



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT THIKA

ELC CASE NO.458 OF 2017

EMMANUEL KAMONI KABAHI.....PLAINTIFF/RESPONDENT

VERSUS

EMMAH WANGARI WANGUL.....1ST DEFENDANT

WILLIAM NDUNGU MUCHAU.....2ND DEFENDANT

THE CO-OPERATIVE BANK (K)LTD.....3RD DEFENDANT

THE LAND REGISTRAR, THIKA LANDS REGISTRY.....4TH DEFENDANT

RULING

By a **Notice of Motion** application dated **11th October 2018**, which is anchored under various provisions of law, the 2nd Defendant/Applicant has sought for the following orders;

- 1. That the 2nd Defendant be granted leave to amend his defence herein and that the attached Amended Defence and Counter-claim be deemed filed upon payment of the requisite court fees.***
- 2. That an order of temporary injunction be issued restraining the Plaintiff/Respondent, his agents, employees, relatives or whomsoever acting on his behalf from entering, building, letting, remaining, alienating and/or interfering in any manner whatsoever with the land title No.Ruiru East Block 1/1778 pending the hearing and determination of the main suit and the Counter-claim herein.***
- 3. That the OCS Ruiru Police Station to ensure compliance with Order 5 above.***
- 4. That costs of this application be granted to the 2nd Defendant/applicant.***

The application is premised on the following grounds:-

- 1. The 2nd Defendant/Applicant has reliably learnt that the Plaintiff is constructing on the suit property title No.Ruiru East/Block 1/1778 despite there being an injunction against him given by Thika Chief Magistrate's court in case No.CMCC 399 of 2017 filed prior to this case.***
- 2. The 2nd Defendant/Applicant is a legitimate owner of the suit property with a legitimate title with a charge registered against it in favour of the 3rd Defendant for which the 2nd Defendant is repaying a huge loan of Kshs.6,900,000/=.***
- 3. The Plaintiff/Respondent has unlawfully encroached and trespassed on the suit property without any colour of right.***
- 4. The Plaintiff/Respondent has and may continue developing, misusing, damaging, wasting, destroying and/or degrading the suit property to the detriment of the 2nd Defendant's/***

Applicant's interests over the same.

- 5. The 2nd Defendant/applicant is a bonafide purchaser of the suit property for value without notice of any other party's interest over the same.***

6. The 2nd Defendant/applicant also seeks to counter-claim against the Plaintiff to pursue his legal rights over the suit property since he is clearly a bonafide purchaser of the suit property for value without notice of the Plaintiff's purported interests.

7. The 2nd Defendant/Applicant risks to suffer irreparably if the orders sought herein are not granted.

8. It is in the best interests of justice and all fairness that this application be allowed with costs.

It is also supported by the annexed affidavit of **William Ndungu Muchai**, the 2nd Defendant/Applicant wherein he has reiterated the contents of the grounds in support of the application. He further averred that he is a *bonafide* purchaser of the suit property for value without Notice of the Plaintiff's purported interest. However, the Plaintiff has started constructing on the said suit property and may continue to **develop, misuse, damage, waste, destroy** and/or **degrade** the same to the detriment of the Applicant's interest over the suit property unless the Orders sought are granted. That he has included a Counter-claim in his Defence which raises a strong case with high probability of success and thus he urged the Court to allow the prayer for amendment of the Defence and inclusion of a Counter-claim.

The said application is opposed by the Plaintiff/Respondent, **Emmanuel Kamoni Kabaki**, who filed a **Replying Affidavit on 29th October 2018**, and averred that; he has been advised by his advocate that the instant application is an abuse of the court process, is grossly incompetent, lacking in merit and is defective; is a deliberate attempt to convolute the matter and delay the expeditious disposal of the same; is a belated attempt to appeal a **Ruling of 13th July 2018** through the back door and is *Res judicata*.

