



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 141 B OF 2011

CANON AUTOMOBILE LTD.....PLAINTIFF

VERSUS

KWALE INTERNATIONAL SUGAR CO. LTD

ATTORNEY GENERAL..... DEFENDANTS

RULING

(Application seeking to introduce a Third Party and also amend defence to introduce a counterclaim against the same parties; not tenable for both proceedings to continue and election be made on one; election made to proceed with counterclaim; leave granted to amend defence if one was filed, or alternatively, file defence out of time as proposed, if no defence was filed in the first instance)

1. The application before me is that dated 3 May 2019 filed by the Attorney General who appears as the 2nd defendant. The application is said to be brought pursuant to the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010. It seeks orders that the applicant be granted leave to issue a Third Party Notice upon Suleiman Abdalla Machafu, Hamisi Omar Ndar, Abdalla Mohammed Sarai, Hassan Ali Mkungu and Hamisi Ali Mkungu. There is also a prayer for leave to amend the defence to include a counterclaim against the above parties.

2. The suit itself was commenced through a plaint which was filed on 29 November 2011. The plaintiff averred that it purchased the land parcel Kwale/Shirazi Bodo/754 (the suit land) on 15 April 2011, from Suleiman Abdalla Machafu, Hamisi Omar Ndar, Abdalla Mohamed Sarai, Hassan Ali Mkungu, and Hamisi Ali Mkungu, who were then the registered proprietors of the suit land. It claimed that the 1st defendant, Kwale International Sugar Company Limited, had trespassed into the land and in the suit a permanent injunction is sought against the 1st defendant and a declaration that the plaintiff is the rightful owner of the suit land. The 1st defendant denied that there was such land as described and averred that it holds a leasehold title over land registered as LR No. 27742 from the Government.

3. It will be seen that in this application, the Attorney General wishes to have leave to file a Third Party proceeding and also a counterclaim. When the application came up for hearing, it was pointed out by Mr. Ongere, learned counsel for the plaintiff, that the applicant cannot seek to have Third Party proceedings and a counterclaim against the same parties and one option had to be taken. Mr. Wachira Nguyo, learned State Counsel, for the applicant then stated that if he has to make an election, he would prefer to proceed with the counterclaim.

4. I have considered the above. I agree with Mr. Ongere, that one would only file Third Party proceedings against a person who is not in the suit, such that if there is an order to amend the defence to include a counterclaim against these same persons, then one would not need a Third Party proceeding, for the same issues will already be in the counterclaim. Since Mr. Wachira has preferred to follow the route of the counterclaim, I need not make any orders on the Third Party proceedings.

5. In as much as the application seeks leave to amend defence, I have perused the file and I have not seen a defence by the applicant. If there is one filed, I do grant leave to amend so as to include a counterclaim against Suleiman Abdalla Machafu, Hamisi Omar Ndar, Abdalla Mohammed Sarai, Hassan Ali Mkungu, and Hamisi Ali Mkungu. If no defence was filed in the first place, I do grant leave to the applicant to file defence out of time in line with the draft defence annexed to the application.

6. I make no orders as to costs.

7. Orders accordingly.

DATED, SIGNED and DELIVERED at MOMBASA this 30th day of October 2019.

MUNYAO SILA

JUDGE.

IN THE PRESENCE OF:

Ms. Murage holding brief for Mr. Kongere for the plaintiff.

Court assistant; Koitamet.