



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT KAJIADO**

**ELC CASE NO. 862 OF 2017**

**(Formerly Machakos ELC No. 360 of 2012)**

**JOSEPH KUYO LEGEI.....PLAINTIFF**

**VERSUS**

**KANTAI OLE NTUSERO.....DEFENDANT**

**RULING**

What is before me for determination is the Defendant's Notice of Motion application dated the 4<sup>th</sup> May, 2018 brought pursuant to Section 1A, 1B, 3, 3A of the Civil Procedure Act, Order 7 Rule 8(3), (5), (7) & (8) of the Civil Procedure Rules and all the other enabling enactments. In this application, the Defendant seeks leave to file an amended Defence and Counterclaim. The application is premised on the grounds, which in summary is that a Defence was filed without a Counterclaim contrary to the Defendant's instructions to his lawyer. The Defendant has incurred huge loss of use of the suit land since the Plaintiff refused to pay the balance of the purchase price as well as vacate it. The Counterclaim is for an order of eviction as well as mesne profits against the Plaintiff from the date he occupied the suit land until the date he vacates.

The application is supported by the affidavit of the Defendant KANTAI OLE NTUSERO where he deposes that his late father bequeathed him land parcel number KAJIADO/ KAPUTIEI – NORTH/ 15760 where he resides with his family. He avers that in 2006, he subdivided land parcel number KAJIADO/ KAPUTIEI – NORTH/ 15760 into three parcels including KAJIADO/ KAPUTIEI – NORTH/ 44786 and KAJIADO/ KAPUTIEI – NORTH/ 44787. He claims that on 27<sup>th</sup> September, 2006, he secretly as well as unlawfully entered into an agreement with the Plaintiff to sell to him 10 acres out of the suit land which he was holding as a trustee. He explains that he never obtained proper legal advise before he signed the agreement at the Plaintiff's home. He denies that the Advocate Mayiani Senkale was present at the Plaintiff's home when they signed the agreement and contends that he had no legal authority to enter into an agreement with the Plaintiff. He insists he sought to refund the purchase price but the Plaintiff refused and by that time he had excised 10 acres of the suit land and allowed the Plaintiff to take up occupation of the said portion. He reiterates that since the Plaintiff declined to vacate the suit land, his wife lodged a complaint at the then Kajiado Land Disputes Tribunal vide TC /289/04/011 against the Plaintiff and himself. Subsequently the Plaintiff also sued him and his wife vide Machakos Misc case no. 276 of 2011 and after the said case was determined, the Plaintiff has filed the instant suit seeking specific performance.

The application is opposed by the Plaintiff who filed Grounds of Opposition dated the 3<sup>rd</sup> September, 2018 where he states that his suit having been heard and closed on 21<sup>st</sup> March, 2018, the instant application is extremely prejudicial to him. He states that the Application has been brought too late in the day as he has tendered his evidence and is a calculated delay in the finalization of the suit. He insists the Defendant's Advocates participated in the pre – trial of this suit and confirmed the same for trial and this application amounts to a fishing expedition.

Both parties submitted on the application which arguments I have considered.

**Analysis and Determination**

Upon perusal of Notice of Motion application dated the 4<sup>th</sup> May, 2018, including the supporting affidavit and Grounds of Opposition, the only issue for determination is whether the Defence should be amended to include a Counterclaim.

I note the matter had proceeded for hearing and the Plaintiff closed his case on 21<sup>st</sup> March, 2018. Further, that the Defense hearing was scheduled for 1<sup>st</sup> October, 2018 but the Defendant filed this application seeking leave to amend the Defence to include a Counterclaim, which application has been opposed by the Plaintiff. From the court records, both parties were present in Court on 24<sup>th</sup> October, 2017 during pre trial, when they were granted leave to file further documents. Further, on the said date they mutually agreed to schedule the suit for hearing on 21<sup>st</sup> March, 2018.

Order 8 of the Civil Procedure Rules gives the Court discretion to grant leave to a party seeking to amend their pleadings. More specifically Order 8 rule 5 of the Civil Procedure Rules stipulates as follows: ' (5) **An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.**'

In the case of Rose Kandie & Anor V Esther Jepkemboi Kiplangat (2016) eKLR, the Court of Appeal held as follows: ' **In our view, the amendments that fell into the third category which the courts rightly rejected were: paragraphs 3A, 9A and 9C introducing the defence of frustration; paragraph 10C introducing the cause of action in trespass; paragraph 10D introducing the defence of lack of capacity to contract; paragraph 12C asserting unavailability of the remedy of specific performance; and paragraphs 20 and 21**

**introducing for the first time claims for the remedies of eviction and damages for persistent annoyance. Considering that the plaintiffs' case was already closed and that the defence case had already commenced, and considering further that the proposed amendments were being introduced over eight years after the pleadings had closed, we think that the amendments in the third category would have occasioned injustice to the plaintiffs.'**

Insofar as the above cited legal provisions stipulate that courts should allow amendments at any given time, I opine that the opposing party should not be prejudiced. In applying the above dicta to the current scenario, it is my considered view that the proposed amendment and introduction of the counterclaim at this juncture is prejudicial to the Plaintiff who had already closed his case while the Defendant seeks to introduce a new cause of action that will culminate in the pleadings being reopened, resulting in the delay in hearing of the instant suit. I note the Defendant had a lot of time to apply for amendment of the Defense before the hearing date but he failed to do so. It is my considered view that this application was an afterthought after the Defendant had heard the evidence of the Plaintiff.

It is against the foregoing that I find the application dated the 4<sup>th</sup> May, 2018 unmerited and dismiss it with costs. I further direct the parties to take a date for the Defense case.

**Dated signed and delivered in open court at Ngong this 13th day of November, 2018.**

**CHRISTINE OCHIENG**

**JUDGE**