



REPUBLIC OF KENYA



**Kitiyo & another v Mwoi & 2 others (Environment & Land Case
184 of 2016) [2023] KEELC 16530 (KLR) (23 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16530 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 184 OF 2016
FO NYAGAKA, J
MARCH 23, 2023**

BETWEEN

MICHAEL FRANCIS CHEMONGES KITIYO 1ST PLAINTIFF

BIBLE CHRISTIAN FAITH CHURCH 2ND PLAINTIFF

AND

STEPHEN LOWASKOU MWOI 1ST DEFENDANT

THE CHIEF LAND REGISTRAR 2ND DEFENDANT

THE ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. The instant Application dated September 30, 2022 was filed by the 1st Plaintiff on October 3, 2021 (sic). It relies on Order 8, Rule 3 and Order 51, Rule 1 of the [Civil Procedure Rules](#) seeking the following reliefs:
 1. That leave be granted to the 1st Plaintiff to amend the Plaint in terms of the draft amended Plaint annexed to the supporting Affidavit of this Application;
 2. That costs of this Application be in the cause.
2. The Application is supported by the grounds on its body and further by Supporting Affidavit of the 1st Plaintiff. The facts as deposed in the Application are that from June 1, 1996, the Government of Kenya leased all that parcel of land namely Kitale Municipality Block 3/474 to the 1st Plaintiff for a term of ninety nine (99) years. The copy of Lease was annexed and marked as MK1.
3. The Applicant contended further that subsequent thereto, the 1st Plaintiff sold a portion of the same measuring 0.74 Ha to the 2nd Plaintiff in 2003. The Sale Agreement was marked MK2. Pursuant to the agreement, the 1st Plaintiff obtained the Land Control Consent to subdivide the suit land.



- He thereafter instructed a surveyor to subdivide the suit land into two (2) portions. The surveyor informed him that the subdivision gave rise to title number Kitale Municipality Block 3/973 and Kitale Municipality Block 3/974.
4. Kitale Municipality Block 3/974 was transferred to the 2nd Plaintiff who was issued with a certificate of lease by the 2nd Defendant. The certificate of lease and certificate of official search proving this was marked as MK3 and MK4 respectively. The 2nd Plaintiff thereafter occupied the said parcel of land and erected a church. He produced a photograph of the same marked as MK7.
 5. At the same time, title number Kitale Municipality Block 3/973 was registered in the name of the 1st Plaintiff. He produced the Certificate of Lease and Certificate of Official Search marked as MK5 and MK6 respectively. He has since constructed a school whose photos were marked in a bundle as MK8.
 6. Upon conducting a search in 2015, the Plaintiffs discovered that the 1st Defendant lay claim to the suit land. A Certificate of Official Search thereof was marked as MK9 in fact revealed that the suit land had been registered in his name on April 17, 2013. It is this registration that instigated the filing of the present suit.
 7. He argued further that it come to the attention of the 1st Plaintiff that the subdivisions stated earlier on did not take place in the suit land. He annexed a copy of the Registry Index Map marked MK10 for this holding. Following that discovery, the 1st Plaintiff lodged a complaint at the DCI for investigation. A copy of the letter was produced and marked MK11.
 8. Based on the foregoing reasons, the 1st Plaintiff has now sought to amend the Plaintiff in terms of the annexed draft amended Plaintiff marked MK12. As such the amendment was necessary to reflect the actual position on the ground. The Applicant added that was necessitated by the need to effectively determine the dispute between the parties. He prayed that the Application be allowed.

The Responses

9. The 1st Defendant opposed the Application. He filed a Replying Affidavit on October 13, 2022. He stated that the Application was an afterthought since it was filed after the Applicant had prosecuted and closed his case. It was his view that the Applicant sought to have a second chance to prosecute his suit. He denied any correlation with LR No. Kitale Municipality Block 3/474 and LR No Kitale Municipality Block 3/973 when seen together with LR No. Kitale Municipality Block 3/974 since they were not located within the same vicinity. He annexed SLM1, the Registry Index Map supporting this argument.
10. He continued that the Applicant was extensively cross-examined and could not prove that subdivision took place. The Applicant had formerly successfully applied for orders to have a surveyor to establish the position of the subdivided plots. However, that order marked as SLM2 was not enforced yet it would have set the record straight. In the circumstances, this court should reject to allow the prayers sought.
11. Since the Applicant had prosecuted his case to its conclusion, coupled with the intended delay the grant of the Application would have on the 1st Defendant's case, the 1st Defendant prayed that the Application be dismissed with costs.
12. The 2nd and 3rd Defendants on their part filed Grounds of Opposition dated November 2, 2022 on November 3, 2022. They grounded that the Application offended the rules of amendment; introduced a new cause of action substantially different in character and form; amounted to an admission of fraud on the Plaintiffs part from their deponents and testimonies on record; acted mala fides that the



Court should not cure their outright criminal culpability and that the amendments would result in irreparable loss, prejudice and difficulties to the 2nd and 3rd Defendants.

