



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

LAND CASE NO. 122 OF 2012

ESTATE OF SYLVESTER KIMAGUT SANG

REPRESENTED BY JENNIFER CHEBET SANG) ::::::::::: PLAINTIFF

VERSUS

JANE JEPTOO SAWE ::::::::::: DEFENDANT

RULING

1. The applicant Jane Jeptoo Sawe brought a notice of motion dated 5/8/2014 in which she seeks leave of the court to amend her defence to include a counter-claim. The applicant contends that she recently came across a letter of consent allowing sub-division of Mateket Farm which was issued in 1987. She further contends that the said consent included the six acres which her husband had bought from the late husband of the plaintiff.
2. The application is opposed by the respondent Jennifer Chebet Sang through a replying affidavit sworn on 6/9/2012. The respondent contends that the application for amendment has been brought belatedly. That the plaintiff/Respondent has already closed her case and that the applicant/defendant is almost closing her case and that allowing the application at this late stage will be unfair as it will entail the plaintiff re-opening her case.
3. The respondent further contends that there was no consent of the land control board given and therefore the transaction between the husband of the applicant and the respondent became null and void. The respondent further contends that the applicant's counter-claim is incompetent and is barred by limitation of time.
4. I have gone through the applicant's application as well as the replying affidavit of the respondent and the submissions of counsel. Before I go to the merits of the application, a brief background of this case is necessary. The applicant is the wife of one Gideon Bore who is now deceased. The respondent is wife of Sylvester Kimagut Sang who is also deceased. Between April, 1983 and April, 1985 the applicant's husband bought 6 acres from the husband of the respondent.
5. In 1987 the respondent who had realised that her husband had sold land to the the applicant's husband went before the Tribunal and filed a case against the applicant's husband. The Tribunal ruled that the applicant's husband be given 3 acres. Both the respondent and the applicant's husband were dissatisfied with the Tribunal verdict. The applicant's husband petitioned the court to order that the dispute be referred back to the D.O for re-consideration. The applicant's husband however died before the D.O could bring back the re- considered dispute to court.

6. After Gideon Bore died in 2005, his wife (the applicant) went before Kaplamai Land Disputes Tribunal where she filed a case against the respondent's husband. The Tribunal ruled that the applicant be given 6 acres. The respondent's husband was not satisfied with the verdict. He moved to the High Court to challenge the decision of the Tribunal. He however died before the application could be heard. He was substituted by the respondent who had now become his legal representative. The application was heard and the Tribunal's decision was quashed on 15/3/2012.
7. The respondent herein then filed a suit in court on 28/9/2012 seeking a declaration that her husband is the registered owner of the suit land and that the applicant has no proprietary interest in the same and that she should be evicted. On 2/7/2013 the respondent gave her evidence and closed her case on the same day. On 12/3/2013, the applicant gave her evidence and called two witnesses before the case was adjourned to enable her bring more witnesses.
8. On 24/9/2014 the case was set for defence hearing but counsel agreed to proceed with the application herein. This civil procedure rules provide that amendment to pleadings can be made at any stage of proceedings. However in deciding whether an amendment should be granted or not, the court has to consider a number of factors. In the present application, the applicant is seeking to introduce a counter-claim in her defence. This is a completely new cause of action. The basis upon which she is seeking to do so is that she came across a letter of consent in which the land control board had granted consent to sub divide Mateket Farm in 1987. She has annexed that letter of consent to her affidavit. A look at the letter of consent shows that the board granted consent to members of Mateket Farm to sub divide the land into 107 portions. There is no evidence that this consent related to sub-division of the suit land as well. Counsel for the applicant in her submissions submitted that that will be given during the hearing of the case.
9. If these amendments were to be allowed it will mean that the applicant will be urging the claim on behalf of the estate of her deceased husband. The question which then comes up is whether she can do so without first having letters of administration in respect of the estate of her late husband. There is no evidence that she has taken out letters of administration in respect of the estate of her deceased husband. From the ruling in the High Court which resulted in quashing of the decision of Kaplamai Lands Disputes Tribunal, the judge observed that the applicant herein had gone to claim the land on behalf of her deceased husband when she had no letters of administration. The Judge held inter-alia that she had no locus standi to file the proceedings before the Tribunal. Since she has not taken out letters of administration, it will therefore be difficult to allow her to mount a counter-claim when she has no capacity to do so. The applicant's counsel tried to argue that since the applicant was sued in her individual capacity, she can also bring a suit in her individual capacity. I do not think that this is the correct position. The applicant was sued as a trespasser on the suit land. If she wanted to raise a counter-claim to show that the title being held by the husband of the respondent was fraudulently obtained, then she needed to have letters of administration to give her locus standi.
10. The applicant has no locus standi to bring the proposed counter-claim and secondly she has not demonstrated that the said consent related to sub division of the suit land. If the consent related to the sub-division of the suit land, nothing will have been easier than providing that evidence at the beginning. It does not help to say that that evidence will be brought later. I find that there will be no useful purpose served by allowing the amendment. The upshot of this is that the applicant's application is hereby dismissed with costs to the respondent.

It is so ordered.

Dated, signed and delivered at Kitale on this 23rd day of October, 2014.

E. OBAGA

JUDGE

In the presence of Mr Kiarie for respondent and M/S Arunga for the applicant. Court Clerk – Kassachoon.

E. OBAGA

JUDGE

23/10/2014