



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF K-ENYA AT KISII**  
**CIVIL CASE NO.134 OF 2003**

**SAMUEL NYAKANGA ARERI ..... PLAINTIFF**

**VERSUS**

**1. FRANCIS OMONDI GWAKO )**

**2. NKURU GWAKO ) ..... DEFENDANTS**

**RULING**

Applicant/Defendants application is under Order VI Rule 13 (1) (b) (d) and 16 of Civil procedure Rules and S.3A C.P.A. He seeks the court to strike out the plaint herein with costs, to the defendant.

The first defendant swore an affidavit in support of the application. He deponed that he and his co-defendant brought the land in dispute in 1960 from ARERI NYAKANGA and they paid full purchase price. He put them in occupation. Demarcation was done in 1968 and they were issued with joint title deed. They had been shown the boundaries of the land after they were fixed by the surveyors. Neither the plaintiff nor anybody else raised any complaints then.

Mr. Mogikoyo for the applicant submitted that the plaint filed on 13/8/03 be struck out. He submitted that plaintiff filed an amended plaint on 31/5/04 without leave of the court. Also the amended plaint has no verifying affidavit accompanying it.

He further submitted that the defendants are the registered owner of the land in dispute. Theirs was a first registration and it cannot be defended in any way under the provisions of S.143 R.L.A. Further it was submitted that adjudication process took place before title was given. Determination map was drawn. Respondent did not raise objection in accordance to s. 26 of Land Adjudication Act.

The plaintiff strongly opposed the application. It was pointed out that court granted leave to file an amended plaint. It was submitted that the owner of the land died in 1964. Registration was in 1968 when the seller was already dead. The case therefore raises triable issues which can only be dealt with after full trial. Defendants did not pay the full purchase price as 5 heads of cattle were not paid. Further it was stated that trust was pleaded and should go for trial.

There is an amended plaint filed on 31/5/04. This is not the plaint the defendant struck out as counsel submitted that the plaint they wont struck out is the one dated 13th August 2003. He said there was no leave by the court before the amended plaint was filed. However the courts records are clear. On 20/5/04 Mr. Mogikoyo for the defendant and Mr. Gekenye holding brief for Mr. Mokuia for the plaintiff agreed by consent that the plaintiff be at liberty to amend his plaint before the next hearing date.

Amended plaint was filed 10 days later. It is therefore not true that the amended plaint was filed without court's leave.

The original plaint had a verifying affidavit. There is no requirement that an amended plaint too has to have a verifying affidavit.

Thus I find the plaint which is on record now is the amended plaint dated 31/5/04. Mr. Mogikoyo in his submissions said that they were seeking the plaint dated 13/8/03 struck out. Even if I do that I cannot dismiss the suit as there is an amended plaint on record. On that point alone the application will fail. However assuming the submissions were also directed to the amended plaint I find that this is not a proper case to be dealt with summarily. True the Defendants registration was a 1st registration and s.143 R.L.A. is very clear as restated in the Case of AMBALE VS. MASOLIA (1986) KLR 241.

That registration is indefeasible. However the plaint revises other issues of trust and right of way. There are allegations of concealments of some material facts. Applicant May not have revised any complaints during demarcation process but he cannot be shut out of the court. There are triable issues which I think can only be fully determined after the court hears evidence from both sides. The issues are capable of being canvassed before the court.

In the circumstances the application is rejected and dismissed with costs.

Dated and delivered at Kisii this 14th October 2004.

**KABURU BAUNI**

**JUDGE.**

**14/10/04**

Mr. Ogari for the Mr. Mogikoyo for the defendant/applicant.

**KABURU BAUNI**

**JUDGE.**