REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT KISII

LAND CASE NO. 189 OF 2010

AGNES MORAA NYANGESO …….... 1ST PLAINTIFF

DOUGLAS OBWOGE NYANGESO ……. 2ND PLAINTIFF

VERSUS

JOSEPH BARONGO MONYANCHA …….... 1ST DEFENDANT

ISAAC MAONA OKENYO …… 2ND DEFENDANT

R U L I N G

1. The 1st defendant's application dated 29th April 2016 seeks leave to amend the statement of defence dated 27th March 2014 to introduce a counterclaim. The application is supported on the grounds set out on the face of the application and on the affidavit sworn in support by the 1st defendant. Interalia the 1st defendant avers that at the time he retained his previous advocates they were not only to file a statement of defence but also to file a counterclaim. The 1st defendant states that he believed that the advocates had executed his instructions and had filed a defence and counterclaim. The 1st defendant further avers that he only discovered his previous advocates had not filed a counterclaim on 18th June 2015 when the plaintiff's case was heard. The 1st defendant states that it was a mistake and/or lapse on the part of his previous advocate to fail to file a counterclaim. The 1st defendant therefore seeks leave of the court to be allowed to amend his defence to plead a counterclaim and further avers that unless the leave is granted he will be denied and/or deprived of the opportunity to plead the counterclaim and will hence be prejudiced as he will not be able to ventilate his claim against the plaintiffs.

2. The plaintiffs/respondents filed grounds of opposition to the 1st defendant's application on 20th June 2016. Interalia the plaintiffs in the grounds of opposition aver that:-

(i) The application has been brought too late in the day after the plaintiffs have given evidence and closed their case.

(ii) The application is calculated to delay the finalization of the suit to the prejudice of the plaintiffs since the 1st defendant is in occupation.

(iii) That the purported sale to the 1st defendant was an exercise in futility as the alleged seller one Joseph Ratemo Nyangeso (step son to 1st plaintiff) had no locus standi to effect the sale of a deceased person's property before succession had been undertaken.

(iv) The intended counterclaim discloses no reasonable cause of action against the plaintiffs and has no chances of succeeding.

3. The plaintiffs claim vide the plaint filed on 7th July 2010 was that the defendants had unlawfully staked claim to a portion of land parcel **Bogiakumu/1296** (Plot No. 10 Itibo). The plaintiffs claimed that the defendants had without any consent and/or authority commenced the construction of structures thereof and sought an order of permanent injunction restraining the defendants from constructing any structures thereon and an order for removal of any structures that may have been put thereon by the defendants. As per the record the 1st defendant filed a statement of defence dated 10th September 2010 through the law firm of E. M. Mochama & Co. Advocates. Paragraph (3) of the statement of defence is in the following terms:

3.That the 1st defendant is a purchaser of a portion of land known as Plot No. 10 Itibo which is registered in the names of Sabastiano Nyangeso who is now deceased having purchased it on 29th December 2007 from one Joseph O. Nyangeso.

4. The law firm of Minda & Co. Advocates filed a Notice of Change of Advocates dated 12th March 2014 on behalf of the 1st defendant taking over the conduct of the matter from E. M. Mochama & Advocates who hitherto had acted for the 1st defendant. The firm of Minda & Co. Advocates on 29th April 2014 notwithstanding the 1st defendant had a defence on record filed a fresh statement of defence dated 27th March 2014 resulting in the 1st defendant having two sets of defences on record. Paragraphs 6 and 7 of the new statement of defence was in the following terms:-

6.The 1st defendant avers that he has beneficial interest over a portion measuring 32feet by 100feet of the property Wanjare/Bogiakumu/1296 which he purchased from Joseph O. Nyangeso a son of the deceased registered proprietor after the foresaid property had been subdivided amongst the deceased's beneficiaries awaiting succession.

7.The 1st defendant avers that the plaintiffs just like him fall in the cluster of the deceased's beneficiaries albeit them as widow and son respectively and the 1st defendant as "purchaser".

5. The court record is unclear how the firm of Oguttu-Mboya & Co. Advocates who have filed the instant application came to be on record for the 1st defendant as a perusal of the record does not show that any Notice of Change of Advocate was filed for and on behalf of the firm. However the record shows that Mr. Ochwangi advocate of the said firm appeared for the 1st defendant on 18th June 2015 when the suit was scheduled for hearing and he participated in the proceedings. He cross examined the plaintiffs when they gave evidence on that date and further appeared before me on 25th November 2015 when I gave directions respecting the further hearing of the suit since the same was part heard before my predecessor who had by then been transferred to another station.

