



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MURANG'A

ELC NO. 46 OF 2017

PRISHAR WAMBUI KAGUURA.....PLAINTIFF

VS

PETER WAITHAKA KAGUURA.....1ST DEFENDANT

ELIZABETH WANJIKU WAITHAKA.....2ND DEFENDANT

PETER KANINI MUGO.....3RD DEFENDANT

RULING

1. The 3rd Defendant filed Notice of Motion on 13/11/2017 seeking orders as follows;

a) Spent.

b) That the Honourable Court be pleased to allow the 3rd Defendant to amend his statement of defence and/or alternatively allow the 3rd Defendant to file a statement of defence afresh.

c) That the Honourable Court be pleased to allow that the statement of defence annexed to this application be deemed to have been properly filed.

d) That the Honourable Court be pleased to allow the parties to file their replies to the 3rd Defendant's statement of defence if need be.

e) That the Honourable Court be pleased to give directions in terms of recalling of witnesses for further examination; examination in-chief, cross-examination and re-examination.

f) That the Honourable Court be pleased to give further directions on the hearing of this suit as it deems fit.

g) That the costs of this application be provided.

2. The application is based on the following grounds; -

a) That the subject herein is land parcel number LOC 2/KANDERENDU/1511.

b) That the judgement delivered in the Environment and Land Court case number 278 of 2014 Kerugoya on 31st May, 2017 ordered the cancellation of sub-division and title deeds for the land parcel number LOC 2/KANDERENDU/1511 and number LOC 2/KANDERENDU/1512.

c) That the aforesaid Court further ordered that the re-instatement and merger of the original land parcel number LOC 2/KANDERENDU/640 to what it was before.

d) That the ruling delivered in the Environment and Land Court case number 278 of 2014, Kerugoya on 6th October, 2017 confirmed that land reference number LOC.2/KANDERENDU/1511 does not exist.

e) That from the aforesaid ruling it is clear that the orders of 31st May, 2017 have already been executed and land parcel number

LOC 2/KANDERENDU/1511 and 1512 were no longer in existence having been cancelled and land parcel number LOC 2/KANDERENDU/640 has reverted back to the Plaintiff and the 1st Defendant herein.

f) That the 3rd Defendant is desirous of amending his defence and/or filing a defence afresh.

g) That for the purpose of determining all questions in controversy between the parties herein it is meted and just if the 3rd Defendant application is allowed.

h) That no prejudice will be caused to either party if the application is allowed as they will have a chance to reply if need be.

3. It is further supported by the affidavit of the Peter Kanini Mugo sworn on 13/11/18 which he reiterates the grounds stated in para 2 above.

4. In addition, he deposed that the Plaintiffs Advocate, who is the son of the Plaintiff and brother to the 1st Defendant and brother in law to 2nd Defendant were aware of the Court orders issued in ELC No. 278 of 2014, Kerugoya, the cancellation of subdivision and the title deeds for the land parcel Nos. LOC 2/KANDERENDU/1511 and number LOC 2/KANDERENDU/1512. That the suit land does not exist and is now desirous in amending the Defence and Counterclaim against the 1st and 2nd Defendant. He has annexed a draft Defence and Counterclaim.

5. In opposing the application, the Plaintiff stated, inter-alia, that cancellation of titles did not in any way affect the Plaintiffs prayer for general damages against the 3rd Defendant. That the intended amendment by the 3rd Defendant is only meant to cause confusion and further delay the hearing of the case. That the 3rd Defendant ought to file his claim against the 1st and 2nd Defendants separately as the Plaintiff has never been a party to their previous fraudulent activities regarding registration.

6. The 1st and 2nd Defendants did not oppose the application despite being duly served.

7. The 3rd Defendant relied on Order 8 rule 3, Order 8 rule 5 of the Civil Procedure Rules; Article 50(1), 159 (2) (b) and (d) of the Constitution to persuade this Court to allow amendment of the Defence and Counterclaim.

8. He relied on the following case law to support his case;

a) Danson Munene Kibetu –vs- Edward Njeru & 2 Others E.L.C Case NO. 26 OF 2016, Kerugoya

b) Central Kenya Ltd –vs- Trust Bank Ltd & 5 Others (2000) Eklr

c) Rosemary Chebet Koros –vs- Samuel Kiprono Sang (2015) Eklr

d) Daniel Ngetich & Another –vs- K-Rep Bank Limited (2013) Eklr

e) Diamond Trust Bank Limited –vs- John Wakaba Joseph & Another(2013) Eklr

9. The Plaintiff submitted that the parties, the 3rd Defendant, included, were accorded full opportunity to file their documents before the hearing commenced. The Plaintiff has closed her case and allowing the 3rd Defendant to file a fresh statement of defence would amount to allowing him to make up his case towards the end of trial. Parties ought to disclose their case at the earliest stage to avoid ambush, delay and increase of costs. That the application has not been brought in good faith and its only purpose is to delay the case.

