



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KERICHO
ENVIRONMENT AND LAND DIVISION

E.L.C CASE NO.4 OF 2013

ROSEMARY CHEBET KOROS.....PLAINTIFF

VERSUS

SAMWEL KIPRONO SANG.....RESPONDENT

RULING

(Application for leave to amend defence to include counterclaim; leave granted but conditional to deposit of security for costs)

The application before me is that dated 25th November, 2014 filed by the defendant. The application is brought under the provisions of Order 7 Rules 8 and 9; Order 8 Rules 3 and 5 of the Civil Procedure Rules, and Sections 1A and 3A of the Civil Procedure Act. The applicant seeks the following orders :-

1. *That the defendant be granted leave to amend his statement of defence.*
2. *That the proposed 2nd and 3rd defendants be enjoined in this suit.*
3. *That the Amended Defence and Counterclaim be deemed to have been duly filed and served.*
4. *That costs of this application be provided for.*

Among the grounds cited for the application are that this suit cannot be fairly adjudicated without the proposed 2nd and 3rd defendants being made parties to the suit. The application is opposed but before I go to the gist of the objection, I think it is best that I lay down a little background to this suit.

The suit was commenced by way of plaint filed on 15th January, 2013. Briefly, the case of the plaintiff is that the defendant as the previous owner of the land parcel LR No. 631/457 (the suit property), charged it to the Housing Finance of Kenya Limited (HFCK). In the year 2009, HFCK, as chargee, in exercise of its statutory powers of sale, sold to one David Musyoka Nzuku the suit land and a transfer was effected. On 10 November 2011, David Musyoka Nzuku, sold the property to the plaintiff at a consideration of Kshs. 1,000,000/=. The property was then transferred to the plaintiff. Upon purchase, the plaintiff found the defendant occupying the suit property and demanded rent but the defendant refused to pay. Through this suit, the plaintiff wants the defendant evicted from the suit premises and for a permanent injunction to restrain the defendant from the same.

The defendant/applicant filed defence where inter alia he pleaded that the suit property belongs to him

and eviction cannot arise. He also pleaded that he shall at the appropriate time move to enjoin HFCK as party to the proceedings.

Through an application dated 19th February 2014, the defendant filed an application seeking to enjoin HFCK and David Musyoka Nzuku as third parties. That application was disallowed vide a ruling delivered on 27th March 2014. In the ruling the learned judge (Waithaka J) held *inter alia* that the application was not brought under the correct provisions of the law and that there was no evidence that the property was fraudulently transferred to the plaintiff.

It will be seen that through this application, the defendant now wants HFCK and David Musyoka Nzuku brought to this case through the avenue of amendment of defence so that the two parties may be made defendants to his counterclaim. I have looked at the draft amended defence and counterclaim annexed to the supporting affidavit. Essentially, what the plaintiff proposes to plead is that the sale of the property to David Musyoka Nzuku was fraudulent as there was no notification of the sale, no advertisement, no public auction, no valuation and that the property was sold below the market price. He seeks a declaration that the purported sale to David Musyoka Nzuku and the second sale to the plaintiff are null and void. He has also sought damages and costs.

The plaintiff has opposed this application by filing a replying affidavit. It is her position *inter alia* that the proposed counterclaim does not raise any legitimate claim against the plaintiff and therefore does not qualify to be a proper counterclaim. She has averred that she is a purchaser for value and that the applicant is a stranger to her.

Mr. Acholla for the applicant and Mr. Koko for the respondent argued their client's respective positions. Mr. Koko *inter alia* pointed out that the defendant had filed an application to include the same parties, which application was rejected. This was in reference to the Third Party application. He argued that the issues raised in that application are similar to what this application attempts to raise and therefore this application is *res judicata*. He further argued that there is no lawful counterclaim and that the claim of the defendant can be addressed by filing a separate suit.

I have considered the matter. Courts are usually liberal when it comes to allowing a party to amend his pleadings, unless, it is demonstrated that great prejudice will be caused to the other party, which prejudice cannot be remedied by an award of costs. In the case of *Eastern Bakery v Castelino (1959) EA 461*, the court held that :-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs”.

