



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MURANG'A

ELC NO. 118 OF 2017

FRANCIS MAINA MUGO - **1ST PLAINTIFF**

PETER MUCHOKI MUGO - **2ND PLAINTIFF**

VS

CHURCH COMMISSIONER FOR KENYA LIMITED - **1ST DEFENDANT**

BISHOP JULIUS WANYOIKE, THE BISHOP A.C.K THIKA DIOCESE - **2ND DEFENDANT**

JAMES KAMANDE MWANGI

JOSEPH KIMANI KAMAU (SUING AS THE CHAIRMAN AND SECRETARY OF

NDABATABI SELF HELP GROUP) - **3RD DEFENDANT**

THE NATIONAL LAND COMMISSION - **4TH DEFENDANT**

RULING

1. The ruling arises from Notice of Motion dated 11/7/18 by the Defendants seeking to amend the Counter claim in form of the draft attached.
2. The application is based on the grounds as follows;
 - a. That the Plaintiff's and the Defendants herein are in occupation of LR NO. KAKUZI/KIRIMIRI BLOCK III/38 (NDABATABI) and have competing claims over the suit land.
 - b. That the Defendants have filed a Counter claim to the suit herein dated 14th January 2017 which Counter claim changes the designation of the parties advancing the Counterclaim by naming them as Plaintiffs, which designation is likely to create confusion in the matter.
 - c. That it is therefore in the interests of justice that the Defendants be allowed to amend the Counterclaim herein by changing the designation of the parties advancing the Counterclaim and naming them as Defendants.
3. It is supported by the Supporting Affidavit of Daniel Gachau Mwangi Advocate who reiterated the grounds above.
4. The Notice was opposed by the Respondents who filed grounds of opposition as follows;
 - a. The application as drawn and filed is fatally defective, mischievous incompetent, frivolous, vexatious and an abuse of the due process of the law and Court – the same is meant to mislead the Court, on past orders and directions issued.
 - b. The Defendants continue to inundate the Court with frivolous applications to frustrate the hearing of the main suit.
 - c. Pursuant to the orders of the Court as issued on the 29/11/2017 and 18/1/2018 the application as before Court is not merited and

does not lie.

d. A party may not be allowed to amend what does not legally exist.

5. The parties have filed Written Submissions which I have read and considered.

6. I have perused the record and note as follows; The Defendants by way of Notice of Motion dated 2/10/2017 sought orders to file a Counterclaim and enjoin the National Land Commission and such other parties as they deemed necessary. On the 29/11/17 by consent of the parties the Notice of Motion dated 2/10/17 was allowed. The Court ordered the Defendants to amend its defence and include a Counterclaim and serve the National Land Commission within 14 days from 29/11/17. Corresponding leave was granted to the Plaintiffs to respond, if need be.

7. On the 18/1/18 the Court was informed that the National Land Commission had not responded to the claim. From the record the Defendants filed its Counterclaim on 18/1/18 instead of 13/12/17, which was in 14 clear days from 29/11/17. This Counterclaim was filed out of time without the leave of the Court. According to the record no leave was sought at all.

8. On the 15/2/17 the Plaintiff's Advocate brought to the attention of the Court that there are documents on record filed without the leave of the Court and that there was need for the Defendant to regularize them. The parties took a date for 15/2/18 for such directions but the Advocate for the Defendants was absent in Court.

9. On 18/4/2018 the Defendants' Counsel informed the Court that he had served the National Land Commission with the Counterclaim. No evidence that he sought leave of the Court in respect to the Counterclaim on record filed on 18/1/18 was presented before the Court.

10. On 3/7/18 the Defendant's Counsel sought to amend the Counter claim to rectify a mistake which related to how the Defendants had been named as Plaintiffs instead of Defendants. The Court directed the parties to file a formal application, which application was finally filed on 9/7/18. This is the application which is subject to the ruling.

11. Order 1 rule 9 of the Civil Procedure Rules provides as follows;-

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

Order 8 rule 3 & 8 provides as follows;

“3. (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the Court may 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, allow any party to amend his pleadings.

(2) Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the Court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as Plaintiff or as Defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(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.

8. The Court may hear and determine an oral application made under this Order”.

12. I have reviewed the application as well as the draft Counterclaim to be amended which shows that the correction to be amended is in relation to the way the Defendants have been named as Plaintiffs instead of Defendants. The drafting of the Counter claim could have been better. As far as the amendments are concerned, the same was amended by way of consent of the parties on 29/11/17 however the Defendant failed to file /comply with the orders given on 29/1/17 requiring the Defendant to file and serve with amended Counter claim within 14 days. According to the record, the amended Counter claim was filed on 18/1/18 out of time and without the leave of the Court. No explanation has been given by the Defendant for his wanton disobedience of this Court orders.

13. In the end the Court strikes out the amended Counter claim which was not appropriately filed (no amendments underlined as per the provisions of ^{Order} 8 rule 7 (2) filed on 18/1/18. The reason for striking out is because it was amended out of time and with no leave of the Court. With that Counter claim having been struck out, there will be no pleading to be amended.

14. The application is therefore not merited and it is dismissed with costs to the Plaintiffs.

Orders accordingly.

DELIVERED, DATED AND SIGNED AT MURANG'A THIS 6TH DAY OF DECEMBER 2018

J.G. KEMEI

JUDGE

Delivered in open Court in the presence of:

Kirubi for the 1st & 2nd Plaintiffs.

Defendants; 1

2 Ms Githinji for the Defendants Present.

3

4th Defendants – Absent.

Irene and Njeri, Court Assistants