



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CIVIL SUIT NO.32 OF 2005**

**LUCY NYAGUTHII MUHORO.....PLAINTIFF**

**VERSUS**

**GEORGE STEPHEN CHEGE MUHOR.....1<sup>ST</sup> DEFENDANT**

**JOSEPH KAMAU MUHORO.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

1. The Application dated 20<sup>th</sup> July 2010 seeks Orders under **Order VI A Rules 3(1), 5 and 8** of the **Civil Procedure Rules** and **Sections 1, 1A and 3A** of the **Civil Procedure Rules** that the 1<sup>st</sup> Defendant be granted leave to amend his pleadings “*by adding to the Replying Affidavits filed herein in response to the Originating Summons dated 6<sup>th</sup> January 1998 and converted into a Plaint by Order of Court of 11<sup>th</sup> February 1999 and the said amendment be in terms of the Draft Further Replying Affidavit marked annexure GSCM-1 in the Affidavit of George Stephen Chege Muhoro.*”
2. The Applicant’s Affidavit sworn on 20<sup>th</sup> July 2010 and the grounds in support of the Application show that the reasons why the amendment is sought are;
  - i) *That it is necessary to put before the Court all material facts to enable it make a fair determination of the issues in contest and to enable the applicant put forward his entire case.*
  - ii) *That it is in the interests of justice that the amendment should be allowed.*
3. The Application is opposed and in his Replying Affidavit sworn on 21<sup>st</sup> September 2010, and of relevance to the issue at hand, the Plaintiff/Respondent has urged the point that the Application aforesaid is an abuse of the Court process and if granted will greatly prejudice her. That the matter is part-heard and when it was last adjourned, the 1<sup>st</sup> Defendant was undergoing Cross-examination and to allow the amendment would necessitate the Plaintiff re-opening her case.
4. It is the Plaintiff’s further argument that the 1<sup>st</sup> Defendant is attempting to re-introduce evidence which in any event exists in his previous Affidavits and that the only issue to be determined is whether

the Plaintiff contributed to the acquisition of certain properties during her marriage and not whether any party paid utility bills, school fees etc. In addition, that the Defendants attempted to have the matter heard de novo but their quest was thwarted by Nambuye J. on 25<sup>th</sup> February 2010 and the present Application is an attempt at circumventing that order and to enable them to continue to enjoy the contested property.

5. The 2<sup>nd</sup> Defendant, by his Replying Affidavit sworn on 23<sup>rd</sup> September 2010 supports the Application for amendment and has gone to great lengths to justify his position as regards the suit and the property in dispute.

6. I have taken into account the Submissions by Advocates for the parties and I should begin by stating the principles to be applied when a party seeks to amend its pleadings.

7. In Mullah, The Code of Civil Procedure 16<sup>th</sup> Edition Vol.2 at page 1822 it is stated thus;

***“i) All amendments should be allowed which are necessary for determination of the real controversies in the suit;***

***ii) The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;***

***iii) Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;***

***iv) Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;***

***v) Amendment of a claim or relief barred by time should not be allowed;***

***vi) No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;***

***vii) No party should suffer on account of the technicalities of Law and the amendment should be allowed to minimise the litigation between the parties;***

***viii) The delay in filing the Petitions for amendment of the pleadings should be properly compensated by costs;***

***ix) Error or mistake, which if not fraudulent, should not be made a ground for rejecting the Application for amendments of pleadings.”***

8. Further, at page 1824, it is added that “*rules of procedure are intended for the administration of justice and a party should not be refused just relief, merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. It is only when costs would not be adequate compensation that amendment will be refused.*”

9. The principles above, if applied to the present case, would lead me to make the following observations;

10. Firstly, I wholly agree with the Plaintiff that this suit has been pending for far too long in this Court and its conclusion would benefit the parties and the wider interests of administration of justice. However, as can be seen above, any delay that is not mala fides, can be compensated in costs - see also Bullen and Leak on Precedents of Pleading (on the issue of need for good faith when seeking amendment of a pleading.)

11. Secondly, from the Draft Further Affidavit annexed to the Application under consideration, the following are the issues that the Applicant wishes to bring forth;

- a) *Evidence of his businesses since 1976 and earnings/income therefrom.*
- b) *Evidence of the acquisition of L.R. No.1/191 and sub-division thereof.*
- c) *Litigation surrounding L.R. No.1/1007, a sub-division of L.R. No.1/191.*
- d) *Evidence of loans taken from Housing finance Co. Ltd and Savings and Loan Kenya Limited on the security of L.R. No1/1006 and 1007. Evidence of repayments thereof are also noted in this regard.*
- e) *Evidence of payments of school fees for children born of the union between the Plaintiff and 1<sup>st</sup> Defendant.*
- f) *Evidence of payments of utility bills for the family.*
- g) *Evidence of ownership of titles Nos.L.R. 1/2007 by the 2<sup>nd</sup> Defendant.*
- h) *Evidence of the ownership of titles No.s Dagoretti/Riruta/2752 and 2753.*

12. To my mind, the above issues are not irrelevant to the issue of contribution for purposes of the dispute between the parties. Further, it is my view that the depositions in the Draft Affidavit aforesaid will but only assist the Court in reaching a fair determination of the matter.

13. Secondly, the Plaintiff has lamented that since the matter is part-heard, it would be prejudicial to her if the amendment is allowed. My view on that issue is that the 1<sup>st</sup> Defendant has not concluded his evidence and in fact, he has not been cross-examined by the Plaintiff's Advocates. The veracity of all the matters raised in the amendment can be tested at that stage and should the Plaintiff wish to re-open her case to answer to those matters, she can do so at the discretion of the trial judge. I see no prejudice which cannot be cured by costs in the circumstances.

14. Lastly, I see no evidence that the Applicant is acting mala fides and on the whole any discomfort that may be caused to the Plaintiff can be assuaged by costs.

15. For the above reasons, Prayer 1 of the Application dated 20<sup>th</sup> July 2012 is granted and the Draft Further Replying Affidavit shall be filed within seven (7) days of this order.

16. Costs shall be paid to the Plaintiff

**AND**

17. Parties are now urged to take directions on the continuation of the hearing with a view to finalizing this matter.

18. Orders accordingly.

**DATED, DELIVERED AND SIGNED AT NAIROBI THIS 10<sup>TH</sup> DAY OF FEBRUARY, 2012.**  
**10/2/2012**

**CORAM**

**BEFORE LENAOLA – JUDGE**

**MIRON – COURT CLERK**

**MR. KALSI HOLD BRIEF FOR MR. KIMONDO FOR RESPONDENT**

**MR. ABIDHA HOLD BRIEF FOR MR. BWIRE FOR APPLICANT**

**ORDER**

**RULING DULY READ.**

**ISAAC LENAOLA**

**JUDGE**

**FURTHER ORDERS**

**MENTION ON 15<sup>TH</sup> MARCH 2012 BEFORE G.B.M. KARIUKI, JUDGE FOR DIRECTIONS.**

**ISAAC LENAOLA**

**JUDGE**