



**REPUBLIC OF KENYA**

**ENVIRONMENT AND LAND COURT AT KISII**

**CASE NO. 32 OF 2008**

**THE REGISTERED TRUSTEES REDEEMED GOSPEL CHURCH .... PLAINTIFF**

**VERSUS**

**KENNEDY BOSIRE GICHANA ..... DEFENDANT**

**RULING**

1. The defendant/applicant by a Notice of Motion application dated 21<sup>st</sup> October 2015 brought under Order 7 Rules 3 and 8, Order 8 Rules 3 and 5 of the Civil Procedure rules seeks leave to amend the defence to include a counterclaim and further that the annexed draft amended defence and counterclaim be deemed as duly filed and served upon payment of the requisite court fees. The application is premised on the following grounds set out on the face of the application and on the supporting affidavit sworn by the defendant:-

**(a) That there is need for the defendant/applicant to amend the defence to include a counterclaim against other parties to bring forth the real matters in controversy between the parties before this matter can be set down for hearing.**

**(b) That the defendant/applicant cannot amend the defence to include a counterclaim unless with leave of the court.**

**(c) That the defendant wishes to amend its defence to include a counterclaim.**

2. In the supporting affidavit the defendant/applicant states that he had on 15<sup>th</sup> January 2010 served the Attorney General with the requisite notice that he intended to institute a suit against the Commissioner of Lands and the District Land Registrar Kisii for appropriate redress in regard to the suit property but since there was a pending judicial review the defendant opted to await its determination before taking any action. The copy of notice to the Attorney General and the judgment on the judicial Review Application are annexed and marked “KBG1” and “KBG2” respectively. The defendant/applicant avers that the National Land Commission is a necessary party so as to explain the process of issuance of letters of allotment and other documents of title and/or ownership. The amendment he claims is necessary for the effectual and complete adjudication of the real questions in controversy in the suit.

3. The defendant/applicant further avers that no prejudice will be occasioned to the plaintiff/respondent if the amendments are allowed. The defendant further asserts the proposed amendments stem substantially from the facts in respect of which the plaintiff/respondent claims relief in the suit and no injustice or prejudice will be occasioned to the plaintiff if the leave is granted.

4. The plaintiff/respondent has filed a statement of grounds of opposition to the application by the

defendant dated 22<sup>nd</sup> October 2015. Interalia the grounds are:-

- 1. The Notice of Motion is misconceived, incompetent and untenable.**
- 2. The application is subjudice the Notice of Motion application dated 4<sup>th</sup> February 2010 filed on 5<sup>th</sup> February 2010 which has not been heard and/or disposed of and hence the defendant's application contravenes Section 6 of the Civil Procedure Act.**
- 3. The intended amendment and the joinder of parties sought would offend the provisions of the Limitation of Actions Act, Cap 22 Laws of Kenya as the action is time barred.**
- 4. The defendant/applicant has been aware and has had knowledge of the facts and or circumstances underlining the intended amendment and would therefore be undeserving of the exercise of discretion in his favour.**
- 5. The defendant/applicant is guilty of inordinate delay in bringing the application.**
- 6. The defendant/applicant's application is devoid of any merit and otherwise constitutes abuse of the due process of the court.**

5. On perusal of the court record there is apparent confusion. The defendant/applicant on 5<sup>th</sup> February 2010 filed the chamber summons application dated 4<sup>th</sup> February 2010 which interalia sought leave to amend the defence filed on 30<sup>th</sup> May 2008 to include a defence and counterclaim as per the amended draft defence and counterclaim. The plaintiff filed a statement of grounds of opposition dated 26<sup>th</sup> February 2010. This application was on 19<sup>th</sup> January 2012 fixed for hearing by consent on 3<sup>rd</sup> May 2012. The application was not heard then but was refixed for hearing on 19<sup>th</sup> September 2012 again by consent. There is no record that anything happened on 19<sup>th</sup> September 2012. The next action on the file was on 22<sup>nd</sup> July 2015 when the matter was listed for notice to show cause for dismissal for want of prosecution under Order 17 Rule 2 (1) of the Civil Procedure Rules. Chacha Mwita J. referred the matter to the Environment and Land Court as it related to land. On 6<sup>th</sup> October 2015 the matter was fixed before me for case conference and it was then Mr. Momanyi advocate for the defendant indicated he wished to amend the defence to include a counterclaim and as Mr. Ochwangi advocate was opposed to grant of leave the court directed the defendant to file a formal application for leave to amend. The defendant did not draw the court's attention to the pending application for leave and instead proceeded to file the Notice of Motion application dated 21<sup>st</sup> October 2015 which virtually seeks the same orders as the application dated 4<sup>th</sup> February 2010.

6. On 3<sup>rd</sup> March 2016 the court gave directions that the plaintiff's application dated 21<sup>st</sup> October 2015 be argued by way of written submissions. The submissions filed by the defendant/applicant relate to the application dated 4<sup>th</sup> February 2010 and filed on 5<sup>th</sup> February 2010 and not the application dated 21<sup>st</sup> October 2015 in respect of which the court had given directions. The plaintiff's response submissions dated 27<sup>th</sup> May 2016 filed on 30<sup>th</sup> May 2016 indeed respond to the defendant's application dated 4<sup>th</sup> February 2010 and not the application dated 21<sup>st</sup> October 2015. In the face of the earlier pending application dated 4<sup>th</sup> February 2010 which virtually sought similar orders as are sought in the later application dated 21<sup>st</sup> October 2015 the said later application was misconceived and constitutes abuse of the court process. I order the same struck out of the record and I award the costs of the same to the plaintiff.

