



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT**  
**AT KITALE**  
**LAND CASE NO. 144 OF 2006**

**MARY WAMBUI MURIITHI.....PLAINTIFF**

**VERSUS**

**MARGARET WANJIKU KARIUKI.....DEFENDANT**

**R U L I N G**

**BACKGROUND**

1. The applicant Margaret Wanjiku Kariuki filed a Notice of Motion dated 26/4/2016 in which she sought the following prayers:-

- a. **That the order/ruling of the court made on 10/12/2008 and any subsequent order/judgment be and is hereby reviewed.**
- b. **That upon reviewing of the said order the applicant be and is hereby granted leave of the court to amend her statement of defence to include a counter-claim.**
- c. **That the annexed amended statement of defence and counter-claim be deemed to be duly filed pending the payment of requisite court fees.**
- d. **Any other order the court deems fit to grant.**

2. The respondent had sued the applicant herein on 3/8/2006. The applicant filed a defence to the plaintiff's claim on 15/8/2006. The defence was filed in person. On 13/10/2006 the applicant appointed a firm of advocates to represent her. On 13/3/2007 the applicant filed an amended defence and counter-claim. On 5/8/2008 the present respondent filed an application seeking to strike out the amended defence and counter-claim.

3. In a ruling delivered on 10/12/2008, the amended defence and counter-claim was struck out by Justice Ombija who ordered that the plaintiff proceeds to list down the case for hearing by way of formal proof. This is the ruling which triggered the present application.

**APPLICANT'S CONTENTION**

4. The applicant contends that the court was misled into believing that prior to the filing of amended defence and counter-claim, there was no defence on record. The orders which were obtained vide ruling of 10/12/2008 were meant to allow the respondent to proceed with the case by way of formal proof thus

circumventing the cause of justice. The applicant therefore contends that there is need for her to be allowed to file an amended defence and counter-claim so that all issues can be determined by the court.

### **RESPONDENT'S CONTENTION**

5. The application by the applicant is opposed based on the respondent's replying affidavit sworn on 14/5/2016. The respondent contends that the filing of this application is an abuse of the process of the court in that there are two previous applications filed by the applicant which are similar to this one and that the filing of the current one is therefore an abuse of the process of the court. The respondent further contends that the filing of this application was unnecessary as the respondent had sought and obtained leave to amend the plaint subsequent to the ruling sought to be reviewed. The respondent argues that the applicant had a right to file an amended defence and counter-claim upon being served with an amended plaint by the respondent. The respondent argued that the grant of leave to the respondent to amend the plaint in essence rendered the order of 10/12/2008 unnecessary.

### **ANALYSIS**

6. I have gone through the applicant's application as well as the opposition thereto by the respondent. The issues which emerge for determination are firstly whether this application is an abuse of the process of the court. Secondly whether the applicant has made out a case for review of the ruling of 10/12/2008. Lastly, is there need for the court to grant leave to amend in view of the fact that the applicant had the opportunity to file an amended defence and counter-claim after the plaintiff had been granted leave to file an amended plaint?

7. A look at the pleadings shows that the applicant filed an application to amend defence and counter-claim on 17/12/2009 and another one on 11/3/2016. These two applications are still pending. This notwithstanding, the applicant filed the current one without seeking to withdraw the two previous applications. The applicant's conduct amounts to an abuse of the process of the court. A litigant cannot keep filing similar applications which are left in the court file. I find that the filing of this application is actually an abuse of the process of the court.

8. On the second issue, ***Order 45 of the Civil Procedure Rules*** is clear on the grounds upon which an application for review can be made. In the instant application, the applicant seems to be complaining that the court was misled into believing that there was no defence before an amended defence and counter-claim was filed. It is clear that the applicant seems to think that this was the case because the trial judge directed that the matter do proceed by way of formal proof. There is no contention that the applicant had filed a defence to the respondent's claim on 15/8/2006. The issue which was before the trial judge was whether there was leave obtained before an amended defence and counter-claim were filed. There could have not been an amended defence without a defence having been filed. The judge's direction that the case was to proceed to hearing by way of formal proof was therefore an erroneous direction. There is no way the suit would have proceeded by way of formal proof when the applicant had already filed a defence. What was struck out was the amended defence and counter-claim and not the defence. This erroneous finding of the judge cannot therefore be a ground for review. It can only be a good ground for appeal. I therefore find that there is no ground for review disclosed and I cannot therefore review the court's ruling delivered on 10/12/2008.

9. On the last issue, it is clear that the applicant's amended defence and counter-claim were struck out on 10/12/2008. Subsequent to this striking out, the respondent filed an application seeking to amend her plaint. This application was not opposed. An amended plaint was filed and served on the applicant's advocates on 12/5/2010. The effect of the amendment of the plaint subsequent to the ruling of 10/12/2008 is that it rendered the ruling of 10/12/2008 superfluous. The applicant was given a fresh opportunity to amend her defence and file a counter-claim. She did not do so. What she should have done was to seek extension of time to file an amended defence and counter-claim and not to go for review and seek for amendment when she had the opportunity to do so.

10. This is one case which has been pending in court not because of any good reason but because of

inaction by the parties. The case was set for dismissal for want of prosecution in February this year but it was spared dismissal. As early as 24/1/2007 the court had given parties in this case 60 days within which to finalize with pre-trial procedures but that seems not to have been heeded. To ensure that this case moves forward I will allow the prayer for amendment of defence to include a counter-claim. Amended defence and counter-claim should be filed and served within seven days from the date hereof. If this is not done, the application shall stand dismissed without further recourse to court.

It is so ordered.

Dated, signed and delivered at Kitale on this **18<sup>th</sup>** day of **August, 2016**.

**E. OBAGA**

**JUDGE**

In the presence of M/S. Wanyama for Mr. Kiarie for plaintiff/respondent and son of the defendant/applicant. Court Assistant – Isabellah.

**E. OBAGA**

**JUDGE**

**18/8/2016**