13. The 2nd Plaintiff did not file any response to the Application.

Rejoinder

14. The Applicant in response filed a Further Affidavit on November 22, 2022 and sworn on November 21, 2022. In a brief rejoinder, the Applicant reproduced its letter dated September 6, 2022 marked as MK1 maintaining that he had complained to the DCI that the 1st Defendant forged documents. He added that he has always acted in good faith and adopted the contents of his Application.

Submissions

15. Parties were directed to dispose of the Application by way of written submissions. However, as at the time of writing this ruling, only the Applicant had filed his submissions. The Applicant's submissions dated November 21, 2022 and filed on November 22, 2022 were that if the Application was allowed, the Defendants will have the opportunity to amend their pleadings and recall witnesses. As such, no prejudice would be occasioned on the part of the Defendants. He prayed that the Application be allowed.

Analysis and Disposition

16. I have considered the Application, the annexure thereto as well as the responses in opposition. I have also given due consideration to the relevant law. The Application seeks to amend the Plaint as per the draft amended Plaint annexed to the Application.
17. Under Order 8, Rule 3 and 5 of the Civil Procedure Rules, a party may amend his or her pleadings for the purpose of determining the real issue in controversy. The order may be granted in such a manner as the court directs on such terms as to costs or otherwise as are just. An amendment order is so indispensable that it may be allowed notwithstanding its effect will be to add or substitute a new cause of action arising out of the same facts substantially or otherwise. The Court of Appeal in [*Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited \[2013\] eKLR*](#) held as follows on amendment of pleadings:

' The law on amendment of pleading in terms of section 100 of the [*Civil Procedure Act*](#) and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition*, in the case of [*Joseph Ochieng & 2 others vs First National Bank of Chicago, Civil Appeal No 149 of 1991*](#) as follows:-

'The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an



amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.'

18. As such, an amendment can be allowed at any stage of the proceedings, however late, as long as it is done so in good faith. This also would happen so long as costs can be compensated to the other party. If the amendment is such that it would substantially create a different character out of the suit to conveniently create a fresh action, that amendment will not be allowed.
19. I have looked at the Application and particularly paid scrutiny to the Draft Amended Plaint. The 1st Plaintiff proposes several changes to his Plaint. For instance, the 1st Plaintiff wishes to abandon the fact that the properties were subdivided justifying that he discovered that the suit lands were never subdivided. He relies on annexures MK1 and MK11 to demonstrate that he lodged a complaint at the DCI offices.
20. A cursory perusal of that letter reveals that the 1st Plaintiff allegedly initially complained on March 4, 2021 as to allegations of forgery. This means that he was in possession of this knowledge since 2021.
21. A further reading of the Draft Amended Plaint reveals that the 1st Plaintiff also wants to abandon the allegation that he charged the suit land to Equity Bank. He also wants to abandon the fact that the 2nd Plaintiff was in occupation of Kitale Municipality Block 3/974.
22. In my view, given the circumstances above, the Application is not made in good faith. Furthermore, it seeks to conveniently change the cause of action to suit the 1st Plaintiff's hidden desire of the who seems to have discovered mysteriously that subdivision never took place yet that information was within his purview since 2021. It is further instructive to note that irrespective of these, the 1st Plaintiff testified and closed his case but is now seeking to amend his pleadings much later.
23. I concur with the Respondents and find that the Application is simply an afterthought, and geared towards sanitizing and elevating the 1st Plaintiff's chances of success. The 1st Plaintiff is attempting to salvage his case by filing the present Application. Contrary to his submissions, this Application has been made in bad faith. It is for the above reasons that I find that the Application dated lacks merit and it is hereby dismissed with costs to the Respondents.
24. I further direct parties to appear before me on April 13, 2023 to take further directions on the hearing. Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 23RD DAY OF MARCH 2023.

HON. DR.IUR FRED NYAGAKA

JUDGE, ELC KITALE