Further, that he only learnt of proceedings in **Thika CMCC No.399 of 2017**, when this application was served to his advocate since the said pleadings have never been served. That the said parallel pleadings were filed on **11th May 2017**, after the 2nd Defendant was served with the instant pleadings which were filed on **19th April 2017**. However, when the matter came for interparties hearing on **16th May 2017**, the 2nd Defendant/

Applicant who was fully represented did not make any disclosure about the parallel proceedings at Thika Chief Magistrate's Court. He contended that he has been continuously and interruptedly been in occupation of the suit property and has even fenced it with a concrete wall and gate. Further that his advocate has advised him that the matter being raised by the 2nd Defendant/Applicant were fully canvassed and considered by the Court in its **Ruling of 13th July 2018** and the Applicant did not appeal or sought review of the same. Further that he has also been advised that the pleadings herein have closed and the intended amendment to the 2nd Defendant's Defence serves no purposes at all as his claim is a different cause of action which should be pursued in another case.

The Plaintiff/Respondent urged the Court to dismiss the instant application with costs to pave way for the hearing and determination of the main suit.

The application was canvassed by way of written submissions which rival submissions have been carefully read and considered by this Court. The Court too has considered the general pleadings, annexures thereto, the cited authorities and relevant provisions of law and renders itself as follow;-

There are basically two issues for determination:-

1. Whether the Court should allow amendment of the 2nd Defendant's defence and the Counter-claim.

2. Whether the 2nd Defendant is deserving of the injunctive orders sought.

There is no doubt that this suit was filed by the Plaintiff/Respondent herein on **19th April 2017**, wherein he sought for various prayers: among the Orders sought was an Order directed to the 4th Defendant to immediately cancel any titles and illegal entries made in respect of or in favour of the 1st, 2nd and 3rd Defendants and to immediately rectify the Register to reflect the Plaintiff as the owner of the unencumbered title **No.Ruiru East Block 1/1778**.

Simultaneously, the Plaintiff had sought for various interlocutory orders among them orders for injunction and inhibition over the suit property. The said interlocutory application was canvassed interparties by way of written submissions and a **Ruling** was delivered on **13th July 2018**, wherein the Court allowed the two orders of injunction and inhibition over the suit property **Ruiru East Block 1/1778** and directed the **OCS Ruiru Police Station** to assist in the enforcement of the said Orders. The above Orders were directed against the Defendants, the 2nd Defendant/Applicant herein included. The parties were consequently directed to comply with Order 11 within a period of 45 days from the date of the said Ruling and were to appear before the Deputy Registrar on **20th September 2018** for Pre-Trial Directions.

After the said **Ruling** wherein the Orders were extracted on **26th July 2018**, the 2nd Defendant did not appeal against the said Orders or sought for review or setting aside of the same. He however filed the instant application wherein he is seeking injunctive orders in his favour against the Plaintiff herein. This would basically mean that if the said orders are granted, there would be parallel orders in favour of two different parties over the same suit property. That would create an absurd situation because the Police would not know which Orders to enforce and such a situation would create disharmony and chaos.

Be that as it may, the Court will proceed to determine the above framed issues:-

1. Whether the Court should allow amendment of the 2nd Defendant's Defence and Counter-claim? Section 100 of the Civil Procedure

Act grants the right to amend

pleadings. It provides as follows:-

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

Further **Order 8 Rule 3(1)** of the **Civil Procedure Rules** provides that:-

“..... the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings”.

From the above provisions of law, it is clear that the Court has discretion to allow a prayer for amendment of pleadings. However, such discretion must be exercised judicially. The principles to be considered in an application for amendments are the ones set out in the case of **Eastern Bakery...Vs...Castelino (1958) EA 461**, wherein the Court held that“-

- i. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.*
- ii. There is no injustice caused to the other side if it can be compensated with costs.*
- iii. The court will not refuse an amendment simply because it introduces a new case.*
- iv. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject matter of the suit.*
- v. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment eg. By depriving him a defence of limitation.*
- vi. The principles applicable to amendments of Plaints are equally applicable to amendments of written statements of defence.*
- vii. A Judge has discretion to allow amendment to the statement of defence to introduce a counter-claim provided that such an amendment does not transgress any of the aforesaid principles.*
- viii. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.*

Further in the case of **Central Kenya Ltd...Vs...Trust Bank Ltd & 5 Others (2000) eKLR**, the Court held that:-

“All amendments should be freely allowed and at any stage of the proceedings , provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

Taking into account the above principles and juxtaposing them with the facts of the case herein, has the 2nd Defendant satisfied this Court that he deserves the sought orders for amendments?