7. As the parties have submitted in regard to the application dated 4<sup>th</sup> February 2010 the court will consider the same on its merits. The said application interalia sought the following orders:-

- 1. That the defendant/applicant be granted leave to amend his defence filed herein on 30<sup>th</sup>**

**May 2008 to include a counterclaim against the plaintiff, the Commissioner of Lands and the Attorney General as per the draft annexed hereto.**

**2. That the amended defence and counterclaim annexed hereto be treated as the defendant/applicant's defence and that the same be deemed as having been duly filed and served upon the plaintiff.**

**3. That summons to enter appearance with copy of the amended defence and counterclaim be served upon the added parties.**

8. The defendant in support of the application avers that the intended amendments are necessary to place before the court all the matters in controversy between the parties and for the court to make a determination of the issues on merits. The defendant avers that the intended amendments have been necessitated by information that has come to light in regard to the matters in controversy and hence it would be fair and just to permit the amendments so that the issues could be determined finally. The defendant further avers the intended amendments arise out of the same or substantially the same facts in respect of which relief is claimed by the plaintiff and the plaintiff will not suffer any prejudice if the leave to amend is granted.

9. The plaintiff/respondent filed a statement of grounds of opposition dated 26<sup>th</sup> February 2010 and inter alia contended the defendant's application was misconceived, that the intended amendment would be barred by limitation by virtue of Section 4 of the **Public Authorities Limitations Act**, Cap 39 Laws of Kenya and further that the issues intended to be brought forth through the amendment were subject matters in **Kisii J/R No. 6 of 2008** which was then pending and further that the applicant was guilty of inordinate delay in bringing the application. The plaintiff further contended the application was devoid of merit and was otherwise an abuse of the court process.

10. As earlier stated the parties canvassed the application by way of written submissions. I have considered the application and the submissions and the issue to be determined is whether in the circumstances and the facts the court should exercise its discretion in favour of the defendant/applicant and allow the amendment sought.

11. The discretion of the court to allow amendments to pleadings is unfettered and this is the case particularly where the hearing of the matter has not commenced. The court under Order 8 Rule 3 (2) and (5) of the **Civil Procedure Rules** can even allow amendments where the limitation period has expired provided the 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. Order 8 Rule 3 (1) permits the court to at any stage of the proceedings allow any party to amend his pleadings on such terms as to costs or otherwise as may be just and in such manner as the court may direct.

12. The Court of Appeal of East Africa in the case of **Eastern Bakery –vs- Castelin [1958] EA 461** held 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.”**

The court in the same case went on to hold that leave should only be refused where allowing the amendment will 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. The court additionally held that the main principle is that an amendment should not be allowed if it causes injustice to the other side.

13. In the proposed amendment by the defendant, he seeks to introduce a counterclaim enjoining the Commissioner of Lands as a party with the objective of having the Commissioner of Lands as the

authority who had the responsibility of allocating land and issuing titles to answer to the issues relating to the allocation and issue of title to the defendant which the Commissioner of Lands subsequently purported to revoke and/or cancel. The property in contest is the same one that the plaintiff claims ownership of and seeks the defendant to be evicted therefrom. The plaintiff like the defendant was allocated the suit land by the Commissioner of Lands and I am of the view that apart from the Commissioner of Lands being perhaps a necessary party in the proceedings the court will be placed in a better position to adjudicate on all the issues in controversy if the amendment is allowed and the parties respond to the issues.

14. While the defendant has been guilty of delay in prosecuting the application, I nonetheless consider that the ends of justice would be met if the defendant was granted leave to amend his defence to introduce the counterclaim which will enable all the issues in controversy to be determined fully. The plaintiff has pleaded that the amendment if allowed would offend Section 4 of the **Public Authorities Limitation Act**, Cap 39 but my view is the plaintiff cannot plead limitation on behalf of the proposed intended parties and besides under Order 8 Rule 3 (5) the facts giving rise to the intended joinder of the Commissioner of Lands arose out of the same facts or substantially the same facts giving rise to the plaintiff's cause of action. The plaintiff became entitled to ownership of the suit land following revocation/cancellation of the defendant's title. The plaintiff was allocated that land which the defendant asserts to be his following the revocation. That is the cancellation/revocation the defendant challenges through the counterclaim.

15. The plaintiff in my view will not be prejudiced in any way as they will have the opportunity to respond and reply to the defence and counterclaim and that whatever prejudice the plaintiff may suffer can be compensated for by an award of costs. In the premises and in the exercise of my discretion, I will grant the application dated 4<sup>th</sup> February 2010 and as I take judicial notice that the Office of the Commissioner of Lands has since the date of filing of the application become defunct I will allow the defendant to file the amended defence and counterclaim naming the National Land Commission (the successor to the Office of the Commissioner of Lands) in place of the Commissioner of the Lands in the amended pleading. In the result the defendants application is allowed and granted on the following terms:-

- (1) The defendant shall file and serve the amended defence and counterclaim within 21 days from the date of this ruling.**
- (2) The plaintiff/respondent upon service of the defence and counterclaim upon them shall have liberty to file a reply to defence and counter claim within 21 days of being served.**
- (3) The enjoined parties in the counterclaim to be served with summons to enter appearance.**
- (4) The plaintiff is awarded costs of the application assessed at kshs. 7,500/= payable within 30 days from the date of this ruling.**
- (5) Orders accordingly.**

**Ruling dated, signed and delivered at Kisii this 29<sup>th</sup> day of July, 2016.**

**J. M. MUTUNGI**

**JUDGE**

**In the presence of:**

Mr. Ochwangi for the plaintiff

Mr. Momanyi for the defendant

Mr. Ngare Court Assistant

**J. M. MUTUNGI**

**JUDGE**