



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT & LAND COURT AT MURANG'A**

**ELC NO. 14 OF 2019**

**CYRUS MUCEBIU IRUNGU.....PLAINTIFF/RESPONDENT**

**VS**

**ALEXANDER MUGAMBI MIRITL.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**MUKURA JAMES CHACHA.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**JAMES MWANGI KAMAU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**TERESIA WANGUI NGANGA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**GEORGE KANGATA MWANGI.....5<sup>TH</sup> DEFENDANT/APPLICANT**

**ALLAN PETER KARANJA..... 6<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE LAND REGISTRA, MURANGA....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**THE HON ATTORNEY GENERAL.....8<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The Applicant filed this motion on the 18/10/19 under Order 8 Rules 5(1) Order 11 Rule 3(2) and other provisions of the Civil Procedure Rules seeking the following orders;

a. spent

b. that leave be granted to the 5<sup>th</sup> Defendant to amend her statement of defence dated the 8/7/2019 to include a counterclaim in the manner reflected in the draft Amended statement of defence and counterclaim annexed to the supporting affidavit by the 5<sup>th</sup> Defendant herein.

c. That leave be granted to the 5<sup>th</sup> Defendant to file list of documents, list of witnesses and witness statements out of time.

d. That this Honorable Court do give further directions to the hearing and disposal of this suit.

e. That costs of this application be in the cause.

2. The grounds upon which the application is made are that it is in the wider interest of justice that the 5<sup>th</sup> Defendant pleads all her issues in the instant suit to avoid filing another suit. That the Applicant seeks to caution herself from the being estopped from lodging a fresh suit after conclusion of the instant suit. That the intended amendments will address the real issues in controversy for a just and expedient resolution of the issues. That the Applicant had already inadvertently paid the filing fees for the amended defence on the 15/10/2019 when the matter was before this Court. That the delay in filing the amended defence was caused by lack of funds on the part of the Applicant to instruct an Advocate. The Applicant is alive to the need to seek leave to amend pleadings after close of pleadings. That unless the application is granted she risks losing money paid for filing the amended defence on 15/10/2019 and being locked out from ventilating all her issues relating to the subject matter here in. That the grant of the instant application will not occasion any prejudice to the Respondents and prays it be granted in the interests of justice.

3. In her supporting affidavit to the application the Applicant in addition to reiterating the grounds on the face of the application discloses that her intended amendment in her defence is to include a counterclaim against the 1<sup>st</sup> Defendant as an alternative prayer in order to redeem the purchase price she apparently paid should her defence be declined by the Honorable Court. She also explains that she has since paid filing fees of Kshs. 75,000 towards the filing of the amended defence which she also risks losing in the event her application is disallowed. The Applicant has also alluded to challenges in raising money to instruct her Advocates on record hence the delay by her Advocate when the matter came up for pretrial conference.

4. The application was opposed by the Plaintiff who regards the application as incompetent and an abuse of Court process and urges the Court to dismiss the same. He also accuses the Applicant of laxity in complying with Court orders and has cited several incidents when the Applicant failed to attend Court and comply with Court orders. He is convinced that the Applicant's application is an afterthought for reasons that the documents relied upon in the counterclaim have always been on record and the Applicant's Advocates have always been on record for the Applicant so the issue of lack of instructions does not arise. He views the application as ill thought of and an attempt to introduce an inconsistent cause of action to the suit too late in the day. He posits that the intended counterclaim can only be ventilated through a fresh suit after conclusion of the instant one. That allowing the instant application will give room for all the other Defendants to bring such applications in order to stall the hearing of the suit. That to date the Applicant has not complied with order 11 and no reasons offered for the same. He has urged the Court not to come to the aid of an indolent pleader to defeat an accrued claim by the Plaintiff.

5. The application was opposed through grounds of opposition dated 25/10/2019 by the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 6<sup>th</sup> Defendants listed as follows;

- a. The application dated 17/10/2019 does not lie in law in that a Defendant cannot file a counterclaim against a co-Defendant.
- b. The application is bad in law and defective as the orders sought cannot be countenanced by this Court in that the intended counterclaim by the Applicant against a co-Defendant is defective. The Applicant can only file a fresh suit against the first Defendant.
- c. The Defendant thus prayed for the application to be dismissed with costs.

6. When the application came up for hearing, the parties were directed to file written submissions but none are on record at the date of writing this ruling.

7. I have perused the amended statement of defence and counterclaim and note that the intended counterclaim is by the 5<sup>th</sup> Defendant against the 1<sup>st</sup> Defendant. That the 1<sup>st</sup> Defendant allegedly sold the parcel number NGINDA/ SAMAR/BLOCK 1/2916 to the 5<sup>th</sup> Defendant for a price value of Kshs. 3,600,000/- which she claims to have paid as an innocent purchaser for value without any notice of defect which she now seeks to recover from the 1<sup>st</sup> Defendant through the counterclaim. That parcel of land is a subdivision of the original parcel of land known as NGINDA SAMAR/BLOCK 1/351 that is one of the subject matter of the suit herein which the Plaintiff claims proprietorship rights over and alleges to have been fraudulently acquired by the Defendants herein.

