



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NAKURU**

**ELC NO. 194 OF 2013**

**DR. DAVID MAINA MUTAHI KAIHURA**

.....**PLAINTIFF**

**VERSUS**

The Estate of Ibrahim Manguma Kigathi alias Ibrahim Manguya Kigathi ( deceased)

(Sued through the Legal representative /Administrator) **JANE NYAGUTHII KIGATHI** .....  
**DEFENDANT**

**RULING**

*(Application for amendment of plaint; principles to be applied; plaintiff's claim being that he purchased one acre of land; defendant pleading in defence that the sale if any was void for want of Land Control Board Consent; plaintiff now wishing to amend plaint to add a prayer for extension of time for grant of Land Control Board consent; defendant contesting the amendment on basis that this will prejudice her defence; generally amendments before the hearing should be freely allowed; no injustice caused to defendant who can as well amend her defence to contest the proposed new prayer; amendment allowed but subject to payment of thrown away costs)*

1. The application before me is that dated 27 September 2016 filed by the plaintiff. It is an application to amend the plaint and the same is brought pursuant to the provisions of Order 8 Rule 3 and 5(1) of the Civil Procedure Rules and Sections 95 and 3A of the Civil Procedure Act. The application is opposed by the defendant who has filed a replying affidavit.

2. The original plaint was filed on 2 June 2010. The case of the plaintiff, in a nutshell, is that on 15 August 2003 he purchased one acre out of the land parcel Nyandarua/Kahuru/672 from the owner, one Ibrahim Kigathi (now deceased). He paid the full purchase price and took possession. The land was however not transferred to him and the owner died on 19 December 2006. What prompted him to file suit was the action of the beneficiaries of the estate of the deceased who allegedly invaded the land and started cultivating on it. In the plaint, the plaintiff sought prayers to have the members and beneficiaries of the estate of the deceased permanently restrained from the one acre portion; a declaration that the plaintiff is the bona fide purchaser of the one acre; together with costs and interest.

3. The defendant, who is the legal representative of the estate of the deceased, filed defence vide which he refuted that there was any sale between the plaintiff and the deceased. He also pleaded that if there was any sale, the same became null and void for want of the requisite Land Control Board consent.

4. The matter was mentioned on several occasions and certified ready for hearing on 17 June 2015.

5. Through this application, the plaintiff now wants to be granted leave to amend his plaint. I have gone through the draft amended plaint and I have noted that what the plaintiff wants is to add a pleading that the deceased refused to sign the documents of transfer for the one acre, including refusal to sign application forms for consent of the Land Control Board. The plaintiff proposes to add a prayer for extension of time within which the consent of the Land Control Board may be obtained.

6. In her replying affidavit, the respondent has averred that she is opposed to the application for it goes to the very root of her defence, and if allowed, will cause her great prejudice. She has further stated that through this application, the plaintiff has admitted that the plaint is a nonstarter for want of consent of the Land Control Board. She has also pointed out that the case was confirmed for hearing in the year 2015.

7. I have considered the application. Courts are generally liberal in allowing parties to amend their pleadings unless of course great injustice is going to be caused to the other party which cannot be compensated by way of costs.

8. When a case is yet to start, it is difficult to see what prejudice the other party will suffer for such party may be at liberty to also amend his/her pleadings. This indeed was the basis of the decision in the case of ***Eastern Bakery vs Castelino (1958) EA 461*** where the East African Court of Appeal held inter alia 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."*

9. It has of course been said that the amendment will compromise the defence raised by the respondent, but I do not see how that can be used to defeat a party from amending his/her pleadings. I have already said that what the plaintiff wants to amend is principally to include a prayer for extension of time for obtaining consent of the Land Control Board. If the amendment is allowed, the defendant will have an opportunity of amending her defence, if she is minded so to do, and plead why such an extension of time ought not to be granted. I really do not see what injustice the defendant will suffer if I allow the plaintiff to amend his plaint.

10. I therefore allow this application. I direct the plaintiff to file and serve the amended plaint within 7 days from today. Upon service of the amended plaint, the defendant has 14 days within which to file an amended defence, if any.

11. The plaintiff of course had opportunity to plead his case fully in the first instance, and this grant of leave is subject to him paying thrown away costs, which in my discretion I assess at Kshs. 12,500/= and the same ought to be paid within 7 days from today failure to which the leave granted herein will lapse.

12. It is so ordered.

**Dated, signed and delivered in open court at Nakuru this 15<sup>th</sup> day of February 2017.**

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**

**In presence of :**

Mr. Kanyi Ngure for the plaintiff/applicant

Mr. Njuguna Kamanga for the defendant/respondent

Court Assistant : Nelima

**MUNYAO SILA**

**JUDGE**

**ENVIRONMENT & LAND COURT**

**AT NAKURU**