It is evident that the amendments sought herein are inclusion of Counter-claim. The bone of contention is the suit property herein wherein both the Plaintiff and 2nd Defendant are seeking ownership. It is clear that in his initial Defence, the 2nd Defendant had sought for dismissal of the Plaintiff's suit but had not sought to be declared as the legitimate owner of the same. In the included Counter-Claim, the 2nd Defendant has now sought to be declared as the lawful owner of the suit property **LR.No.Ruiru East Block 1/1778**. He alleged that he purchased the same as an innocent purchaser from the 1st Defendant. Though the Plaintiff/Respondent has submitted that allowing such Counter-claim would mean an introduction of a different cause of action, the Court finds that the claim by the 2nd Defendant is over the same suit property that is being claimed by the Plaintiff herein. The inclusion of the Counter-claim would not introduce a new cause of action. The said Counter-claim would even prevent filing of multiplicity of suits which is one of the principle to be considered in deciding whether to allow an amendment to pleadings or not. It is clear that in the **Eastern Bakery Case (supra)** the Court held that a Judge has discretion to allow an amendment to the defence and introduce a Counter-Claim provided such amendment does not transgress any of the laid down principles. The Counter-Claim sought to be included herein would not transgress any of the principles but would assist in avoiding multiplicity of suits.

The Court finds and holds that the amendment herein is sought before the suit has started. The Plaintiff will have an opportunity to respond to the said Counter-Claim in his pleadings and will not be prejudiced at all.

Consequently, the Court arrives at a finding that the amendments sought herein are necessary for the purposes of aiding the court to determine the real question in controversy as between the parties. The 2nd Defendant/Applicant is deserving of the said prayers for amendment.

2. Whether the 2nd Defendant is deserving of the injunctive orders sought?

As the court observed earlier, there are injunctive orders in favour of the Plaintiff/Respondent. The 2nd Defendant/Applicant has not appealed against the said Orders. He has also not sought for setting aside of the said Orders via a Review. The Applicant has alleged that there are injunctive orders issued by Lower Court in **Thika CMCC No.399 of 2017**. The Court has noted that the said Orders were issued on **11th May 2017** while this suit was in existence. During the prosecution of the earlier interlocutory application, the 2nd Defendant did not mention the existence of **Thika CMCC No.399 of 2017**. The said suit was filed to forestall the outcome of the Notice of Motion application that was filed on **19th April 2017**. Therefore **Thika CMCC No.399 of 2017** was not filed in good faith and the 2nd Applicant has not brought the instant application with clean hands.

Further as the Court observed earlier, grant of injunctive orders herein would create chaos and an absurd situation as the **OCS Ruiru Police Station** would not be sure of which orders to enforce. The Court finds that the orders of injunction sought are not merited and are dismissed entirely.

However, it is evident that both the Plaintiff and 2nd Defendant are claiming ownership of the suit property. Before the main suit is determined, the suit property should be preserved by maintaining the *status quo*. The *status quo* herein is that the Plaintiff/Respondent is in possession, has erected a concrete wall and gate. He should remain in such possession and the concrete wall and gate should remain as such. However, the Plaintiff/Respondent should not **construct, develop, alienate and/or dispose off** the suit property until the main suit herein is heard and determined. See the case of *Virginia Edith Wambui...Vs....Joash Ochieng Ougo, Civil Appeal No.3 of 1987 (1987) eKLR*, where the Court of Appeal held that:-

“The general principle which has been applied by this court is that where there are serious conflicts of facts, the trial court should maintain the status quo until the dispute has been decided on a trial”.

Therefore the Court directs the *status quo* to be maintained as above stated.

Consequently, the Court finds that the **Notice of Motion** dated **11th October 2018** is merited in terms of prayer No.4 and the same is allowed entirely.

However, prayer No.5 is not merited and is disallowed entirely but is replaced with the *Status Quo* Order above. Prayer No.6 is disallowed and costs shall be in the cause.

It is so ordered

Dated, Signed and Delivered at Thika this 29th day of October, 2019.

L. GACHERU

JUDGE

In the presence of

No appearance for Plaintiff/Respondent

Mr. Wambugu holding brief for Mr. Kanyi for 1st Defendant/Applicant

No appearance for 2nd Defendant/Applicant

No appearance for 3rd Defendant/Applicant

No appearance for 4th Defendant

Jackline - Court Assistant

L. GACHERU

JUDGE

29/10/2019