



**REPUBLIC OF KENYA**

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

**ELC CASE NO. 316 OF 2017**

**WASHINGTON MUCHOKI MBURU.....PLAINTIFF/APPLICANT**

**AND**

**CECILIA WANJIRU MWAURA.....DEFENDANT/RESPONDENT**

**RULING**

1. The Plaintiff filed suit against the Defendant on 24/3/17. The cause of action is disclosed in the pleadings as trespass by the Defendant on the Plaintiffs suit land LR No. Loc.6/Gikarangu/4419 thus depriving him of his right to enjoyment of property. He sought Orders *inter alia* of eviction of the Defendant from the suit land.

2. The Defendant filed a defence on 23/3/17 denying the Plaintiffs claims and stated that the land is a subdivision derived from Loc 6/Gikarangu 357 previously owned by the father of the Plaintiff. That she has settled on the suit land with her children On the 12/10/17 the Defendant filed an application seeking the following Orders;

a) That the Defendant/Applicant herein be granted leave to amend her defence dated 23<sup>rd</sup> day of May 2017 to include a counterclaim and file the amended defence and counterclaim.

b) That the annexed amended defence and counterclaim be deemed as properly filed and served upon payment of the requisite Court filing fees.

c) That the Costs of this application be provided for.

3. The application is grounded on the grounds stated below;

a) That Defendant/Applicant filed the defence herein on 23<sup>rd</sup> day of May 2017.

b) That the Defendant/Applicant now wishes to make amendment in the said defence to include a counterclaim and some vital information which were left out.

c) That the Defendant/Applicant will suffer irreparable loss and damage if the Orders sought are not granted as the defence has hiatus descriptive obvious thereof while the Plaintiff/Respondent will not be prejudiced in anyway.

d) That it is in the interest of justice to so to order.

She has attached the draft defence in support of her application.

4. In support of her application the Defendant submitted that the dispute involves ownership of family land and sought to include a counterclaim in her defence which she avers was omitted inadvertently. That she stands to be prejudiced if the amended defence and counterclaim is not admitted.

5. In opposition to the application the Plaintiff filed grounds of opposition as follows;-

a) That the application lacks merit and the same is an afterthought in view of the issues raised by the Plaintiff in his further replying affidavit dated 2<sup>nd</sup> June 2017.

b) That the Application is incurably defective for want of form and substance, that the same is an abuse of the Court process, frivolous, vexatious and merely intended to embarrass and delay the trial and disposal of the Plaintiff's claim.

c) That the counterclaim, the genesis of the current application is unsustainable by this Court, an abuse of the Court process and the counterclaim including the application ought to be struck out with costs.

d) That that Orders sought in the application cannot be granted by this Honourable Court under the legal provisions which the application is brought as this Court does not have jurisdiction to revoke the title deeds and revert the old Title Number Loc.6/Gikarangu/357.

e) That furthermore an Order to cancel or revoke the title deeds and revert to the old title deed number Loc.6/Gikarangu/357 would not only occasion an injustice to the Plaintiff but also to 2 others who are innocent and not party to this suit.

f) That the matters canvassed in the counter claim are matters that should be dealt with by the probate and administration Court.

g) That indeed it is true the Defendant does not have locus standi to make any claim towards the subject property because she is neither a beneficiary of the original owner of the land Loc.6/Gikarangu/357 and neither is the subject Land Loc.6/Gikarangu/4419 matrimonial property as she claims.

h) That it is only fair and just that the Defendant's application be dismissed with costs to allow the Plaintiff to proceed with his suit.

i) That the application is incompetent, scandalous and an abuse of the Court Process and the same should be dismissed with costs.

6. Both parties elected to file written submissions which I have considered.

7. The background of this case is that the Defendant was married to the Plaintiffs brother one Mburu Githori Nduati and were blessed with Children. The Plaintiff therefore is a former brother in law to the Defendant. The two divorced and their divorce was concluded vide a decree nisi absolute dated 19/9/15. It is averred that the estate of Nduati Mukarara (Deceased) was distributed vide Murang'a Succession Cause No. 1095 of 2013 without the Defendant being involved or being provided for. The Defendant avers that she has been in possession of her former husband's land since 1973 when she got married.

8. It is the Defendant's submission that her former husband renounced his right in his father's estate without her consent and to her and her children's exclusion. It is her case that the Plaintiff has unlawfully and unprocedurally acquired the Defendants portion of the suit land. In her counter claim she seeks cancellation/revocation of the subdivisions of Loc.6/Gikarangu/4419,4420 & 4421 and revert the land to Loc.6/Gikarangu/357; secondly declaratory Order that the Defendant is entitled to a portion of one acre of family land Loc.6/Gikarangu/357 where she has possession.

9. The Plaintiff Respondent has challenged the Defendants averments to wit; that the Court does not have jurisdiction to revoke titles and revert to old title No. Loc.6/Gikarangu/357; matters canvassed in the counter claim are matters that should have been dealt with in the Probate and Administration Court; that she is neither a beneficiary nor the suit land is a matrimonial property.

10. The issue for determination is whether the Applicants application is meritorious, whether the Court has jurisdiction to determine the case and in particular the counter claim.

11. The Civil Procedure Rules Order 8 Rule 3 gives the Court discretion to allow the amendments of 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.

12. Under Order 8 Rule 5(1) the Court could on its own motion Order or on application of a party Order any document to be amended in such manner as to such terms as to costs or otherwise as are just. This may be done for purposes of determining the real question in controversy between the parties.

13. In the case of **Eastern Bakery vs Castellino 1958 EA 461** the Court held;

“amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated by costs. But there is no power to enable one distinct cause of action to be substituted for another....”

Further the Court of Appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** said;

“a party would be allowed to make such amendments of pleadings as was necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side”.

14. The claim of the Plaintiff/Applicant in the counter claim is founded on the following; -

a) That the husband revoked a right or interest in the suit property.

b) That she claims under her former husband or on her own and that of her children the right to the property as beneficiaries.

c) That she and her children were not provided for in the succession proceedings that apparently included her husband (with or

without his right to renounce interest).

d) That she is entitled to 1 acre which she has occupied since 1973 & developed the same by planting trees, bananas, food crops and building a house.

e) That the entitlement is based on matrimonial property.

15. The totality of the Plaintiffs claim in the counter claim is premised on provision or lack of it from the estate of the family patriach. This falls squarely under the law of succession. I understand the Plaintiffs claim to be setting up a challenge to the decision in Succession Cause No. 1095/2013. Effectively the claim being set up in the counterclaim is new and an inconsistent cause of action that cannot be sustained in this Court. In any event proceeding with the claim as drafted is likely to be prejudicial to the Defendant. The Defendant is best advised to canvass this matter in the proper forum.

16. Guided by the decision in the Court of appeal in **Central Kenya Ltd. Vs. Trust Bank Ltd (2000) 2 EA 365** aforestated and based on the reasons adduced above the application is devoid of merit. It is dismissed with costs to the Plaintiff.

**DELIVERED, DATED AND SIGNED AT MURANG'A THIS 8<sup>TH</sup> DAY OF MARCH,2018.**

**J G KEMEI**

**JUDGE**