



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MALINDI
ELC CIVIL CASE NO.8 OF 2007

JOSPHAT KAZUNGU ZIRO (*suing hr' CHRISTINE ZIRO MWATELA*)

***vide Power of Attorney*.....PLAINTIFF/RESPONDENT**

=VERSUS=

1. JOHNSON KAVIHA THOYA.....DEFENDANT/APPLICANT

2. HOUSING FINANCE CO. OF KENYA LTD.....THIRD PARTY

R U L I N G

1. What is before me is the Application by the Defendant dated 29th May 2015 seeking for the following orders:

(a) That the Defendant/Applicant be granted leave to amend his Defence and file counterclaim in terms of annexed Amended Defence and counterclaim.

(b) That the Amended Defence and counterclaim annexed hereto be treated as the Defendant's/Applicant's Defence and Counterclaim and the same be deemed to having been duly filed and served upon payment of requisite fees.

(c) That the Plaintiff/Respondent be at liberty to reply to the Amended Defence and Counterclaim if it so wishes within a period to be fixed by this Honourable Court.

(d) That the costs of this application be provided for.

2. The Application is premised on the ground that the amendments are intended to bring to the court the real matter in controversy; that the amendments are necessitated by the information which is relevant and that the information came to the Applicant's knowledge subsequent to the filing of the Defence.

3. In his affidavit, the Defendant deponed that the increment of interest on the amount he borrowed

is more than, 800%; that he was never involved or consulted when the Plaintiff re-mortgaged his house through private treaty and that he wish to demonstrate that he did not owe the Plaintiff the claimed amount.

4. It is the Defendant's case that the interest rate that was applied by the Plaintiff in re-mortgaging his property was not legal and was meant to impede his right to continue owning the suit property.
5. In his response, the Plaintiff's advocate deponed that the intended inclusion of a counterclaim, based on the purported overcharge of interest, has the effect of introducing a fresh cause of action which is time barred and that this court does not have the jurisdiction to deal with the issues raised in the counterclaim.
6. I have considered the submissions on record.
7. This suit was filed on 13th February 2007 by the Housing Finance Co.
8. In the Plaintiff, the then Plaintiff alleged that the Defendant/Applicant refused to settle the outstanding loan; that the Defendant has no right to continue being in occupation of the suit property and that the Plaintiff is entitled to vacant possession.
9. In his Defence, the Defendant denied that he is indebted to the then Plaintiff and that the market rates charged by the then Plaintiff spiraled out of control.
10. The Plaintiff was amended on 9th November 2009 in which Housing Finance of Company of Kenya Limited was substituted by the current Plaintiff. The reason for the substitution was because the suit property had been sold to the current Plaintiff.
11. After the amendment, the Defendant still brought back the initial Plaintiff in the suit by filing a Third Party Notice on 15th June 2012. The current Plaintiff's advocate filed a Defence on behalf of the Third Party. In the Defence, the bank averred that it exercised its statutory power of sale by selling the suit property to the Plaintiff.
12. The record shows that this matter was partly heard by Omondi J on 18th May 2011. The matter has never proceeded for hearing since then.
13. The Defendant's Application is principally grounded on a report of an organisation known as Interest Rates Advisory Centre which has advised him that he was overcharged by the bank.
14. In the draft counterclaim, the Defendant is seeking for general damages for breach of contract and to be paid the difference between the lawful interest and the illegal interest charged.
15. Order 8 Rule (3) (1) of the Civil Procedure Rules provides that the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just, allow any party to amend his pleadings.
16. Order 8 Rule 5 provides that an amendment may be allowed 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 fact.
17. The Defendant is in possession of what he considers to be the calculations of the interest that the Third Party overcharged him. On that basis, the Defendant is seeking for damages for breach of contract and for payment of the amount that the Third Party overcharged him.
18. I do not think that the Defendant's claim in the proposed counterclaim is a new cause of action considering that in the Defence, the Defendant had already alleged that he was not indebted to the Plaintiff.
19. The Defendant's current claim is meant to show that to the contrary, it is the Third Party who actually owes him money and should not have exercised its statutory power of sale.
20. The issue of whether the Defendant's claim for breach of contract or for reimbursement of what he claims to be an over payment is time barred or not can only be raised at trial.
21. I say so because the issue that will have to be ventilated at trial is the date when the Defendant's cause of action arose considering that the Third Party had not sold the suit property as at the time it filed the suit.
22. Considering that the Plaintiff and the Third Party have not closed their respective cases, and in view of the issues raised by the Defendant in the proposed amended Defence and counterclaim,

it will be in the interest of justice that this court hears the Defendant's counterclaim alongside the Plaintiff's suit.

23. For those reasons, I allow the Defendant's Application dated 29th May 2015 in the following terms:

- (a) **The Defendant be and is hereby granted leave to amend his Defence and Counterclaim in terms of the annexed amended Defence and Counterclaim within 14 days from today.**
- (b) **The Plaintiff and the Third Party are at liberty to file their amended Plaint and Defence respectively within 14 days from the date of service of the amended Defence and Counterclaim.**
- (d) **Each party to bear his/its own costs.**

Dated and delivered in Malindi this 13th day of November 2015.

O. A. Angote

Judge



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