



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

Civil Case 119 of 2008

M'MUKIRI M'BUTURA PLAINTIFF

VERSUS

SIMON GICHUNGE M'RUKARIA DEFENDANT

RULING

The plaintiff filed this claim seeking orders of declaration that the defendant obtained by fraud transfer into his name parcel No. ABOGETA/U-CHURE/662. The defendant by his defence filed on 7th November 2008 denied the plaintiff's claim. He averred in that defence that the plaintiff had handed to him the title deed of that parcel of land by mutual agreement. In that defence he stated that he would in due cause file a counter-claim.

After pleadings were closed, the defendant has approached this court by way of chamber summons dated 27th May 2009. That chamber summons is brought under order VIA Rules 3, 5, 7 and 8 of the Civil Procedure Rules.

The application seeks for leave of the court to amend the defence to include a counter-claim. The defendant annexed to the application the draft proposed amended defence. In affidavit in support of that application, the defendant stated that he was applying to amend his defence to put for counter-claim as he had intimated before.

The defendant further informed that the purpose of seeking the amendment was to enable the court to determine the real dispute in controversy. That application was opposed. The plaintiff relied on grounds of opposition which were in the following terms:-

- 1. *The application is bad in law and not sustainable.***
- 2. *The proposed amendment introduces a new cause of action.***
- 3. *The application and proposed amendment is vexatious, frivolous, scandalous and abuse of the court process.***

In oral submissions, the plaintiff's counsel argued that the defendant by making the application was abusing the court process. He supported this argument by saying that although the defendant intimated in his defence that he intended to file a counter-claim he nevertheless waited until the pleadings had closed and six months later filed his application.

The defendant counsel in argument relied on Order VIA Rule 5 (1) of the Civil Procedure Rules. That Rule is in the following terms:-

“5.(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on 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 as are just.”

In the case of Eastern Bakery V. Castelino (1958) EA 461 Sir. Kenneth O’Connor stated as follows in summarizing the principles that should guide the court when considering an application for amendment.

“It will be sufficientto say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs..... The court will not refuse to allow an amendment simply because it introduces a new case But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit. The court will refuse to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

The Court of Appeal in the case of HCCA No. 2 of 2002 James Ochieng’ Oduor T/A Ochieng Oduol & Co. Advocates Vrs. Richard Kuloba had this to say in respect of the provisions of Order VIA Rule 1(1) they stated:-

“The provisions of Order VIA Rule 5(1) of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence. A careful reading of Order VIA Rule 3 of the Civil Procedure Rules clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view are lacking here. We appreciate that particulars were requested for and furnished; and that by dint of the provisions of Order VI Rule 8(b), the particulars now form part of the pleadings. However, in a case as this one where a plaintiff is reacting to a defence raised, the court should be slow in allowing amendments to the plaint which prima facie have the effect of defeating that defence.

The amendments that the defendant seeks to introduce in the counter claim, in my view is, not substantially different in character from what he pleaded in his defence. The defendant in his proposed amendment repeated that the title documents to the suit property were released to him by the plaintiff by mutual agreement. In his proposed counter-claim, the defendant pleaded a sale agreement between himself and the plaintiff. He further prayed that the plaintiff be ordered to refund to him Kshs. 300,000/= in respect of that agreement.

The plaintiff in opposing the amendment did not show to this court the prejudice he would suffer or what injustice he will incur which cannot be compensated by costs. The proposed amendments in my view does not in any way affect the plaintiff’s accrued rights in this action. I am of the view that the application is merited. I grant the following orders:-

- 1. The defendant is hereby granted leave to file and serve an amended defence and counter-claim within 14 days from this date hereof.***
- 2. The plaintiff is granted leave to file an amended reply to that defence and counter-claim within 14 days of service.***
- 3. The costs of the chamber summons dated 27th May 2009 are awarded to the plaintiff in any event.***

Dated and delivered at Meru this 9th day of July 2009.

MARY KASANGO

JUDGE