



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

**ELC CASE NO. 93 OF 2016**

VERONICA WAMBUI MUIBIRI.....PLAINTIFF

VERSUS

VERONICA WANGUI MWANGI.....DEFENDANT

**RULING**

This is in respect to the defendant's Notice of Motion dated 13th December 2016 seeking the following orders:

- 1. That the defendant be granted leave to amend the defence and file a counter-claim.***
- 2. That JOSEPH WANJOHI MWANGI be joined as a defendant in the counter-claim.***

The application which is premised under ***Order 1 Rules 10 and 35 of the Civil Procedure Rules*** is supported by the affidavit of **MWANIKI WARIMA** who is the defendant's advocate. In that affidavit, it is deponed that circumstances have necessitated the amendment of the defence and therefore the Court should exercise its unfettered discretion to grant leave to amend the defence and this will not prejudice the plaintiff who will have leave to reply to the amended defence. I should pause at this point to note that the Court has not been informed of the nature of the proposed amendment as there is no draft amended defence nor counter-claim.

The application is opposed and by her replying affidavit, the plaintiff has deponed, inter alia, that she has not even been served with the original statement of defence sought to be amended, that the defendant's advocate has no capacity to act for the defendant and also adduce evidence contrary to ***Order 18 Rule 3 (1) of the Civil Procedure Rules*** and this application is therefore incompetent. There are other averments raised in the replying affidavit and which, in my view, appear to address the dispute herein and not the application at hand.

Submissions to the application have been filed both by **GORI OMBONGI** advocates for the plaintiff and **MWANIKI WARIMA** advocates for the defendant.

I have considered the application, the rival affidavits and submissions by counsel.

***Order 1 Rule 10 of the Civil Procedure Rules*** donates to the Court the power to amend pleadings, to enjoin a party either as a plaintiff or a defendant "***whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit***".

The plaintiff has taken issue with the fact that the defendant's advocate, rather than the defendant herself,

has sworn the affidavit in support of the application. Ordinarily, an affidavit should not be sworn by an advocate on behalf of his client more so in matters where the advocate is acting for the client. This could be a minefield for potential conflict. However, **Order 19 Rule 3 (1) of the Civil Procedure Rules** states that:

***“Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove.....”***

In **KAMLESH PATNI VS NASIR IBRAHIM ALI & OTHERS C.A CIVIL APPEAL No. 354 of 2004 (NBI)**, the Court of Appeal in dealing with an objection on the admissibility of an affidavit sworn by counsel stated that:

***“There is otherwise no express prohibition against an advocate who, of his own knowledge can prove some facts, to state them in an affidavit on behalf of his client, so too an advocate who cannot readily find his client but has information the source of which he can disclose and state the grounds for believing the information.....”***

There can therefore be no real objection to this affidavit sworn by **MWANIKI WARIMA**. The only problem with that affidavit is that it is completely bereft of any useful information that can assist this Court in determining whether the intended amendment will serve the purposes that **Order 1 Rule 10 of the Civil Procedure Rules** seeks to address and that is, ***“to enable the Court effectively and completely to adjudicate upon and settle all questions involved in the suit”***. This is made worse by the fact that even a draft copy of the proposed amended defence and counter-claim was not annexed to the application. It is a good practice to do so. The only information worth noting is that in the submissions by counsel for the defendant, it is submitted that the said **JOSEPH WANJOHI MWANGI** who the defendant seeks to enjoin in these proceedings is the one who sold the land in dispute to the defendant. Such information should ordinarily be contained in the supporting affidavit and not in submissions. I must therefore express my displeasure in the casual manner in which counsel for the defendant has approached this application.

The Court enjoys a wide latitude in granting parties leave to amend their pleadings. In **CENTRAL KENYA LTD VS TRUST BANK LTD & OTHERS C.A CIVIL APPEAL No. 222 of 1998 (2002 e K.L.R)**, the Court of Appeal stated as follows:

***“Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder, as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see BECOCO LTD VS ALFA LAVAL CO. LTD 1994 4 ALL E.R 464)”***.

In the same case, the Court said:

***“The overriding consideration in application for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for granting leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”***.

As indicated above, the basis of the application is that **JOSEPH WANJOHI MWANGI** who is sought to be enjoined in these proceedings is the one who sold the land in dispute to the defendant. In my view, the said **JOSEPH WANJOHI MWANGI** is therefore a necessary party in these proceedings ***“to enable the Court effectually and completely to adjudicate upon and settle all the questions in the suit”***. There also has been no undue delay in bringing this application as the parties have not even complied with the pre-trial directions under **Order II Civil Procedure Rules**. Finally, there is no prejudice that the plaintiff will suffer that cannot be compensated for by an order for costs.

The up-shot of the above therefore is that the defendant's Notice of Motion dated 13th December 2016 is allowed in the following terms:

***1. The defendant is allowed to amend her defence to enjoin JOSEPH WANJOHI MWANGI and also file a counter-claim within 15 days of this ruling being delivered.***

***2. The plaintiff shall have 15 days from the date of service of the amended defence and counter-claim to file a reply and defence to the same.***

***3. The defendant shall meet the costs of this application.***

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**

Ruling delivered, dated and signed in open Court this 14<sup>th</sup> day of July 2017

Mr. Ombongi for Plaintiff present

Ms Muthike for Mr. Warima for Defendant present.

**B.N. OLAO**

**JUDGE**

**14<sup>TH</sup> JULY, 2017**