



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT OF KENYA

AT NAKURU

ELC NO. 83 OF 2013

DOMINIC MBURU NJUGUNAPLAINTIFF

VERSUS

PETER NJUGUNA GITAU.....1ST DEFENDANT

GATIMU KARIITHI2ND DEFENDANT

RULING

(Application to amend defence; application allowed)

1. The application before me is that dated 27 July 2017 filed by the 2nd defendant. It is an application seeking leave to amend the statement of defence principally to include a counterclaim. The supporting affidavit is sworn by one Gatimu Kariithi who has stated that he holds a power of attorney donated by the 2nd defendant. He has averred that the intended amendment is meant to bring all relevant facts before the court. The application is opposed by the plaintiff who has inter alia contended that the application will introduce a counterclaim which is time barred. The 1st defendant on his part has not opposed the application.

2. The suit itself was commenced on 13 January 2010. The case of the plaintiff is that on 2 July 2002, the 1st defendant sold to the plaintiff the land parcel Nakuru Municipality Block 16/286/15 now Nakuru Municipality Block 16/634 (herein also described as the suit land) at a consideration of Kshs. 250,000/=. It is averred that upon payment, the plaintiff took possession of the land and made developments including four family units. It is pleaded that on 4 January 2010, the 2nd defendant came to the plot and claimed that the same land has been sold to him by the 1st defendant and sought to have the plaintiff move out of the property. It is contended that having sold the land, the plaintiff had no title to pass to the 2nd defendant. In his suit, the plaintiff has inter alia asked for a declaration that he is the owner of the suit property and cancellation of the title issued to the 2nd defendant.

3. In his statement of defence, the 2nd defendant/applicant averred that he purchased the suit property on 15 May 2002 and he was issued with a certificate of lease on 3 July 2007. He asserted that he is entitled to ask the plaintiff to vacate the suit property.

4. I have noted that through this application, what the 2nd defendant wants to add is a counterclaim to seek orders of vacant possession and permanent injunction against the plaintiff. This being an application to amend, the provisions of Order 8 apply and I believe Order 8 Rule 3 (1) and (2) are on point in this application. The same are drawn as follows:-

Order 8 Rule 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.

5. In as much as the plaintiff has contested the application by claiming that the amendment will introduce a counterclaim which is time barred, it will be seen that Order 8 Rule 3 (2) still allows a court to allow an amendment even where there is a question on whether the same will introduce a claim which is time barred. The essence of allowing an amendment is so that the party can plead his/her case as he/she wishes. It is only a pleading, that is, what the party wants to present in the case, and allowing it does not mean that the pleadings are also allowed. Whether or not a party will succeed on the basis of the pleadings that he has presented will be determined after a full hearing on merits. The issue of whether or not the case of the 2nd defendant is time barred is therefore an issue that can be brought forth during the hearing of this suit. I observe that the hearing of this suit is yet to commence and the plaintiff will of course have a chance to counter the pleadings of the 2nd defendant. I therefore see no prejudice which the plaintiff will suffer, and I am unable to find any reason, why I should not permit the 2nd defendant to amend his case.

6. I therefore allow the application to amend and order the 2nd defendant to proceed and effect amendments to his defence within 14 days from today. The 2nd defendant will however shoulder the costs of the application as he had the opportunity to properly plead his case in the first instance. In essence costs to the plaintiff.

7. It is so ordered.

Dated, signed and delivered in open court at Nakuru this 19th day of October, 2017.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU

In presence of : -

Mr. Maina for the plaintiff/respondent

Mrs Murande holding brief for M/s Henia Anzala & Co. Advocates for the 2nd defendant/applicant

No appearance on the part of M/s Robert Ndubi & Co. Advocates for the 1st defendant

Court Assistant: Carlton Toroitich.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

AT NAKURU