



**REPUBLIC OF KENYA**

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

**MILIMANI LAW COURTS**

**FAMILY DIVISION**

**CIVIL SUIT NO. 54 OF 2016 (O.S)**

**ENW.....PLAINTIFF**

**V E R S U S**

**PWM.....RESPONDENT**

**RULING**

1. By an Originating Summons dated 21<sup>st</sup> December 2016 filed on 23<sup>rd</sup> December 2016, the plaintiff/applicant sought for orders against the respondent as hereunder;

**(i) That it be declared that the properties House No. L.R. No. xxxx Buruburu II Nairobi and 8 acres of land at Mua Hills Kitanga Settlement Scheme on Plot No. 18 Machakos County are/were owned by the Respondent in trust for the applicant and their children.**

**(ii) That the respondent, his servants and or agent be restrained from alienating, transferring, giving in, exchanging, encumbering or in any other way disposing any of the property before the hearing and determination of this application.**

**(iii) In the alternative, the respondent be ordered to pay the applicant half the value amounts of the properties; house on L.R. No. xxxx Buruburu II Nairobi and 8 acres of land at Mua Hills Kitanga Settlement Scheme on Plot No. 18 Machakos.**

**(iv) That the Registrar of the High Court of Kenya be authorised to sign any transfer documents in place of the respondent or any other person holding any title on behalf of the respondent to effect all the orders of this court in favour of the applicant.**

2. On 23<sup>rd</sup> September 2019, the applicant filed Chamber Summons dated 18<sup>th</sup> September 2020 seeking to amend her Originating Summons in the manner set out in the draft amended Originating Summons and amended statement.

3. According to the draft amended Originating Summons, the applicant is seeking to substitute the property in question to reflect House on No. Nairobi Block xxxx Buruburu Phase II Nairobi and not house on L.R. No. xxxx Buruburu II Nairobi as it appears in the original Originating Summons of 21<sup>st</sup> December 2016. Secondly, she is seeking to amend the acreage of land in Mua Hills Kitanga Settlement Scheme on Plot No. 18 Machakos to read 7 acres and not 8 acres as reflected in the original Originating Summons of 21<sup>st</sup> December 2016. Thirdly, she has introduced an extra property known as 1acre land at Mua Hills Kitanga Settlement Scheme Plot No. xx Machakos County.

4. The application is supported by grounds set out on the face of it and an affidavit sworn on 18<sup>th</sup> September 2019 by the applicant in which she averred that the properties in question were acquired through her joint efforts with the respondent during the subsistence of their marriage.

5. To prove that the proper description of the land is Nairobi/Block xxxx Buruburu Estate Phase II Nairobi City, the applicant attached a valuation report of the said property (ENW 4).

6. In response to the application, the respondent filed a replying affidavit sworn on 28<sup>th</sup> January 2020 deposing that the application is incompetent, misguided, misconceived and fatally defective as it raises nothing new hence a waste of the honourable court's time.

7. That the application is based on mere speculation as the applicant has not attached any proof of ownership of the said property. She

further stated that, the applicant had not attached any proof of contribution towards the acquisition of the said property and that the properties in question do not constitute matrimonial property.

8. During the hearing, Mrs. Kilonzo for the applicant basically reiterated the contents in the affidavit in support of the application. She argued that, amendments sought are formalistic hence occasioning no prejudice to the applicant.

9. M/s Wayua holding brief for Mwenda counsel for the respondent challenged the application basically on grounds that the applicant has no proof of contribution towards the acquisition of the property in question and that the property in question was sold to a 3<sup>rd</sup> party long time ago.

10. I have considered the application herein, supporting affidavit, replying affidavit and oral submissions by both counsel.

11. Although not specified, the application herein fall under the purview of Order 8 rule 3(1) of the Civil Procedure Rules which provides that;

**“Subject to Order 1, rules 9 and 10, Order 24 rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”**

12. From the wording of the above provision, the power to grant amendment of pleadings is a discretionary one which must be exercised by the court reasonably and only in deserving cases in order to achieve the ends of justice. The court should however not act whimsically or capriciously (see **Albert Imbuga Kisigwa v Recho Kawai Kisigwa Succession Cause No. 158/2000**).

13. The objective in amendment of pleadings is to enable the court make a just determination. The process is meant to correct an error or wrong which will otherwise if not attended to will occasion a miscarriage of justice. (see the case of **Merry Beach Limited v Barclays Bank of Kenya Ltd and another (2018)eKLR** in which the court stated that:-

**“Various authorities will show that amendment of pleadings should be allowed if the amendment will assist the court to determine the real question in controversy.”**

14. In the instant case, the application for amendment was made long after filing of pleadings had closed. The application is basically anchored on correcting the description of the title of the property in question and the amount of acreage in Mua Hills property. Clearly, these are minor amendments which do not alter or affect the substance of the suit.

15. It is prudent for parties to state the correct title and amount of acreage of the property sought to be distributed. This will enable the court make appropriate orders in case of division for other actors like lands office to know the actual property and the acreage involved. To that extent, the application is not incompetent nor does it amount to abuse of the court process.

16. As regards lack of proof of contribution towards the acquisition of the said property by the applicant as claimed by the respondent, that is a matter of evidence. The burden to prove contribution is reserved for the hearing and not at this stage.

17. Accordingly, it is my finding that the application is merited and the same is allowed as prayed and the draft amended Originating Summons attached be and is hereby deemed as duly filed upon payment of the requisite court fee.

18. The respondent shall be and is at liberty to file a response to the amended Originating Summons if need be within 14 days and thereafter parties to fix the matter for directions on how to proceed with the substantive hearing. Order accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 9<sup>TH</sup> DAY OF JULY 2020.**

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**J. N. ONYIEGO**

**JUDGE**