



REPUBLIC OF KENYA

ENVIRONMENT AND LAND COURT AT MACHAKOS

ELC. CASE NO. 42 OF 2007

BONIFACE MUTUA MBONDO.....PLAINTIFF/RESPONDENT

VERSUS

JOHN MALINDA-CHAIRMAN OF

SENGUKA SELF HELP GROUP.....1ST DEFENDANT/APPLICANT

BONIFACE MATHEKA MULI THE SECRETARY OF

SENGUKA SELF HELP GROUP.....2ND DEFENDANT/APPLICANT

ALOISE KITAMBI-THE TREASURER OF

SENGUKA SELF GROUP.....3RD DEFENDANT/APPLICANT

SENGUKA SELF HELP GROUP.....4TH DEFENDANT/APPLICANT

RULING

1. In the Application dated 23rd October, 2012, the Defendants are seeking for the following orders:

- 1) That leave be granted to the Defendant/Applicants to further amend the amended defence amended on 22/6/2007 out of time in terms of the annexed further amended defence.***
- 2) That the further amended defence be deemed as duly filed and served upon payment of the requisite fees.***
- 3) That leave be granted to the Defendant/Applicants to issue and serve a Third Party Notice out of time upon Philomena Kawinzi in terms of the third Party Notice annexed hereto.***
- 4) That the costs of this Application be provided for.***

2. The Application is premised on the grounds that the intended amendments will go along way to bringing out the real issues for determination; that the 4th Defendant's bonafide officials have since changed; that no prejudice will be occasioned to the Plaintiffs if the amendments are granted and that the proposed third party should be joined to facilitate the final and effectual determination of the issues arising in the suit.

3. In the Affidavit of John Wambua Mutiso, he has deponed that Philomena Kawinzi is the daughter in

law of the Plaintiff; that the Defendant purchased a portion of land of parcel of land Matungulu/Kyaume/1506 from Philomena Kawinzi and that it is in the interest of justice that the Application is allowed.

4. In response, the Plaintiff averred that the Application is incompetent, frivolous, bad in law and an abuse of the court process; that the Application offends the mandatory provisions of the law and that the orders being sought cannot be granted.

5. In his submissions, the Defendants' advocate submitted that the proposed amendments will not prejudice the Plaintiff because the matter has not been heard; that the law allows pleadings to be amended at any stage and that the Defendants' Application should be allowed.

6. The Defendants' counsel relied on several authorities which I have considered.

7. The Plaintiff's advocate submitted that the deponent of the Affidavit in support of the Application has not averred in what capacity he has sworn the Affidavit; that the said deponent is not a party to the suit and that the Defendants' Application is muddled up with many orders.

8. Counsel submitted that the amendments seek to substitute the Defendants with new ones; that it is only the Plaintiff who can drop parties to a suit and that the proposed amendments are seeking to affect the character of the suit.

9. The Application before the court is seeking to further amend the amended Defence by introducing new Defendants in the suit.

10. According to the Affidavit of John Wambua Mutiso, the officials of the 4th Defendant have since changed hence the need to replace the retired officials with the new ones.

11. The deponent of the Affidavit is not a party to the suit. Indeed, the said John Wambua Mutiso has not described himself in the said Affidavit. It is therefore not clear to this court in which capacity he is swearing the Affidavit in a matter in which he is not a party.

12. Considering that the deponent of the Affidavit in Support of the Application is not a party in the suit, I find that the Application dated 23rd October, 2013 is bad in law and fatally defective.

13. In any event, the Plaintiff sued the Defendants on the ground that they had trespassed and erected structures on the suit land.

14. Having sought reliefs as against the Defendants, the Applicant cannot seek to substitute the Defendants with new ones.

15. Indeed, it is within the province of the Plaintiff to decide the parties he wishes to sue and not the Defendants or the said John Wambua Mutiso.

16. In the circumstances, I find and hold that the Application is not only bad in law but also unmeritorious.

17. I therefore dismiss the Application dated 23rd October, 2012 with costs.

DATED, SIGNED and DELIVERED in MACHAKOS this 19th DAY OF MAY, 2017.

O. A. ANGOTE,

JUDGE.