



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT

AT MALINDI

ELC CIVIL CASE NO. 201 OF 2013

TUSMA KENGA MWADZEMBA.....PLAINTIFF/RESPONDENT

=VERSUS=

KAREMBO ANTHONY MASHA.....DEFENDANT/APPLICANT

R U L I N G

Introduction:

1. What is before me is the Application by the Defendant dated 10th October 2014 seeking for the following orders:
 - (a) **That this Honourable Court be pleased to grant leave to the Defendant to enjoin one LENNOX NZAI CHOGO as a Defendant in her counterclaim out of time.**
 - (b) **That the honourable court be pleased to grant leave to the Defendant to amend her counterclaim dated and filed on the 23rd December 2013.**
 - c. **That the costs of this application be provided for.**
2. The Application has been opposed.

The Applicant's case:

3. The Defendant's Application is premised on the ground that the Intended Defendant, Lennox Nzai Chogo, sold the suit property to Margaret Kabibi Helbing while knowing that the Defendant's husband had purchased three acres from his late father and that by the time of the unlawful and fraudulent sale of the three acres to Margaret Kabibi Helbing, the Defendant had been in physical possession Of the same since the year 2001.
4. According to the Defendant, it is important for Lennox Nzai Chogo to be enjoined as a Defendant in the Counterclaim as a Defendant for a fair and just determination of the suit and the Counterclaim.

Submissions:

5. The Defendant's advocate submitted that at the time of the sale of the suit property to the donor, three acres of the said land formed part of the Estate of the Applicant's deceased husband and the

- said sale amounted to meddling with the Applicant's deceased husband's Estate.
6. According to counsel, once the Intended 2nd Defendant comes on board, the three parties in the matter will be afforded an opportunity to ventilate their cases. Counsel relied on the provisions of Order 7 Rule 8 and 9 of the Civil Procedure Rules.
 7. In his submissions, the Respondent's advocate submitted that the Applicant is introducing issues involving a deceased person; that the Intended 2nd Defendant is not the beneficiary of the Estate of Karisa Chongo and that the Application's sole intention is to delay the hearing of the suit.

Analysis & findings:

8. The Defendant in this matter is seeking to enjoin Lennox Nzai Chongo, the son of the late Karisa Chogo Nzai.
9. It is the Defendant's/Applicant's case that as at the time Lennox sold the suit property to Kabibi on 9th July 2008, the Defendant's husband had already purchased three acres thereof from his late father in the year 2001. The agreement has been annexed on the Affidavit.
10. The Plaintiff in this matter is representing Margaret Kabibi, who is said to be the registered owner of the suit property. In the Plaintiff's Affidavit, the Plaintiff has deposed that Ms Kabibi bought the suit property from Lennox, the Intended 2nd Defendant.
11. In view of the deposition by the Defendant that her late husband purchased a portion of the suit property from Lennox's father, and that Lennox is the administrator of the Estate of his late father, the joinder of Lennox in the suit is necessary for the determination of the real matters in dispute.
12. The said joinder will enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. The joinder will also avail the intended Defendant an opportunity to state the circumstances under which he sold the suit property to Ms Kabibi.
13. Indeed, the Application before me is in compliance with Order 1 Rule 3 of the Civil Procedure Rules which states as follows:

“All persons may be joined as defendant against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where if separate suits were brought against such persons any common question of law or fact could arise.”

Order 7 Rule 8 of the Civil Procedure Rules on the other hand provides as follows:

“When a Defendant by his defence sets up any Counterclaim which raises questions between himself and the Plaintiff, together with any other person, he shall add to the title of his defence a further title.....setting forth the names of all persons, who if such Counterclaim were to be enforced by cross-action, would be defendants to such cross-action.

14. The alleged transaction between the Intended Defendant's father and the one between the Plaintiff and the Intended Defendant arises out of the same act or a series of acts and falling within the purview of Order 1 Rule 3 and Order 7 Rule 8 of the Civil Procedure Rules..
15. Consequently, I shall, which I hereby do, allow the Application dated 10th October 2014 with no orders as to costs.

Dated and delivered in Malindi this 15th day of May, 2015.

O. A. Angote

Judge