



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

**AT NYERI**

**ELC NO. 33 OF 2015**

**TABITHA WANJIKU KARIITHI .....PLAINTIFF**

**-VERSUS-**

**JOHN NDEGWA KARIITHI .....DEFENDANT**

**RULING**

1. John Ndegwa Kariithi, the defendant (hereinafter referred to as the applicant) brought the notice of motion dated **30th December, 2016** seeking leave to amend his statement of defence to include a counter-claim.
2. The amendment sought is said to be necessarily as it will assist the court to address all pertinent issues in the suit and to comprehensively deal with the real question in controversy between the parties to this suit.
3. The application is supported by the affidavit of the applicant in which it is *inter alia* deposed that the amendment is sought to reflect the changed circumstances of the case. In that regard, it is pointed out that the suit properties to wit L.R Thegenge/Karia /4432 to 4436 were cancelled during the pendency of this suit and the suit property reverted to it's original title to wit Thegenge/Karia/269.
4. Through the amendment sought, the applicant seeks judgment against the plaintiff for an order of subdivision of the suit property (Thegenge/Karia 269 into equal shares and transfer of the shares to the beneficiaries thereof).
5. In response, the plaintiff filed grounds of opposition dated 20th February, 2017 in which she contends that the application is frivolous, vexatious and a gross abuse of the process of the court.
6. Arguing that through the application the applicant has admitted her claim, the plaintiff urges the court to dismiss the application with costs to her.

**Law on amendment of pleadings**

7. The general power of the court to amend pleadings draws from **Section 100** of the Civil Procedure Act (CPA) which provides as follows: -

**“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the**

proceeding.” (Section 100 CPA).

8. The power is also donated by **Order 8 Rule 3** of the Civil Procedure Rules (CPR) which provides as follows:-

**“Subject to Order 1, rules 9 and 10, order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as may direct, allow any party to amend his pleadings.”**

### **Analysis and determination**

9. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank limited (2000)2 E.A 365* as follows: -

**“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”**

10. In the case of *Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014]eKLR* the court observed:

**“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”**

11. **Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition** provides as follows concerning amendment of pleadings:-

***“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”***

12. It is quite clear from the above cited provisions of the law, case law and treatises that the discretion of a trial court to allow amendments of pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

13. In applying the foregoing principles to the instant case, the applicant seeks leave to amend his pleadings to include a counter-claim and to reflect the changed circumstances of the case, that is to say title to the suit property has been reverted to its original state.

14. On the merits of the application, although case law suggests that the power to partition land occupied in common vests in the Registrar (see the cases of **Teresa Andawo Ogola & 3 others v George Onyango Obwanda [2016] eKLR**; **Kiprono Arap Koske v. John Cheruiyot Koske (2016) eKLR** and **Ali Sharif Maulana & Another v. Scavo Pietro & Anotherf (2015) e KLR**), being of the view that this court in exercise of its inherent power to do justice to parties can order the Registrar to hear the tenants in common with a view of severing their interest in the co-tenancy in view of the changed circumstances of

the case, I hold the view that the applicant has made up a case for being allowed to amend his pleadings to reflect the changed circumstances of the case.

15. The upshot of the foregoing is that the application has merit and is allowed as prayed.

**Dated, signed and delivered at Nyeri this 14th day of June, 2017.**

**L N WAITHAKA**

**JUDGE.**

**In the presence of:**

Mr. Muhoho for the defendant/respondent

Ms Wanjira h/b for Mr. Ng'ang'a Munene for plaintiff/applicant

Court assistant – Esther