



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT MACHAKOS**

Civil Case 12 of 2009

**1. ALICE NJOKI WAITIKI**

**2. JOSEPH NGANGA WAITIKI**

**3. JAMES KAHIA KAGIMBI**

**4. FRACIA WANGARI KAHIA**

**5. GEOFFREY NGANGA**

**MBATIA.....PLAINTIFFS**

**V E R S U S**

**1. MOSES NDUNGU MUNGA**

**2. OKOA DEVELOPMENT CO**

**LTD.....DEFENDANTS**

**R U L I N G**

**1.** This is an application (by **chamber summons dated 4<sup>th</sup> June 2010**) by the Plaintiffs for leave to further amend their amended plaint dated 6<sup>th</sup> March 2009. The original plaint is dated 23<sup>rd</sup> January 2009. The application is made under **Order VIA, rules 3 and 5** of the old **Civil Procedure Rules (the Rules)**.

**2.** The grounds for the application appearing on the face thereof are -

- (a) That the proposed amendments are necessary “to assist the court adjudicate on matters in issues”.
- (b) That the Plaintiffs were not aware that the land in issue had been subdivided.
- (c) That the new defendants “may get more than they are entitled to if amendments are not allowed”.

**3.** A draft further amended plaint (in the application it is called “re-amended plaint”) is annexed to the supporting affidavit.

**4.** It is apparent that the 3<sup>rd</sup> and 4<sup>th</sup> Defendants were joined in this suit by an order entered on 26<sup>th</sup> May 2010. This was pursuant to their own application by chamber summons dated 5<sup>th</sup> October 2009.

5. The further amendments sought in the present application are thus a consequence of the addition of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants. See **Order 1, rule 10(4)** of the old **Civil Procedure Rules** (now **Order 1, rule 10(4)** in the new **Rules**).

6. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants have opposed the application by replying affidavit (sworn by the 4<sup>th</sup> Defendant) filed on 15<sup>th</sup> July 2010). The grounds of objection they raise include-

(i) That the Plaintiffs have not been diligent.

(ii) That the averments contained in the proposed further amendments are not true.

(iii) That the Plaintiffs have no cause of action against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants.

(iv) That the Plaintiffs' claim against the 3<sup>rd</sup> and 4<sup>th</sup> Defendants is *res judicata* vide the judgment in **Nairobi CMCC No 11556 of 2003**.

7. Regarding the first objection, leave to amend may be sought and granted at any stage of the proceedings. See **Order 8, rule 3** of the new Rules. In any case, as already pointed out, the further amendments sought are as a consequence of the addition of the 3<sup>rd</sup> and 4<sup>th</sup> Defendants in these proceedings at their own instance. The objection upon the ground of want of diligence is thus not well-taken.

8. As to the veracity or otherwise of the averments contained in the proposed further amendment, that is not an issue that can be tried in the present application. It must await trial of the action when it will be properly canvassed by way of tested evidence.

9. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants having been joined in proceedings at their own instance, they cannot now urge that the Plaintiff's have no cause of action against them. That point is not well-taken at all.

10. Regarding the plea of *res judicata*, the pleadings and judgment in Nairobi CMCC No 1155 of 2003 have not been annexed to the replying affidavit. The issue has thus not been properly taken and cannot be adjudicated at this stage with the material now before the court.

11. I find absolutely no reason why I should deny the Plaintiffs leave to amend their plaint. The policy of the law in this regard is that leave to amend should be freely granted unless there will be grave prejudice to the opposite party. I find no such prejudice.

12. In the event the chamber summons dated 4<sup>th</sup> June 2010 is allowed in prayer 1. Leave to further amend the plaint is granted. Further amended plaint is to be filed within 14 days of delivery of this ruling. Costs of the application will be in the cause. Those will be the orders of the court.

13. The delay in preparation of this ruling is deeply regretted. It was caused by my poor state of health in the recent years. But I thank God that I am much better now.

**DATED AT NAIROBI THIS 2<sup>ND</sup> DAY OF AUGUST 2012**

**H.P.G. WAWERU**

**JUDGE**

**COUNTERSIGNED AND DELIVERED AT MACHAKOS THIS 28<sup>TH</sup> DAY OF SEPTEMBER  
2012**

**ASIKE-MAKHANDIA  
JUDGE**