



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**ENVIRONMENTAL AND LAND COURT**  
**ELC. CASE NO. 2315 OF 2007**

**SALIM HUSSEIN DUNGARWALLA.....PLAINTIFF**

**VERSUS**

**UZIMA PRESS LIMITED..... 1<sup>ST</sup> DEFENDANT**

**RIGHT END PROPERTIES LTD..... 2<sup>ND</sup> DEFENDANT**

**THE REGISTRAR OF TITLES..... 3<sup>RD</sup> DEFENDANT**

**RULING**

Coming up before me for determination is the Notice of Motion dated 27<sup>th</sup> July 2014 in which the 1<sup>st</sup> Defendant/Applicant seeks that the court be pleased to grant it leave to amend its Statement of Defence and Counterclaim dated 19<sup>th</sup> March 2008 in the manner and style of the draft annexed, that the said draft be deemed as duly filed and served subject to payment of requisite court filing fees and that the costs of this Application be in the cause.

The Application is premised on the grounds appearing on its face together with the Supporting Affidavit of Elias Masika, sworn on 27<sup>th</sup> July 2014, in which he averred that he is an advocate of the High Court of Kenya with the conduct of this matter on behalf of the 1<sup>st</sup> Defendant/Applicant. He further averred that the 1<sup>st</sup> Defendant/Applicant filed a Statement of Defence and Counterclaim in this matter on 19<sup>th</sup> March 2008 in which it sought, inter alia, a declaration that a transfer that had been lodged vis-à-vis the 2<sup>nd</sup> Defendant by the 1<sup>st</sup> Defendant in relation to the suit property was valid and not subject to any rights or interests of the Plaintiff. He added that he has been instructed by the 1<sup>st</sup> Defendant/Applicant to amend its Statement of Defence and Counterclaim in the manner and style of the draft annexed. He further averred that the stated amendments are necessitated by the fact that upon terminating the Agreement for sale dated 25<sup>th</sup> June 2005 with the Plaintiff, the 1<sup>st</sup> Defendant/Applicant entered into a fresh agreement for sale with Messrs Ashraf Savani and Madatali Suburali Chartur dated 15<sup>th</sup> June 2007, a Transfer was duly registered in favor of the 2<sup>nd</sup> Defendant on 16<sup>th</sup> February 2011 although the agreed purchase price had not been paid to the 1<sup>st</sup> Defendant by the 2<sup>nd</sup> Defendant and further that at the time the averments in the Statement of Defence and Counterclaim were made by the 1<sup>st</sup> Defendant/Applicant, the Transfer had not been lodged for registration. He stated further that the said Transfer has since been cancelled on account of frustration of the consideration. He further averred that on account of the said cancellation, the averments in the Statement of Defence and Counterclaim have fundamentally changed and been rendered superfluous as the Transfer has in effect been rendered nugatory. He added that this has led the 1<sup>st</sup>

Defendant/Applicant to terminate and rescind the agreement for sale between it and the 2<sup>nd</sup> Defendant and set up its own operational headquarters for its own use on the suit property.

The Application is contested. The 2<sup>nd</sup> defendant filed its Grounds of Opposition dated 7<sup>th</sup> August 2014 as follows:

1. The proposed amendment is not only prejudicial to the 2<sup>nd</sup> Defendant but is also sought so late in the day as:
  - a. The matter is part heard and PW1 is since deceased.
  - b. A party cannot rescind an agreement through an amendment.
  - c. A cause of action cannot be founded through an amendment to a pleading.
  - d. The proposed amendment shall change the character of the case, open up closed pleadings, prompt another pre-trial conference and prompt a collateral attack on proceedings filed elsewhere.
2. The court has no jurisdiction to grant the reliefs sought there being a conference order in terms of Order 11 Rule 4 of the Civil Procedure Rules, 2010
3. The non-completion of the Agreement of Sale between the 1<sup>st</sup> Defendant and the 2<sup>nd</sup> Defendant was on account of orders issued herein and the proposed amendment is a collateral attack on those orders.

The Application is further contested by Martin Maina in his Replying Affidavit sworn on 31<sup>st</sup> August 2014 in which he averred that he is the Plaintiff's former advocate, the Plaintiff having passed on. He further averred that sometime in June 2005, he was engaged by the Plaintiff in the conveyance of L.R. No. 1870/X/24 in Westlands from the 1<sup>st</sup> Defendant/Applicant. He averred further that the amendments sought should be rejected as they will fundamentally alter the nature of the suit herein. He added that the 1<sup>st</sup> Defendant/Applicant wishes to amend their defence and bring in issues which have since transpired after this suit was filed, specifically making reference to paragraph 4(c) and (d) of the Supporting Affidavit. He further averred that the amendments sought herein are being sought after the Plaintiff has testified and been cross examined, with the aim of filling in the gaps which were exposed after the Plaintiff's testimony. He added that the amendments sought are in bad faith as the Plaintiff is now deceased, the transfer mentioned in ground (b) of the Application was a transfer that was registered fraudulently during the pendency of a caveat and an injunction was subsequently reversed by the Registrar, a cancellation of a transfer as stated in ground (c) cannot be frustrated by delays that were occasioned by a court order and further that the ground raised in (d) is a sure show and confirmation of the greed of the 1<sup>st</sup> Defendant/Applicant who admitted the action of rescinding an existing contract with the Plaintiff and further purporting so to do with the 2<sup>nd</sup> Defendant. He further stated that this is a situation whereby the 1<sup>st</sup> Defendant/Applicant having tested the Plaintiff's testimony has now decided to take a second stab at the case by changing the course of their defence which they know will not be put to test as the Plaintiff is deceased. He added that there has been undue delay in seeking the amendments as the 1<sup>st</sup> Defendant/Applicant's advocates came on record on 8<sup>th</sup> March 2013 and only sought leave to put in in this Application on 25<sup>th</sup> June 2014, a period of one whole year. He stated that the amendments sought herein would be prejudicial to the rights of the Plaintiff and would occasion him a great injustice which cannot be compensated by costs as the Plaintiff would not be in a position to test the veracity of the allegations raised both in the Amended Statement of Defence and Counterclaim.

The issue I am called upon to determine is whether to allow the amendment of the Statement of Defence and Counterclaim as per the draft annexed to this Application as sought by the 1<sup>st</sup> Defendant/Applicant. On that issue, the applicable law is as follows:-

Order 2 Rule 15 of the Civil Procedure Rules, 2010 provides that,

***“(1) At any stage of the proceedings the Court may order to be struck out or amended any pleading on the ground that:-***

