



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC CASE NO. 106 OF 2007

GLADYS NJERI KIRUGUMI.....APPLICANT

VERSUS

LANGATA DEVELOPMENT

COMPANY LIMITED.....1ST RESPONDENT

MOSES WAITHANJE MWIHURI.....2ND RESPONDENT

R U L I N G

1. On 1/2/2007, the plaintiff brought this suit seeking the following orders against the defendants:

- a) A declaration that the plaintiff is the rightful owner of Title Number Ruiru/kiu Block 5/845 Githurai Kimbo Estate, Thika.
- b) A permanent injunction restraining the defendants from disturbing the plaintiff in the quiet enjoyment of the said property;
- c) Damages for defamation, stress and anxiety
- d) A temporary injunction pending the final adjudication of this suit preventing the defendants from evicting the plaintiff from the suit property or otherwise disturbing her enjoyment thereof.
- e) Costs of the suit and interest;
- f) Any further relief that this honourable court deems just, necessary and expedient.

2. The plaintiff contends that the 1st defendant fraudulently allocated the suit property to the 2nd defendant yet the plaintiff had, prior to that, purchased the suit property from the 1st defendant

3. In a statement of defence dated 17/4/2007, the 2nd defendant opposes the plaintiff's claim, contending that the plaintiff has been living on the suit property as a criminal trespassers effective from July 1998.

4. On 15/9/2017, the 2nd defendant brought a Notice of Motion dated 14/9/2017 seeking leave to bring a counterclaim for *mesne* profits and an eviction order against the plaintiffs. That application is the subject of this ruling.

5. The 2nd defendant opposes the application on the following grounds:

- a) The application which seeks to introduce a counterclaim is time-barred by virtue of the provisions under Section 7 as read with Section 35 of the Limitations of Actions Act, Cap 22 of the Laws of Kenya.
- b) The application is an attempt to delay the course of justice having been preferred ten (10) years after inception of this suit on 1/2/2007, and is therefore an abuse of the court process as it is aimed as defeating the ends of justice.
- c) The proposed amendments are ineffectual and shall not assist the court to determine the real issues in controversy.

d) The 2nd defendants' application is therefore bad in law and ought to be dismissed

6. The application was orally canvassed in court on 22/1/2018. Mr Kinyua, counsel for the applicant, contended that the application was necessitated by the fact that the defence on record would not give the 2nd defendant the desired results; that there is need for an eviction order should the 2nd defendant's defence succeed. He argued that the filing of the defence without a counter-claim was a mistake of the 2nd defendant's previous counsel. He contended that the cause of action in respect of the counter-claim arose in 2007 when the suit herein was filed. He further contended that the limitation period started running in 2007 and has not lapsed.

7. Mr Githua, counsel for the plaintiff, opposed the application, contending that the contemplated counter-claim is statute-barred under Section 7 of the Limitation of Actions Act. He argued that a counter-claim is a separate action and that, time in respect of a counterclaim runs from the time when the cause of action relating to the counter-claim accrues. He contended that in the present suit, the cause of action accrued in 2003 when the plaintiff purchased the suit property and took possession of the same.

8. I have considered the tenor and import of the application, the affidavit in support thereof, the grounds of opposition, and the parties' rival submissions. I have also considered the relevant legal framework and jurisprudence on the twin subject of amendment of pleadings and limitation of actions.

9. The key issue to be determined in the application is whether the claim which the 2nd defendant seeks to introduce by way of counter-claim is statute-barred under the Limitation of Actions Act.

10. A counterclaim is an action brought by a defendant after an original claim has been brought by the plaintiff. Under Section 35 of the Limitation of Actions Act, a counterclaim is subject to the statutory framework on limitation of actions. For avoidance of doubt, Section 35 of the Act provides as follows:

For the purposes of the Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.

11. Actions for recovery of land are governed by the limitation framework in Section 7 of the Limitation of Actions Act which provides as follows:

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person.

12. The applicant in his defence dated 17/4/2007 has categorically pleaded that the plaintiff has been living on the suit land since 1998 as a criminal trespasser. For avoidance of doubt, he avers in paragraph 2 of the defence thus:

The 2nd defendant denies contents of paragraph 4 and avers that the plaintiff has been living in the 2nd defendant's land since July 1998 and is a criminal trespasser.

13. The 2nd defendant having asserted, through pleadings, that the plaintiff has been a trespasser since July 1998, it follows that the cause of action for recovery of the suit land by the 2nd defendant accrued in July 1998 - the date when the plaintiff entered the suit land. Consequently, the twelve year limitation period stipulated under Section 7 of the Limitation of Actions Act lapsed in July 2010.

14. This being the case, the claim for an eviction order, which in my view, constitutes an action for recovery of land, is presently statute-barred under Sections 7 and 35 of the Limitation of Actions Act. Whether brought as a counter-claim or as a separate original suit, the claim is time-barred.

15. I have deeply reflected on the legality of allowing the *mesne* profits limb of the proposed counter-claim in the absence of a plea for recovery of the suit land in the circumstances of this case. A claim for *mesne* profits in the circumstances of this case would ordinarily be anchored on a tenable plea for trespass and/or action for recovery of land. It therefore follows that, if the counter-claim for recovery of land by the 2nd defendant is statute-barred under Sections 7 and 35 of the Limitation of Actions Act, the contemplated counter-claim for *mesne* profits too would not see the light of day because it would have no basis.

16. The net result is that the Notice of Motion dated 14/9/2017 brought by the 2nd defendant, seeking leave to bring a counter-claim against the plaintiff is dismissed on the ground that the completed counter-claim is statute barred. The plaintiff shall have costs of the application.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF MAY 2018.

B M EBOSO

JUDGE

In the presence of:-

Ms Gathua Advocate for the Plaintiff

Mr Kinyua Advocate for the 2nd Defendant

