



Oroto & another v Okello & 4 others (Environment & Land Case 56 of 2019) [2023] KEELC 16368 (KLR) (23 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16368 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE 56 OF 2019**

**BN OLAO, J
MARCH 23, 2023**

BETWEEN

DENNIS OKETCH OROTO 1ST APPLICANT

BENARD OKETCH 2ND APPLICANT

AND

JOHN BARASA OKELLO 1ST RESPONDENT

NYERERE OKELLO 2ND RESPONDENT

ARTHUR OKELLO 3RD RESPONDENT

SANYO OKELLO 4TH RESPONDENT

CHRISTOPHER OKELLO 5TH RESPONDENT

RULING

1. By a ruling delivered on July 21, 2022, Omollo J reinstated the Applicants’ suit which had earlier been dismissed. In allowing the application to reinstate the dismissed suit, the judge made the following orders:

“(a) That this court does set aside the orders dismissing the Plaintiffs’ suit and reinstates the same to be heard on merit on the following terms:

i. That the Plaintiffs shall deposit in Court Kshs.60,000 as security for costs of the 2nd (5th) and 3rd defendants within a period of 90 days from the date of delivery of this ruling.



- ii. The Plaintiffs either withdraws the suit against deceased defendants or bring an application to substitute them within a period of 120 days from date hereof.
 - iii. In default of both conditions, the order of dismissal will automatically be reinstated.
 - b. The costs of this application awarded to the 2nd (5th) and 3rd defendants/respondents.”
2. The record shows that vide a receipt dated September 19, 2022, the Applicants deposited in this Court the sum of Kshs.60,000. By a notice of withdrawal dated October 19, 2022 and filed herein on November 1, 2022, the Applicants withdrew the suit against the deceased 3rd and 4th defendants/respondents.
3. The Applicants have now moved this court vide their Notice of Motion dated November 30, 2022 seeking the following orders:
 1. That this Honourable court be pleased to extend time within which to bring this application and the same be deemed as duly filed within time.
 2. That this Honourable Court be pleased to allow the Applicants to amend their Originating Summons and add two more Applicants to their Originating Summons by removing Arthur Okello And Sanyo Okello As The 3Rd And 4Th Respondents And Add Eunice Adhiambo Mudei as one of the respondents and the originating Summons annexed hereto be deemed duly filed upon payment of the requisite fees.
 3. That the costs of this application be in the cause.
 4. The application which is the subject of this ruling is premised upon the provisions of Orders 8, 50 and 51 of the *Civil Procedure Rules* and supported by the affidavit of Wycliffe Obwoye Onsongo counsel for the Applicants.
 5. The gravamen of the application is that at the time of filing this Originating Summons, the Applicants were not aware that Arthur Okello And Sanyo Okello (the 3rd and 4th Respondents respectively) were deceased. That this Court ruled that the two be removed and the time within which to do so expired on 21st November 2022 hence the need for extension. That it is important to amend the Originating Summons to bring in two new Applicants namely Celestine Nabwire Oketch And Sofia Mola Oketch And One Respondent Namely Eunice Odhiambo Mudei.
 6. Annexed to the application are the following documents:
 1. Copy of the ruling dated July 21, 2022.
 2. Copy of limited grant ad litem issued to celestine nabwire okecho and sofia mola oketch in respect to The Estate Of Cyperian Oketch Orotu.
 3. Copy of the draft amended Originating Summons and supporting affidavit.
 4. Copy of register for the land parcel No Samia/budongo/371.
 5. Photographs.



The application is opposed and the Respondents filed both grounds of opposition and a replying affidavit by Christopher Okello the 5th Respondent dated January 24, 2023.

7. In the grounds of opposition, the Respondents describe the application as frivolous, vexatious and an afterthought meant only to further delay this suit.
8. In the replying affidavit, the 5th Respondent has re-visited the ruling of Omollo J delivered on July 21, 2022 and deposed that the conditions set at therein were not met. That this application is therefore frivolous, devoid of merit and should be dismissed.
9. When the application was placed before me on January 25, 2023, I directed that it be canvassed by way of written submissions. The same were subsequently filed both by Mr Onsongo Instructed By The Firm Of Wycliffe Obwoye Onsongo & Company Advocates For The Applicants And By Mr Ashioya Instructed By The Firm Of Ashioya And Company Advocates for the Respondent.
10. I have considered the application, the rival affidavits and grounds of opposition as well as the submissions by counsel.
11. The Applicants seek two substantive remedies:
 1. Extension of time to bring this application, and;
 2. Leave to amend the Originating Summons.

Extension Of Time:

12. In ground No 3 among which the application is premised, the Applicants state:
 - 3: “That the time within which to act expired on November 21, 2022 hence the need to extend time.”

And in paragraph 3 of the supporting affidavit, the Applicants’ counsel Mr Wycliffe Obwoye Onsongo has deposed as follows with regard to the removal of the 3rd and 4th Respondents from these proceedings:
 - 3: “That this Honourable Court in it’s ruling dated July 21, 2022 ordered for their removal and we must amend the Originating Summons to remove them (annexed hereto and marked WOO1 is a copy of the ruling).” Emphasis mine.

If I understood counsel well, and I think I did, he appears to have taken the view that in the ruling delivered by Omollo J on July 21, 2022, the judge directed that the Applicants must withdraw the suit against the 3rd and 4th Respondent, and also amend the Originating Summons all within 120 days from the date of the ruling. That is not correct. That part of the Judge’s order which I have already cited above and which, for avoidance of doubt, I shall reproduce in extenso, reads:

- ii. “The Plaintiffs either withdraws the suit against deceased defendants or bring an application to substitute them within a period of 120 days from date hereof.” Emphasis mine.

