



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

Civil Case 70 of 2004

KIPLANGAT ARAP BIATOR ..... PLAINTIFF

VERSUS

ESTHER TALA CHEPYEGON ..... DEFENDANT

RULING

The applicant/defendant brought an application under the provisions of **order VIA rule (1)(2) and 5(1) of the Civil Procedure Rules** seeking leave to amend the statement of defence to include a counter-claim. The application was made on the ground that fresh facts had come to the knowledge of counsel for the applicant after the filing of the defence and those facts would have the effect of altering the nature of the defence if the application herein were to be allowed. The fresh facts referred to were that the plaintiff herein had not applied for consent of the land control board to transfer the suit premises, a parcel of land known as *NAKURU/OLENGURUONE/3*.

The respondent/plaintiff opposed the said application and sought to rely on a replying affidavit sworn by himself on 31.8.2005. He denied that the issue of the land control board's consent was a new one and referred to his earlier affidavit sworn on 9.3.2004 wherein he stated that the Land Control Board's consent was granted on 6.1.1998. He further deposed that the said application had been filed for the purpose of delaying the determination of the suit. He also stated that the applicant had failed to annex a copy of the proposed draft amended defence and counter-claim.

I have carefully considered the contents of the affidavits filed by the parties herein. Although the court has discretion to grant leave to a party to amend his pleadings, such discretion ought to be exercised in a judicial manner and not arbitrarily and so the court must consider whether the amendment sought to be made is merited and whether it will prejudice the respondent if granted. I am aware that there is a serious land dispute between the parties and this court has even dealt with an appeal emanating from the said land dispute. Ordinarily the court will not grant leave to amend pleadings where it is shown that the facts or material that are intended to form the basis of a counter-claim were within the knowledge of the applicant at the time of filing a statement of defence.

However, given the nature of this matter, so that the dispute between the parties can be resolved once and for all, I grant leave to the applicant to amend her defence to include a counter-claim. She should do so within the next ten (10) days from the date hereof. The costs of this application shall be to the plaintiff/respondent.

**DATED AT NAKURU THIS 31<sup>st</sup> DAY OF March, 2006**

**D. MUSINGA**

JUDGE

31/3/2006

Ruling delivered in open court in the presence of Mr. Mbeche holding brief for Mr. Mugambi for the

applicant and Mr. Kahiga for the respondent.

**D. MUSINGA**

**JUDGE**

31/3/2006