

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 32 OF 2003

JOHN MUSYOKA MUSEMBI.....PLAINTIFF

VERSUS

JOSEPH KYANYA KYENGO.....DEFENDANT

RULING

1. In the Notice of Motion dated 8th June, 2017, the Defendant/Applicant is praying for the following orders:

a. That the Defendant be granted leave to amend the Defence and the Counter-claim in terms of the annexed draft.

b. That the annexed Amended Defence and the Amended Counter-claim annexed hereto be deemed duly filed and served upon the payment of the requisite filing fees.

2. The Application is premised on the grounds that the Defence and the Counter-claim omitted crucial facts, to wit: that the Defendant fully repaid a loan on behalf of the Plaintiff at Industrial and Commercial Development Corporation; that the Counter-claim failed to note that it was the responsibility of the Plaintiff to obtain the Land Control Board consent and that the amendments sought are necessary for the purpose of helping the court to determine the real questions in issue between the parties.

3. In his Affidavit, the Defendant deponed that the court allowed the Application dated 16th October, 2009 to amend the Defence and Counter-claim; that the said Application was allowed by the court and that all along, he has been under the impression that the Amended Defence and Counter-claim had been filed by his advocate as ordered by the court on 24th February, 2010.

4. It is the Defendant's deposition that his instructions to his previous advocate was not to seek for a refund but to claim for his portion of land measuring 5 acres from the Plaintiff, that the current Defence and Counter-claim is seeking for a refund of monies paid and that the Plaintiff will not be prejudiced if the suggested amendments are allowed.

5. The Plaintiff filed Grounds of Opposition in which he averred that the Application is without merit as the amendments sought will introduce a new purported causes of action and that the Application is incompetent.

6. The Defendant's advocate submitted that there is no limitation on the amendment of pleadings; that under Order 8 Rule 3 (5) of the Civil Procedure Rules, the only consideration is whether the new cause of action arises out of the same facts or substantially the same facts as a cause of action and that the Application should be allowed. Counsel relied on numerous authorities which I have considered.

7. The Plaintiff's advocate submitted that on 24th February, 2010, the Defendant was granted leave to amend his Defence and Counter-claim; that the Defendant never complied with the consent order and that the Defendant is abusing the process of this court.

8. The Defendant has admitted that he was allowed by the court to amend his Defence and Counter-claim. Indeed, the record shows that on 24th February, 2010, the Defendant's Chamber Summons dated 16th October, 2009 was allowed. The court further directed that the Defendant do file an Amended Defence and Counter-claim within fourteen (14) days. The said order of the court has never been set aside or varied.

9. Having filed an Application dated 16th October, 2009 to amend the Defence and Counter-claim, which Application was allowed, the Defendant cannot file another Application seeking for the same orders. Indeed, the filing of the current Application is not only an abuse of the court process, but the Application is also *res judicata*. Consequently, the court will not go into the merits or otherwise of the Application dated 8th June, 2017.

10. For those reasons, the Application dated 8th June, 2017 is dismissed with costs.

DATED, DELIVERED AND SIGNED IN MACHAKOS THIS 7TH DAY OF DECEMBER, 2018.

O.A. ANGOTE

JUDGE