



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT EMBU**

**E.L.C. NO 102 OF 2014**

**FORMERLY KERUGOYA 382 OF 2013**

**JULIUS NYAGA M'NJENGA.....PLAINTIFF**

***VERSUS***

**CHARITY KAIRU.....DEFENDANT/RESPONDENT**

**RULING**

**Introduction**

The plaintiff/applicant through his counsel filed an *ex-parte* notice of motion under Article 179 (2) (d) of the 2010 Constitution, Order 51 Rules 1 and 2, Order 8 rule 3, Order 1 rule 10 of the 2010 Civil Procedure Rules, Sections 1A, 3A of the Civil Procedure Act and all other enabling provisions of the law, seeking the following orders from this court:

1. The Application be heard *ex-parte*.
2. The plaintiff be granted leave to enjoin the following to the suit:
  1. Felistus Fatuma Wanjiku
  2. Moses Muchangi Ireri.
  3. Herbert Njeru Ngunju
  4. John Njiru Ndwiga
  5. Chief Land Registrar

As 2<sup>nd</sup> and 6<sup>th</sup> Defendants respectively.

3. This Honourable Court be pleased to issue such orders and/or directions as it deems necessary to join the proposed 2<sup>nd</sup> to 6<sup>th</sup> defendants.
4. The plaintiff be granted leave to accordingly amend the plaint dated 24<sup>th</sup> January, 2008.
5. Costs of this application be in the course.
6. The plaint dated 24<sup>th</sup> January 2008 be deemed to have been properly filed.
7. Costs of this application be in the cause.

The defendant/respondent opposed the application. According to her, she has not been served with the plaint or summons to enter appearance and was not aware of the same until 27<sup>th</sup> November, 2014. It is on that date that she was served with this application.

### **The Case for the Applicant**

The applicant in substance seeks two orders from this court. First, he seeks an order to amend his plaint. The proposed amendments are contained in the draft amended defence which is annexed to the supporting affidavit as exhibit "JNN7". Secondly, he seeks to enjoin the 2<sup>nd</sup> to the 5<sup>th</sup> proposed defendants/respondents. He says these are necessary for the proper determination of all the issues in dispute and additionally these are also necessary parties.

According to his plaint, the first defendant sold a four acre parcel of land and the consent of the Land Control Board was obtained. In short, all the formalities in relation to the acquisition and alienation of interest in land were complied with. Furthermore, the first respondent proceeded to sell the same parcel of land to the 2<sup>nd</sup> to the 4<sup>th</sup> defendants/respondents.

Finally, the plaintiff allegedly in collusion with the 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> respondents caused the land to be registered by the 6<sup>th</sup> respondent. The particulars of the alleged fraud are set out in paragraph 15 of the proposed amended defence.

### **The Case for the Respondent:**

According to the respondent in her replying affidavit dated 9<sup>th</sup> February 2015, the suit is barred on account of *res judicata*. She has stated that the applicant filed a case in the court of the Resident Magistrate at Runyenjes in respect of the suit land number Gathuri/Weru/832.

She says that the suit of the applicant was struck out and dismissed with costs. She has annexed the ruling as exhibit "CKM1". Furthermore, she has stated that the applicant did not appeal against the judgement that was issued by the Runyenjes court.

Furthermore, she has also stated that the agreement for the sale of land was entered into over 30 years ago and that the 2<sup>nd</sup> to the 5<sup>th</sup> respondents took possession of the suit land and therefore the applicant's claim is time barred.

Finally, she says that the applicant was never registered as the owner of the suit land and that is why his claim in the court of the Resident Magistrate at Runyenjes was dismissed in civil case number 16 of 1991. And it is for that reason that she has urged this court to dismiss the suit with costs because it is *res judicata*, it lacks merit and is an abuse of the court process.

### **The Applicable Law:**

The applicable law in this application is to be found in Order 1 rule 3 of the 2010 Civil Procedure Rules. The provisions of that Order set out what is required before persons are joined as defendants in a suit. Order 1 rule 8 provides as follows:

***3. All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law of fact would arise.***

Furthermore, the applicant seeks to amend his pleadings. An applicant who seeks to amend his pleadings has to meet the criteria set out in the case of ***Castelino v. Eastern Bakery (1958) EA 461***. According to that case, amendments to pleadings should be freely allowed as long as they do not cause injustice or prejudice to the other party. They should be allowed so that all the issues in dispute and the

necessary parties are joined to enable the court to effectively render a judicial resolution in the interest of justice.

**Issues for Determination:**

In the light of the affidavit evidence and the applicable law, the issues for determination are as follows:

1. Whether or not the proposed defendants are necessary parties to this suit.
2. Whether or not the amendments to the pleadings are necessary in law.
3. Who should pay for the costs of this application.

**Evaluation of the Evidence, Findings and the Law**

I have considered the affidavit evidence, the applicable law and the submissions of both parties. It is clear from the proposed amended plaint that after the first defendant subdivided the suit land into three portions, she fraudulently obtained a further second consent from Gachoka Land Control Board and in collusion with the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants fraudulently sold and caused the 6<sup>th</sup> defendant to effect registration of the newly created parcels of land.

I find from the particulars of fraud that are alleged against the respondents do warrant their being joined as defendants/respondents in this suit.

I also find that the applicant has met the evidentiary threshold for the grant of order to amend the plaint. I further find that the amendments will enable the court to decide effectively on the issues in dispute.

**Verdict and Disposal Order:**

In the light of the foregoing matters, I hereby make the following orders:

1. Leave is hereby granted to enjoin to the suit the following persons:
  - i. Felistus Fatuma Wanjiku
  - ii. Moses Muchangi Ileri
  - iii. Herbert Njeru Ngunju
  - iv. John Njiru Ndwiga
  - v. Chief Land Registrar
2. Costs of the application will be costs in cause.

**RULING DATED, SIGNED and DELIVERED** in open court at **EMBU** this.. **10<sup>th</sup>** ... day of **March,..2015**

In the presence of the defendant and in the absence of counsel for the plaintiff

Court clerk Mr Muriithi

**J.M. BWONWONGA**

**JUDGE**