 but there is no indication of the Defendant having filed any.

8. The court has considered the Defendant's said application, the Plaintiff's replying affidavit in opposition thereto as well as the submissions on record. The principles to be considered in granting or refusing an application for leave to amend a pleading were restated in the case of **Eastern Bakery V Castellino [1958] E.A. 461 at page 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 ...”

9. 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.”

10. The court has considered the Defendant's application in light of the above guiding principles. The court is not persuaded that the application should be refused on any of the grounds cited by the Plaintiff. The alleged forgery of a sale agreement or the Defendant's criminal conviction is totally irrelevant to an application for leave to amend. Such matters fall within the realm of the criminal justice system under which the matters were dealt with. The Plaintiff shall have adequate opportunity to plead that the sale agreement in issue was a nullity for want of consent of the Land Control Board.

11. The court is also not satisfied that the counterclaim against the original Plaintiff did not survive his demise under the law. **Section 2 of the Law Reform Act (Cap. 26)** specifies the causes of action which do not survive against or for the benefit of a deceased person. These include;

- a. *A claim for defamation*
- b. *A claim for damages for seduction*
- c. *A claim respecting inducing one spouse to leave or remain apart from the other*
- d. *A claim for damages for adultery.*

12. The court is not satisfied that the Plaintiff shall suffer any prejudice or any prejudice which cannot be compensated by an award of costs. It was not pointed out that the Plaintiff would suffer any such prejudice. The court is thus satisfied that the application by the Defendant for leave to amend his pleading under **Order 8 of the Rules** ought to be allowed.

13. The Defendant's prayer for leave to join the intended interested parties is well founded. They are said to be the current registered owners of various portions of what constituted the original suit property. Their titles cannot be lawfully challenged without according them a hearing. They cannot be accorded a hearing without joining them in the proceedings as parties. It would be a violation of the cardinal rules of natural justice if the suit was to be heard and determined in the absence of the transferees. That is why the court cannot consider prayer (d) of the application until the concerned parties are served.

14. The upshot of the foregoing is that the court finds merit in the Defendant's Notice of Motion dated 14th November 2018. Consequently, the court makes the following orders;

- a. The Defendant's Notice of Motion dated 14th November 2018 is hereby allowed in terms of Order Nos. (b) and (c) thereof.
- b. The Defendant shall file the amended pleading within fourteen (14) days and serve all concerned parties.
- c. Prayer (c) of the application seeking an order of inhibition shall be heard at a later date upon service of the application upon the interested parties.
- d. The costs of the application shall be in the cause.

15. It is so decided.

RULING DATED, SIGNED and DELIVERED in open court at **EMBU** this **23RD** day of **MAY, 2019**

In the presence of Ms Mureithi holding brief for Mr. Morris Njage for the Plaintiff; Mr. Mureithi holding brief for Mr. P.N. Mugo for the Defendant.

Court Assistant Mr. Muinde

Y.M. ANGIMA

JUDGE

23.05.19