I have considered the assertion by Mr. Koko that the application is *res judicata*, but with respect, I do not agree. What was rejected was an application to introduce the intended defendants as third parties. There has been no application to amend the defence to introduce the counterclaim. It follows that an application of this nature has not been canvassed before. Neither do I think that the counterclaim is not against the plaintiff; it actually is, because the effect of success of the intended counterclaim would be to nullify the title of the plaintiff. True, the defendant can file a separate suit, but that suit will still bring forth the same issues that are to be canvassed in this case, and it cannot be that the counterclaim, if allowed to be argued within these proceedings, will prejudice the case of the plaintiff against the applicant.

That said, I must admit that I am a bit skeptical about the case that the defendant intends to introduce through his counterclaim. I know I have not heard the suit yet, but on the face of it, HFCK appear to have sold the suit property by exercise of its statutory power of sale to David Nzuku. He in turn sold the same property to the plaintiff. The property herein is registered under the Registration of Titles Act (CAP 281) (repealed), which was operative at the time of sale, and therefore the Transfer of Property Act (now repealed) applied to the transaction herein. **Section 69B** of the **Transfer of Property Act**, provided as follows :-

“S.69B (1) A mortgagee exercising the mortgagee’s statutory power of sale shall have power to transfer the property sold, for such estate and interest therein as may be the subject of the mortgage, freed from all estates, interests, rights, and encumbrances to which the mortgage has priority, but subject to all estates, interests, rights, and encumbrances which have priority to the mortgage.

(2) Where a transfer is made in exercise of the mortgagee’s statutory power of sale, the title of the purchaser shall not be impeachable on the ground-

(a) that no case had arisen to authorize the sale; or

(b) that due notice was not given; or

(c) that the power was otherwise improperly or irregularly exercised, and a purchaser is not, either before or on transfer, concerned to see or inquire whether a case has arisen to authorize the sale, or due notice has been given, or the power is otherwise properly and regularly exercised;

but any person damnified by an unauthorized, or improper, or irregular exercise of the power shall have his remedy in damages against the person exercising the power.

(3) A transfer on sale by a mortgagee, made after the commencement of the Indian Transfer of Property Act (Amendment) Act, 1959, shall be deemed to have been made in exercise of the mortgagee’s statutory power of sale unless a contrary intention appears”.*

On the face of it, the beneficiary of the sale by chargee was protected by Section 69B above, and that protection, unless fraud or other serious matter is found, has to be offered to the plaintiff as well. Prima facie, the remedy of the defendant is in damages against the chargee as provided by Section 69B (2). I inquired from Mr. Acholla what his view of Section 69B is, in respect of the intended counterclaim, but with respect, I did not receive an adequate response.

My view therefore is that , in as much as I am not averse to allowing the defendant plead his case as he wishes, and that it could very well be that he will table sufficient material at the hearing to entitle him to the prayers that he seeks, I think, given the circumstances herein, that the leave to amend ought to be conditional on deposit of security for costs. Thus, I will allow the defendant's application, and allow him leave to amend to include the counterclaim, but this will be subject to the defendant depositing a sum of Kshs. 150,000/= in court as security for costs. I will also grant costs of this application to the plaintiff for the defendant had the option of pleading his case in full in the first instance. It may also be useful that I make clear that the two intended parties, are not going to be defendants to the plaintiff's claim, but 2nd and 3rd defendants to the defendant's counterclaim.

With the foregoing in mind, I now make the following final orders on this application:-

(a) That the defendant is hereby granted leave to amend his defence to include a counterclaim but this leave is conditional and subject to the defendant depositing the sum of Kshs. 150,000/= as security for costs.

(b) That the said security be deposited in court before any amended defence is filed and this amount be deposited within 21 days from the date hereof and the amended defence be filed and served within 14 days of the deposit of the security.

(c) That in default of depositing the security within the specified period of 21 days, the leave herein will automatically lapse, and the suit to proceed as filed.

(d) The defendant will bear the costs of this application.

It is so ordered.

DELIVERED, DATED AND SIGNED AT KERICHO THIS 27TH DAY OF MARCH, 2015.

MUNYAO SILA

JUDGE

ENVIRONMENT & LAND COURT

In the presence of

Mr. Acholla for defendant/applicant

Ms. Maritim h/b for Mr. Koko for Respondent

Court assistant-Ruth