



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KERUGOYA

ELC CASE NO. 62 OF 2013

JOHN NDUNGU MWANGI

(Suing as the Legal Representative of the Estate of

MWANGI MACHARIA.....PLAINTIFF/APPLICANT

VERSUS

TARSIANA WAMBURA KABUTU.....RESPONDENT/DEFENDANT

RULING

I have before me an application by the defendant dated 2nd September 2015 for leave to amend her defence to incorporate a counter-claim as per the draft amended defence. The application is supported by the defendant's affidavit sworn on the same day and is brought under the provisions of **Order 8 Rule 3 (5) of the Civil Procedure Rules**. The defendant wishes to amend her defence to include a counter-claim that she is the registered owner of land parcel No. KIINE/SAGANA/1613 which the plaintiff is illegally occupying and therefore she wishes to pray for an injunction and eviction orders. A draft amended defence is annexed to the said application.

The plaintiff has opposed the application by filing a notice of Preliminary Objection in which he states that the defence is statute barred as it come 14 years after orders had been issued by the Court as the case progressed. That the defendant has concealed material facts from this Court including that she was charged in Criminal Case No. 1023 of 2000 **REPUBLIC VS TARSIANA WAMBURA KABUTU** and since she has already admitted that her names are **TARSIANA WAMBURA KABUTU**, she is not **TARSIANA WAMBURA MWANGI** and therefore she is a stranger to these proceedings. There is also a supporting affidavit by the plaintiff annexed to that Notice of Preliminary Objection but it is not clear what the said affidavit is in support of. A reply to amended defence and counter-claim are also filed.

There is another pending application by the plaintiff dated 14th September 2015 but when counsel for the parties appeared before me, it was agreed that the application dated 2nd September 2015 be canvassed first by way of written submissions.

Submissions have now been filed both by Mr. Mathanjuki advocates for the plaintiff and Ms Wangechi advocate for the defendant.

I have considered the application, the Notice of Preliminary Objection thereto and the submissions by counsel.

From the Notice of Preliminary Objection, the following issues have been raised:-

1. *That the defence is statute barred as it comes 14 years after orders had been issued in this case.*
2. *That the defence and application are res-judicata in view of the orders issued by W. KARANJA J. (as she then was) on 29th July 2009.*
3. *That the defendant has deliberately concealed material facts from this Honourable Court including Criminal Case No. 1023 of 2006.*
4. *That the defendant under Section 35 (4) of the Evidence Act has already admitted her name to be TARSIANA WAMBURA KABUTU and not TARSIANA WAMBURA MWANGI so she is a stranger to these proceedings.*
5. *That in a sworn reply on 8th July 2009 in respect of HIGH COURT CIVIL CASE No. 14 of 2007 she referred to herself as TARSIANA WAMBURA KABUTU and gave her Identity card No. 4955256.*

I must first deal with the plaintiff's Preliminary Objection because if it is up-held, then it will bring this application to an end.

A Preliminary Objection as was said by LAW J.A in the case of MUKHISA BISCUIT MANUFACTURING CO. LTD VS WEST END DISTRIBUTORS LTD 1969 E.A 696

"..... consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the Court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration"

In the same case, Sir CHARLES NEWBOLD P stated thus:-

"A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion"

Nearer home, OJWANG J (as he then was) in ORARO VS MBAJA (2005) 1 K.L.R 141 expressed himself as follows:-

"A Preliminary Objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit.... It cannot be raised if any fact is to be ascertained or if what is sought in the exercise of judicial discretion A Preliminary Objection correctly understood is now well defined as, and declared to be a point of law which must not be blurred with factual details liable to be contested, and in any event, to be proved through the process of evidence. Any assertion which claims to be a Preliminary Objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication is not, as a matter of legal principle, a true Preliminary Objection which a Court should allow to proceed. Where a Court needs to investigate facts, a matter cannot be raised as a Preliminary Objection".

