



REPUBLIC OF KENYA
AT THE HIGH COURT OF KENYA

AT NAIROBI

CIVIL SUIT NO. 312 OF 2009

ASHOK RUPSHI SHAH1ST PLAINTIFF
HITEN KUNAR AMRITLAL RAJA 2ND PLAINTIFF

VERSUS

JACOB JUMA 1ST DEFENDANT
COMMISSIONER OF LANDS2ND DEFENDANT
REGISTRAR OF TITLES3RD DEFENDANT

RULING

The 2nd and the 3rd defendants herein filed an application by way of Notice of Motion under Order 6 A Rules 3 and 5 (1), Order L Rule 1 of the Civil Procedure Rules and Sections 1A (1) (2), (3) Section 3A and 63 (e) of the Civil Procedure Act and sections 10 and 55 of the Advocates Act seeking the substantive orders that

1. The Attorney General, counsel for 2nd and 3rd defendants be granted leave to amend the defence filed on 11th September, 2009 and that the proposed amended draft defence be deemed
2. That the proposed amended draft defence be deemed duly filed and served.
3. That leave be granted to the Honourable Attorney General to withdraw the Chamber Summons dated 23rd September, 2009 and filed by Onyancha Mose, Senior Litigation Counsel and the same be struck out and expunged from the court record.
4. That leave be granted to the Honourable Attorney General to withdraw the replying affidavit filed on 22nd September, 2009 on behalf of the 2nd and 3rd defendants and sworn by one Silas Kiogira Mburugu and the same be struck out and expunged from the record.
5. That leave be granted to the Honourable the Attorney General to withdraw the skeleton submissions filed by Onyancha Mose, Senior Litigation Counsel on 19th October, 2009 and the same be expunged from the record.
6. That appropriate directions do issue pursuant to the foregoing prayers.

The Motion is supported by an affidavit sworn by Wanjiku A. Mbiyu, Senior Deputy Chief Litigation Counsel and the grounds set out on the face of the application. The application is opposed and the 1st defendant has filed a replying affidavit sworn on 16th June, 2010. The plaintiffs support the application filed by the 2nd and 3rd defendants.

Following the filing of this application, the 1st defendant filed a Notice Of Preliminary Objection on

points of law on 16th June, 2010 followed by a Supplementary Notice of Preliminary Objection dated 18th June, 2010. It is the 1st defendant's position that the application is incurably defective for mis-joinder of orders and or cause of action. It is also his position that an application for amendment of pleadings is by law required to be brought by way of Chamber Summons whereas the one for withdrawal of pleadings is not tenable in law. In that regard, the hearing of this application will beget this court to breach its own very rules.

In the Supplementary Notice it is the 1st defendant's position that the affidavit in support of the motion is hopelessly defective and liable to be struck out. Several paragraphs of the said affidavit contain hearsay matters and ought to be struck off. That being the case the application cannot proceed on the basis of an affidavit that contains hearsay matters. These are matters of fact in dispute and not within the deponent's personal knowledge and therefore ought to be struck out.

Both learned counsel for the 2nd and 3rd defendants/applicants and the 1st defendant/respondent have filed submissions on the preliminary objection. I have read the submissions and related them to the pleadings and the application leading to the said objection.

There is no way I can address the preliminary objection without going into the pleadings and therefore on considering the material presented this far, I have come to the conclusion that what has been termed as preliminary objection is indeed an answer to the said application. In that case it will be a duplication of proceedings to address the preliminary objection separately from the said application. I find that the application shall remain in place and argued on merit so that the two defendants can be able to canvass all the material before the court and also have the 1st defendant comprehensively reply to the same.

In that regard therefore, the preliminary objection is hereby dismissed with costs to the 2nd and 3rd defendants. The parties shall now take a hearing date for the hearing of the application dated 23rd March, 2010.

Orders accordingly.

Dated, signed and delivered at Nairobi this 26th day of July, 2011.

**A. MBOGHOLI MSAGHA
JUDGE**