



1.

**REPUBLIC OF KENYA**

**HIGH COURT OF KENYA AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL SUIT 1133 OF 2003**

2. **GRACE WANGUI MBURU** .....1<sup>ST</sup> PLAINTIFF  
3. **PETER MUGUTI KAHUNYA** .....2<sup>ND</sup> PLAINTIFF

**VERSUS**

1. **PETER MBURU NGURI** .....1<sup>ST</sup> DEFENDANT  
2. **GODFREY NGANGA NYOIKE**.....2<sup>ND</sup> DEFENDANT  
3. **HOSEA MUTHAMA MWIKA** .....3<sup>RD</sup> DEFENDANT  
4. **KARAGIRA SELF HELP MIXED GROUP**.....4<sup>TH</sup> DEFENDANT  
5. **JOSEPH NGANGA KANYUKII**  
**T/A EXCELLENT AUCTIONEER** .....PROPOSED 5<sup>TH</sup> DEFENDANT

**RULING**

The plaintiffs/Applicants have by a Chamber Summons application dated the 14<sup>th</sup> June 2004 moved the court, on the grounds stated therein supported by the affidavit of the second plaintiff/applicant made on the 14<sup>th</sup> June 2004, for leave to amend their Amended plaint filed on the 17<sup>th</sup> December 2003 to which application the Defendants/Respondents have filed a Notice of Preliminary Objection dated the 30<sup>th</sup> July 2004.

At the commencement of the hearing of the Preliminary Objection, Mr. P.N. Mugo for the Plaintiffs/Applicants, citing various rules of the Civil Procedure Rules, argued that the objection has been raised prematurely as the Plaintiffs are, subject to leave of the court, entitled to amend their pleadings at any stage before judgment.

Mr. Rumba Kinuthia, for the Defendants/Respondents, contended that the Preliminary Objection raised points of law including that the suit itself as presently filed is fatally and incurably defective and that it is, in any event, **res judicata**, which points of law must be determined before the application is heard.

I have considered the application in light of the respective submissions of learned counsel as well as the law.

The statutory provisions and the case law and commentaries on amendment of pleadings is well considered in the decision of this court in **Kuloba v. Oduol** [2001] 1 E.A. 101 and I do not find it

necessary to elaborate them here. Suffice it to say that this court is empowered to allow a party to amend his pleading at any stage of the proceedings upon such terms as the court may direct.

I will, therefore, allow, as I hereby do, the Chamber Summons application dated the 14<sup>th</sup> June 2004 in terms of prayers a) and b) thereof as in any event, there will be no prejudice occasioned to the Defendants/Respondents by my declining to hear at this stage their Preliminary Objection as contained in the Notice dated the 30<sup>th</sup> July 2004 as I consider that it has been prematurely raised – the same is hereby struck out.

It is ordered accordingly and further that the plaintiffs/applicants and the Defendants/Respondents will bear their respective costs of the application and the Preliminary objection respectively.

Dated and delivered at Nairobi this twelfth day of November 2004.

P. Kihara Kariuki

Ag. Judge