8. **Order 8 Rule 1 (1)** of the **Civil Procedure Rules** provides;

“A party may, without the leave of the Court, amend any of his pleadings once at any time before the pleadings are closed,”

9. **Order 8 Rule 2 (a) & (b)** of the **Civil Procedure Rules** provides;

“Where an amended plaint is served on a Defendant—

- (a) if he has already filed a defence, the Defendant may amend his defence; and
- (b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended plaint whichever is later.”

10. **[Order 8, Rule 5.]** General power to amend.

“5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”

11. In the case of **Eastern Bakery v Castelino [1958] EA 462 (CAU)** where it was held at page 462 that:-

“The Court will not refuse to allow an amendment simply because it introduces a new case..... 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 amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ .....”Further to the above, the Court of Appeal also stated in the case of **Central Kenya Limited -v- Trust Bank Limited (2000)2 EA 365** that ;

"..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

12. From the foregoing case law and legal texts cited, it goes without saying that the Court has wide discretion to allow any party to amend its pleadings 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 under Order 8 Rule 3 of the Civil Procedure Rules.

13. Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

14. **Order 8 Rule 3 (5)** provides that an amendment may be allowed notwithstanding that the effect would be to add or substitute a new cause of action provided such cause of action arises out of the same facts or substantially similar to the cause of action out of which relief has been claimed in the suit.

15. I have looked at the draft amended defence and counterclaim in which the Applicant seeks the following prayers;

- a. The Plaintiff's case be dismissed with costs
- b. In the alternative and without prejudice to para a above the judgement against 1<sup>st</sup> Defendant in the sum of Kshs 3.6 million
- c. Costs of the counterclaim
- d. Interest on b and c at Court rates
- e. Any other relief as may be just and fit to grant.

16. It is the Applicant's case that pursuant to the agreement of sale dated the 25/2/16 she purchased parcel NGINDA/ SAMAR/BLOCK 1/2916 comprising 3 acres at the consideration of Kshs 600,000/-. The said parcel NGINDA/ SAMAR/BLOCK 1/2916 was a subdivision of parcel NGINDA/ SAMAR/BLOCK 1/ 2870. That in the event that the said parcel is nullified she is entitled to a refund of the Kshs 3.6 million from the 1<sup>st</sup> Defendant.

17. The application is opposed by the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 6<sup>th</sup> and in their grounds of opposition stated the application is bad in law and defective and the only option is for the Applicant to file a fresh suit.

18. The Plaintiff opposed the application and stated that the application seeks to introduce a new and inconsistent cause of action. That his cause of action is based on fraud and joint collusion of the Defendants in acquiring land parcel No NGINDA/ SAMAR/BLOCK 1/350 and 351 and the 5<sup>th</sup> Defendant's is based on a purported sale agreement between her and the 1<sup>st</sup> Defendant herein. That the causes of action and cannot be said to arise from the transaction. That the 5<sup>th</sup> Defendant's cause of action should be in a different suit as it will not be caught by limitations of actions.

19. The Plaintiff faulted the Applicant for filing this application as a way of delaying the hearing of the suit.

20. Although order 8 generally allows for amendment of pleadings, I have perused the pleadings of the parties and it is obvious that this is the Plaintiffs case. The causes of action in my view are inconsistent with each other. The Defendant cannot file a counterclaim against his co-Defendant, may be an indemnity in the case of the Plaintiff. A counterclaim against the Plaintiff is well founded but not the other way around. The 5<sup>th</sup> Defendant cannot create a cause of action in the case of the Plaintiff. The counterclaim is an independent suit which ought to be filed independently against the 1<sup>st</sup> Defendant.

21. It is for that reason that the application is unmerited. It is dismissed with costs to the Plaintiff, 1<sup>st</sup> – 3<sup>rd</sup> & 6<sup>th</sup> Defendants.

22. **It is so ordered.**

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 19<sup>TH</sup> DAY OF DECEMBER 2019**

**J.G. KEMEI**

**JUDGE**

**Delivered in open Court in the presence of;**

Mureithi HB for Ndegwa for the Plaintiff/Respondent

Bwonwonga HB for Njoroge for the 1<sup>st</sup> – 3<sup>rd</sup> Defendants/Respondents

Ms Awour HB for Ms Nyamwata for the 5<sup>th</sup> Defendant/Applicant

Bwonwonga HB for Njoroge for the 6<sup>th</sup> Defendant/Respondent

7<sup>th</sup> – 9<sup>th</sup> Defendants – Absent

Irene and Njeri, Court Assistants