

REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAKURU

Civil Case 311 of 2002

ERASTUS CHOMBA WAHOME.....1ST PLAINTIFF

GRACE WANGARI CHOMBA.....2ND PLAINTIFF

MARY WANGARI CHOMBA.....3RD PLAINTIFF

VERSUS

DAVID KARIUKI GITHIGA.....1ST DEFENDANT

JEREMIAH KINUTHIA MAHUGU.....2ND DEFENDANT

MICHAEL KURIA.....3RD DEFENDANT

THOMAS WANDERI.....4TH DEFENDANT

W. OLWENY t/a OLWENY & ASSOCIATES.....5TH DEFENDANT

RULING

On the 24th March 2006, this court granted the plaintiffs' application for leave to amend their plaint to include particulars of certain loss and damage which the plaintiffs alleged they suffered during the pendency of the suit. The defendants were given corresponding leave to file defence to the amended plaint if they so wished. The plaintiffs duly filed the amended plaint and served it upon the defendants. The defendants filed an amended defence on the 25th April 2006 and served the same on the plaintiffs. The plaintiffs filed a reply to the amended defence filed by the defendants. This court subsequently thereafter proceeded with hearing of the suit. The plaintiffs have substantially adduced evidence in support of their case. They are about to close their case. The witnesses remaining to adduce the evidence on the part of the plaintiff are Land Registrar and the District Surveyor, Nakuru. Thereafter they intend to close their case.

On the 24th October 2007, the defendants sought leave of this court to enlarge time upon which they could file an amended defence to the amended plaint filed on the 3rd April 2007. The reason the defendants were seeking the enlargement of time was because they contend that they had realised that the amended defence which they filed on the 25th April 2006 did not take cognisance of the original defence which was filed in court on the 6th October 2001. The defendants therefore pleaded with the court to allow them to file another amended defence out of time. The defendants stated that they should not be condemned for the mistake of their counsel. The plaintiffs objected to the application. They contended, *inter alia*, that the matters proposed to be pleaded in the proposed amended defence raised new matters which the plaintiffs would be hampered in their conduct of their case as they had substantially adduced their evidence in this case.

At the hearing of the application, I heard the rival submission made by Mr. Owang' for the defendants and Mr. Kagucia on behalf of the plaintiffs. The issue for determination by this court is whether the defendants have established a case to enable this court grant them extension of time by which to file the proposed amended defence. As stated earlier in this ruling, when the plaintiffs were granted leave to amend their plaint, the defendants were also granted concurrent leave to file a defence to the amended plaint. The defendants duly complied with the order of this court and filed an amended defence on the 25th April 2006. The defendants therefore should have filed a fresh application to be granted leave to file an amended defence. This court cannot enlarge time for a party to do a thing that has already been done.

This court is aware that its jurisdiction to grant leave to parties to amend their pleadings is unfettered. However, the discretion to grant leave to a party to amend its pleading must be with the objective of aiding the court to determine the real issues in controversy (*See Order VI A Rule 5(1) of the Civil Procedure Rules*). In the instant case, as stated earlier in this ruling, the plaintiffs have substantially adduced evidence in support of their case. I think it would occasion injustice to the plaintiffs if this court were to allow the defendants to further amend their defence, especially where such a defence raises new matters that may necessitate this court to re-start the hearing of the case. The defendants were given an opportunity to put their pleadings in order when they were granted leave to amend their defence. They spurned the opportunity.

The hearing of this case has proceeded substantially. The defendants made their application to amend their defence very late in the day. The proposed amendments will prejudice the plaintiffs' case. I decline to exercise my discretion to grant leave to the defendants to amend their defence. The application dated 22nd October 2007 is hereby dismissed with costs.

DATED at NAKURU this 30th day of November 2007

L. KIMARU

JUDGE