10. That the intended amendment introduces a new claim against the 1st and 2nd Defendants for recovery of Kshs. 2,600,000/= being the purchase price for Plot LOC 2/KANDERENDU/1511.

11. The statutory provisions of Section 100 of the Civil Procedures Act give the Court general Power to amend proceedings 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.”

12. According to Order 8, rule 5 of the Civil Procedures Rules:

“(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.

(2) This rule shall not have effect in relation to a judgment or order.”

13. The principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal decision in **Eastern Bakery versus Castelino (1958) EA 461**. The principles were summarised as hereunder:

- “1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.
2. There is no injustice caused to the other side if it can be compensated with costs.
3. The Court will not refuse an amendment simply because it introduces a new case.
4. 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 of the suit.
5. 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, e.g. by depriving him of a defence of limitation.
6. The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.
7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles”.

14. Further Gicheru JA. in the **Central Kenya Limited vs. Trust Bank Limited and 5 Others, CA NO. 222 of 1998**: -

“...that a party is allowed to make such amendments as maybe 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”.

15. In this case the Plaintiff, interalia sought the orders as follows;

- a) A permanent injunction restraining the 1st and 2nd Defendant by themselves from entering into agreements affecting the land known as LOC.2/KANDERENDU/1511 with third parties without involving the Plaintiff.
- b) A permanent injunction restraining the 3rd Defendant himself, his employees, servants or agents barring him from trespassing, disposing, wasting, transferring, alienating, charging encroaching or in any other manner dealing in or selling the Land Reference No. LOC.2/KANDERENDU/1511.
- c) General damages for trespass be borne by the 3rd Defendant.

16. The Defendants filed a joint defence. However upon the suit property having been cancelled and reverted to LOC 2/KANDERENDU/640 under a judgment in Environment and Land Court 278 of 2014, the 3rd Defendant has found it necessary to now amend the defence to include a Counterclaim against the 1st and 2nd Defendants for refund of Kshs. 2.6 Million being the purchase price allegedly paid for LOC 2/KANDERENDU/1511 which as stated now in non-existent. I have perused the draft defence and counterclaim on record and it is clear to me that the same is not an amended defence but a fresh defence and counterclaim. In it, the 3rd Defendant set his defence against the Plaintiff's claim as well as placed a counterclaim against the Defendants. In my view the pleading termed counterclaim is not a counterclaim but a cross claim against his Co – Defendants. The initial joint defence filed on the 9/12/2014 has not been amended at all. In essence if this pleading is allowed it will mean that the 3rd Defendant will have filed two sets of defences and counterclaims, one against the Plaintiff and another one against his Co- Defendants.

17. Guided by the decision in **Eastern Bakery versus Castelino(1958) EA 461**, it is the conclusion of this Court that if the 3rd Defendant's defence and counterclaim is taken to be an amendment of the earlier defence then that action will prejudice the 1st and 2nd Defendants who will have been deprived of a defence and counterclaim. In such a case the prejudice that shall be visited on them is such that it will cause hardship and injustice as they will have no foundation to anchor their defence on.

18. In the event that the Court grants the alternative prayer to the 3rd Defendant to file his defence afresh, the said pleadings will introduce a new cause of action against the 1st and 2nd Defendants. This cause of action subject to Limitation of Actions Act should and ought to be filed under a fresh suit. I say this because the said cause of action though not targeted at the Plaintiff, if allowed is likely to introduce a *new and/or inconsistent cause of action against the Plaintiff*. The 3rd Defendant has all along known of the possibility of this cause of action and he must have faltered in filing a joint defence and counterclaim in the first place. In any event there is no evidence that the said 3rd Defendant has withdrawn his joint statement of defence and counterclaim. Allowing the application therefore amounts to an abuse of the process of the Court.

19. In the end the application has no merit. It is dismissed with costs.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 31ST DAY OF OCTOBER 2018

J G KEMEI

JUDGE

Delivered in open Court in the presence of:

Mbugua HB for Maina Kagura for the Plaintiff/Respondent

Defendant 1 – Absent

Defendant 2 - Absent

Defendant 3 – Absent

Irene and Njeri, Court Assistants