



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KAKAMEGA

CIVIL CASE NO. 134 OF 2010

PAATRICK MAKOKHAPLAINTIFF/ RESPONDENT

VERSUS

FREDRICK BARASA ODUOR)

CHARLES ODUOR WAKANDA)..... DEFENDANTS/ APPLICANTS

RULING

In this matter, in which hearing has not commenced, the defendants have brought the present application by way of Notice of Motion dated 10th June 2013 under **Order 8 rule 3 (1)** and **5 (1)** of the Civil Procedure Rules 2010. They ask for the following orders –

- 1. The Honourable court be pleased to grant leave to the defendants to amend their defence and to plead a counter-claim in terms of the draft attached to the affidavit in support thereof.**
- 2. Cost hereof be provided for.**

The application has grounds on the face of the Notice of Motion. The grounds are that pleadings have been closed thus, the need to apply for leave to amend. Secondly, that it was necessary to amend the defence to plead a counter claim in order to determine all issues in controversy.

The application was filed with an affidavit sworn by the 2nd defendant on 10th June 2013. Annexed to the affidavit was a copy of the intended amended defence.

In response to the application, the plaintiff's counsel filed grounds of opposition, which are as follows –

- a. The application is incompetent.**
- b. The applicant is guilty of inordinate delay.**
- c. The intended amendment contravenes express provisions.**
- d. The application lacks merits.**

Though parties counsel were granted leave by the court to file written submissions, only the defendants' counsel filed the same. On the hearing date Mr. Nyikuli for the defendants relied on written submissions filed. Mr. Fwaya for the plaintiff relied on the grounds of opposition.

Having considered the application, I observe that this is a land matter. Though there are currently specific courts with jurisdiction to deal with land and environment matters, the High Court has been dealing with preliminary issues. This application, in my view, is on a preliminary issue. I will therefore deal with the same.

Though the plaintiff's advocate has filed grounds of objection to the application for amendment of defence, he has not given any indication that the plaintiff will suffer prejudice if the amended defence is filed. As was stated in the case of ***General Manager EAR & H. A. -vs- Thierstain [1968] EA 354*** – it is the function of the court to ensure that pleadings are in suitable form to enable the real questions in controversy between the parties to be determined.

In my view, if the amendment of the defence herein proposed is allowed, the plaintiff will have a chance to respond and challenge the same. Ultimately, costs to the winning party will be adequate compensation. The general grounds of objection filed by the plaintiff's counsel herein are not helpful.

I therefore allow the application, and order that the amended defence be filed within seven days from today. The plaintiff will have 14 days from service of the same to file a response, if any, thereto. The substantive hearing of the case will be in the appropriate land court. Costs of the application are in the cause.

Dated and delivered at Kakamega this 19th day of June, 2014

George Dulu

J U D G E