Examining the plaintiff's Preliminary Objection in light of the principles set out in the MUKHISA and ORARO cases above, it is clear that the issues raised therein are not pure points of law. Rather, they are issues that need to be clarified by evidence. For instance, it is alleged that the defence is statute barred because it comes 14 years after orders had been issued by the Court and the case progressed. It is not clear what orders are being referred to. Limitation is a matter of law and not an issue dependent on Court orders. It is also stated that the defendant has concealed material facts about a Criminal Case involving her. Again that is not a matter of law. That is a matter of fact. Then there is the issue as to

whether the defendant is **TARSIANA WAMBURA KABUTU** or **TARSIANA WAMBURA MWANGI**. The plaintiff has himself sued her as **TARSIANA WAMBURA MWANGI** and she has retained that name in her draft amended defence and counter-claim. I do not see what points of pure law have been raised and I must dismiss that Preliminary Objection.

The defendant's application seeking leave to amend the defence to incorporate a counter-claim is premised under the provisions of **Order 8 Rule 3 (5) and 5 of the Civil Procedure Rules**. **Order 8 Rule 3 (5) of the Civil Procedure Rules** reads as follows:-

“An amendment may be allowed under sub-rule (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 the 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 5 of the Civil Procedure Rules on the hand donates a general power to amend pleadings. It states:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”

The defendant here seeks to amend her defence to include a counter-claim declaring her to be the registered owner of land parcel No. KIINE/SAGANA/1613 and to injunct the plaintiff from interfering with her use, possession and enjoyment of the said parcel of land. She also seeks an eviction order to remove the plaintiff therefrom. The plaintiff on the other hand has by his plaint filed herein on 13th June 2001 sought a declaration that the same parcel of land is part of the Estate of the deceased **MWANGI MACHARIA** on whose behalf this suit has been filed. While this application to amend is coming almost fifteen (15) years after the parties had filed their pleadings, it is noted that this case is yet to commence hearing. The reason for that delay can only be known to the parties. It is however clear that this Court has a wider discretion to allow any party to amend his pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just. The Court of Appeal has stated in the case of **CENTRAL KENYA LIMITED VS TRUST BANK LIMITED 2000 2 E.A 365** as follows:-

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits provided there has been no undue delay, that no new inconsistent cause of action is introduced, that no vested or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”.

The overriding consideration in such an application is whether the amendments sought are necessary for determining the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs. As indicated above, this application has come some fifteen (15) years after pleadings have been filed. However, none of the parties have called any witness in support of their respective cases and therefore the plaintiff will not be prejudiced if the amendment is allowed. Indeed there has been no mention by the plaintiff of any prejudice that he will suffer. In his submissions, counsel for the plaintiff has referred me to what I consider to be issues of evidence to be adduced at the trial including that the defendant has not been obeying Court orders. I can see that is the subject of an application still pending and therefore I cannot touch on it. Suffice it to state that the amendment sought only seeks to include a counter-claim for the same land in dispute. There is really no new claim and if the defendant feels that she is herself entitled to orders with respect to the land in dispute, this amendment cannot be said to be ill motivated.

Considering all the above, I am persuaded that the defendant's Notice of Motion dated 2nd September 2015 is well merited and I allow it and order as follows:-

1. The amended defence and counter-claim be filed and served within 14 days from the date of

this ruling.

2. The plaintiff to reply to the amended defence and answer to the counter-claim within 14 days of service upon him of the amended defence and counter-claim.

3. The defendant shall meet the plaintiff's costs occasioned by this application.

4. To avoid any further delays in this suit, the parties are directed to comply with pre-trial direction and have this case heard and determined expeditiously,

It is so ordered.

B.N. OLAO

JUDGE

19TH AUGUST, 2016

Ruling dated, delivered and signed in open Court this 19th day of August 2016

Mr. Mathanjuki for Plaintiff absent

Ms Munene for Defendant absent

Defendant present.

B.N. OLAO

JUDGE

19TH AUGUST, 2016