6. The parties argued the 1st defendant's application by way of written submissions. The plaintiffs filed their brief submissions on 8th August 2016 while the 1st defendant/applicant filed his submissions on 11th August 2016. I have reviewed the pleadings and the submissions filed by the parties and the issue that stands out for determination by the court is whether the 1st defendant has firstly, laid out an appropriate basis to warrant the court to grant leave for amendment, and secondly whether allowing the 1st defendant to amend the defence and to plead a counterclaim would be prejudicial to the plaintiffs.

7. Under Order 8 Rule 3 of the Civil Procedure Rules the court has a wide discretion to allow amendments to pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just. As a general rule the court will freely allow pleadings sought before the hearing provided they can be made without occasioning prejudice or injustice to the other party. In the case of **Shah –vs- Aperit Investments S. A & Another [2002] 1KLR 130** the appellate judges stated thus:-

"We are in agreement with the learned judge that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs."

This was in line with the holding in the case of **Eastern Bakery –vs- Castelin [1958] EA 461** which their Lordships referred to with approval.

8. In the case of **Central Kenya Ltd –vs- Trust Bank Limited [2000] 2 E.A** which the 1st defendant also referred to in support of his submissions the appellate judge stated thus in their judgment:-

"It is trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to re-open the same subject of litigation (See Order 11. Rule 1 of the Civil Procedure Rules) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendments of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs See Beoco Ltd –vs- Alfa Laval Co. Ltd [1994] 4 All ER 464."

9. The amendment sought by the 1st defendant is to enable the 1st defendant to plead a counterclaim which he states became apparent was necessary to do after the plaintiffs testified. The 1st defendant admits that as at 29th December 2007 when he allegedly entered into an agreement to buy a portion measuring 32feet by 100feet from one Joseph O. Nyangeso the latter was infact not the registered owner of the subject property, the subject of sale but his deceased father. The plaintiffs have pleaded and submitted that the said Joseph O. Nyangeso could not have had the locus to deal with the suit property and he could not particularly dispose the property of a deceased person without first obtaining grant of letters of administration to the estate of the deceased. The legal position is that only a person who has obtained grant of letters of administration has the authority and capacity to deal with the estate of a deceased person under the provisions of Section 82 of the Law of Succession Act Cap 160, Laws of Kenya. Section 82 **Law of Succession Act** provides in part as follows:

82. Personal representative shall, subject only to any limitation imposed by their grant, have the following powers:

(a) to enforce, by suit or otherwise, all caused of action which, by virtue of any law, survive the deceased or arise out of his death for his estate;

(b) to sell or otherwise turn to account, so far as seems necessary or desirable in the execution of their duties, all or any part of the assets vested in them, as they think best:-

Provided that-

(i) ……

(ii) No immovable property shall be sold before confirmation of the grant;

It is doubtful whether the intended counterclaim to the extent that it is founded on an agreement that was entered into by a person who had no locus standi to deal with the suit property since the property formed part of the estate of a deceased person and no letters of administration had been taken out raises a reasonable cause of action against the plaintiffs. I do not think it does.

10. Be it as it may be, the application for leave to amend the defence to include a counterclaim is being made after the plaintiffs have given evidence and closed their case. By the 1st defendant's admission he

realized he needed to have filed a counterclaim after the plaintiffs had testified. In my view what the 1st defendant is attempting to do is to fill the gaps that have become evident in his case after hearing the evidence of the plaintiffs. The court cannot properly allow a party to amend his pleadings after he has heard the evidence of his opponents where the gaps in his case are revealed and the object of the amendment is to plug and/or fill those gaps. In the present matter the 1st defendant's defence needed to be amended to introduce a counterclaim before the suit was listed for hearing. This is not a case of genuine mistake or inadvertence on the part of the advocate which the court could excuse but rather a case of utter casualness and ineptitude on the part of the 1st defendant and his advocates. Order 11 of the Civil Procedure Rules enjoins the court and the parties to settle all pre trial preparations before the suit is fixed for hearing. It is during the pretrial preparations that the 1st defendant should have noted and realized that he needed to amend his defence.

11. The plaintiffs proceeded with the case and gave evidence on the basis that there was no counterclaim. To allow the application at this stage would mean the plaintiffs would have to discard their evidence since at any rate they would have to file a defence to the counterclaim and/or amend their own plaint as the case may be. In my view allowing the 1st defendant's application would prejudice the plaintiffs and would occasion injustice to them which cannot be compensated for by an award of costs. I decline to allow the 1st defendant's application dated 29th April 2016 and the same is ordered dismissed with costs.

12. Orders accordingly.

Ruling dated, signed and **delivered** at **Kisii** this **17th day** of **February, 2017**.

J. M. MUTUNGI

JUDGE

In the presence of:

N/A for the plaintiff

N/A for the 1st defendant

N/A for the 2nd defendant

Milcent Court assistant

J. M. MUTUNGI

JUDGE