



REPUBLIC OF KENYA

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 110 of 1998**

**HARRISON MWANGI NYOTA ..... PLAINTIFF**

**VERSUS**

**NAIVASHA MUNICIPAL COUNCIL & 20 OTHERS .....DEFENDANTS**

**RULING**

The defendants/applicants have filed two applications by way of Chamber Summons which are all dated 2<sup>nd</sup> November 2005.

In the first application, the applicants are seeking to be granted leave to amend their defence and counter claim. It is brought under the provisions of **Order VI A Rule 3** of the **Civil Procedure Rules**. While the second application seeking for restraining orders against the plaintiff/respondent from dealing with any of the plots subdivided from parcel number **Naivasha/ Municipality Block 5/235** pending the hearing and determination of this suit. It is brought under the provisions of **Order 39 Rules 1, 2, 3 and 9** of the **Civil Procedure Rules**.

Both applications were presented and argued before me and I wish to deal with the first application that seeks for leave of this court to allow the defendants amend the defence and counterclaim. The application is predicated on the grounds stipulated in the body of the application and the facts deposed to in the supporting affidavit of **Margaret Wanjiru**, one of the defendants/applicants. The affidavit is sworn on 2<sup>nd</sup> November 2005.

In support of the said grounds and the facts, **Mr. Kahiga** Counsel for the defendants/applicants elaborated in his arguments in court why the orders for leave should be granted. The arguments put forwarded may be summarized briefly.

This is a longstanding dispute as the suit herein was filed sometimes in March 1998. However, the matter took twists and turns and the substantive matter has never been determined because on 12<sup>th</sup> November 1999, the defendants defence was struck out. The defendants filed an appeal against the order striking out their defence which appeal was allowed by the Court of Appeal in a judgment that was delivered on 27<sup>th</sup> day of February 2004.

In the judgment, the Court of Appeal had this to say:

***“In my view, there cannot be a valid answer to these complaint and it is noteworthy that despite the***

***fact that Counsel for the respondent was served with the notice for hearing of the appeal, neither the said Counsel, nor the respondent himself attended the hearing. I would myself allow the appeal, set aside the learned Judge's order striking out the defence and substitute it with an order dismissing with costs the respondent's application dated and filed in the superior court on 22<sup>nd</sup> February, 1999 seeking the striking out of the defence. I would also award the costs of this appeal to the appellant."***

The importance of this judgment is that the defence by the defendants was restored and the position reverts back to where the applicants can now seek to amend the defence and counterclaim. The reasons advanced for the amendment are that the subject matter, relates to a parcel of land formerly known as **Naivasha Municipality Block 5/235** which the plaintiff/respondent has subdivided into several sub-plots as per the annexed Certificates of Search marked (**MW1 V**) which are annexed to the application. According to the applicants it is in the interest of justice to allow the amendment in order to bring out the issue in controversy for effectual determination. The court had earlier on allowed additional parties to be joined in this dispute, thus they should be allowed to ventilate their claim by way of a counterclaim and amendment of the pleadings.

On the part of the plaintiff/applicant, this application for leave to amend pleadings was opposed. Learned Counsel for the respondent, **Mr. Mwangi** relied on the respondent's replying affidavit that was sworn on 17<sup>th</sup> November 2005 in response to the issue raised in this application.

Firstly, Counsel argued that the present application is frivolous and belated attempt by the applicants to ensure the matter herein is delayed. The respondent has detailed the several steps he took to acquire a title to the suit premises, which title is indefeasible. The title was subdivided into several sub-plots which were transferred to third parties who are not parties to this suit. In particular, there are five (5) sub-plots that were transferred to other parties as per paragraph 37 of this replying affidavit.

I have carefully addressed my mind to all the issues that are raised in this matter. Clearly this suit has not been determined and the applicants' have sought for leave to amend the pleadings so that the issues in controversy can be determined. **Order VI A Rule 5 (1)** provides

*"For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceeding, the court may either of its own motion or the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise."*

It will be in the interest of justice to allow this application for purposes of bringing all the matters in controversy for determination by the court. Accordingly, I allow the application for leave to amend the defence and counterclaim. The applicants may file an amended defence and counterclaim within fourteen (14) days. The plaintiff will be at liberty to file an answer and defence within twenty one (21) days of such service.

As regards the second application that seeks for restraining orders against the plaintiff, I note that a temporary interim order of injunction granted on 7<sup>th</sup> November 2005. Counsel for the plaintiff argued that the plaintiff is the registered proprietor of the suit premises and therefore he can not be restrained from dealing with his own title. In any event the plots have been subdivided and transferred to third parties. However looking at the matters raised in the defence herein, I am satisfied that the status quo in respect of the subject matter herein should be preserved until the matter in controversy is determined.

However, the defendants will deposit Kshs.200,000/- being security for costs within fourteen (14) days failure to which the order maintaining the status quo shall lapse.

The following orders are made

**1) The applicants are hereby granted leave to file and serve an amended defence and counterclaim within fourteen (14) days.**

- 2) *The plaintiff/respondents to file their answer and defence (if any) within twenty one (21) days.*
- 3) *Status quo in respect of plots subdivided from parcel number Naivasha Municipality Block 5/235 be maintained until the determination of this suit.*
- 4) *Applicants/defendants to deposit Kshs.200,000/- as security for costs within fourteen (14) days failure to which the order of status quo shall lapse.*
- 5) *Costs of these two applications shall be in the cause.*

It is so ordered.

**Ruling read and signed at Nakuru on this 3<sup>rd</sup> day of November 2006.**

**MARTHA KOOME**

JUDGE