The record is clear that following that ruling, the Applicants withdrew the suits against the 3rd and 4th Respondents *vide* a notice of withdrawal dated October 19, 2022 and filed herein on November 1, 2022. Therefore, the Applicants had two options; either to withdraw the suit against the 3rd and 4th Respondents or have them substituted within 120 days from July 21, 2022 when the ruling was delivered. Having withdrawn



the suit against the 3rd and 4th Respondents on November 1, 2022 well within the 120 days as prescribed in the ruling, the Applicants had satisfactorily complied with one of the alternative options granted by the judge in the above order. They do not therefore require any extension of time to pursue the other option which is the substitution of the deceased 3rd and 4th Respondents. Indeed, in his own submissions at page 3, counsel for the Applicants did subsequently arrive at the right conclusion when he said:

“On condition (ii), the Plaintiffs/Applicants were either to withdraw the suit against the deceased Defendants OR bring an application to substitute them within a period of 120 days from the date of the judgment (sic). The Plaintiffs again complied with the said condition by withdrawing the suit against the two deceased on November 1, 2022. This was done by filing Notice to withdraw which was duly filed and served upon the Defendants/Respondent’s counsel.”

That is indeed the correct position. The judge did not order that the withdrawal of the suit against the 3rd and 4th Respondents and their substitution be done simultaneously within 120 days. It was either of the two. In his submissions, counsel for the Respondents has stated at page 3 that:

“Your Lordship, the last date for such compliance was the November 21, 2022 both these conditions were not fulfilled; the application before you was filed in Court on the November 30, 2022 which was definitely outside the period prescribed by the Honourable Court; this is certainly an abuse of the Court and the law; it is a show of blatant impunity; in paragraph 16(a) (iii) of the ruling as cited above, Justice Omollo decried (sic) as follows:

ii. In default of both conditions, the order of dismissal will automatically be reinstated.”

The above is of course a correct exposition of paragraph (iii) of Justice Omollo’s orders. But as is now clear, paragraph (ii) of the same orders which is the order being referred to in paragraph (iii) makes it clear that the Applicants were to “either withdraw the suit against deceased defendants or bring an application to substitute them within a period of 120 days from date hereof.” There are therefore two limbs to the order in paragraph (ii) and once the 1st limb was complied with, that was sufficient compliance with the orders. And although counsel for the Respondents has submitted further that there was a delay in depositing the Kshs 60,000 and withdrawing the claim against the 3rd and 4th Respondents, the record is clear that the Kshs 60,000 was deposited on 19th September 2022 as per the annexed receipt Ref NO EZKK92JM and the suit against the 3rd and 4th Respondents was withdrawn on November 1, 2022 all within the 120 days which were to expire on November 21, 2022.

13. The application for extension of time was therefore superfluous.

Leave To Amend Originating Summons.

14. The Applicants having complied with the order to deposit the Kshs 60,000 being security for costs within 90 days and having withdrawn the suit against the 3rd and 4th Respondents within 120 days, the application to substitute the deceased through amendment of the Originating Summons was not at all shackled to any of the orders contained in the ruling delivered on July 21, 2022.



15. Order 8 Rule 5(1) of the [Civil Procedure Rules](#) provides for the general power to amend pleadings. It states:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

Section 100 of the [Civil Procedure Act](#) also provides for the general power to amend in the following terms:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

In the case of [Joseph Ochieng & 2 Others v First National Bank of Chicago](#) CA Civil Appeal No 149 Of 1991, The Court of Appeal Stated thus Citing [Bullen & Leake & Jacob's Precedents of Pleadings](#) – 12th edition:

“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 mere 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 be 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.”

16. It is therefore clear from the above that the power to amend pleadings is wide. However, as is now well established, such wide discretion must be exercised judicially. In the circumstances of this case, the hearing has not even commenced. The amendment is necessitated by the need to bring on board legal representatives of deceased parties. It must also be remembered that a party is entitled to a fair trial under Article 50 (1) of the [Constitution](#) and therefore any amendments to pleadings which will enhance that Constitutional right must be freely allowed so that all parties can put forward all their cases without inhibitions. Counsel for the Respondents has submitted at length and cited case law on the jurisprudential criteria in determining whether or not to dismiss a suit. But that issue is now spent because it was considered by Omollo J in her ruling dated July 21, 2022 and the dismissal order was set aside on the conditions outlined above. And I am persuaded that those conditions were met and that the only issue for my determination now is whether the application for amendment of pleadings by substituting the deceased parties is available to the Applicants. From the material placed before me, I am persuaded that the application to amend the Originating Summons by substituting the deceased 3rd and 4th Respondents and adding two Applicants as per the annexed amended Originating Summons is well merited and is for allowing. The Respondents can be adequately compensated by an award of costs.
17. The up-shot of the above is that having considered the Notice of Motion dated November 30, 2022, this Court makes the following disposal orders:



1. Leave to amend the Originating Summons is hereby granted.
2. The Applicants shall file and serve the amended Originating Summons upon all the Respondents including the substitutes within 7 days from to-day and pay the requisite fees.
3. The Respondents shall file and serve their replying affidavits to the amended Originating Summons within 14 days from the date of service.
4. The applicants shall meet the costs of this application.
5. The matter shall be mentioned before the Deputy Registrar for pre-trial on April 18, 2023 to confirm compliance will Order 11 of the *Civil Procedure Rules* and thereafter list the suit for hearing on a date convenient to the parties.

RULING DATED, SIGNED AND DELIVERED ON THIS 23RD DAY OF MARCH 2023 BY WAY OF ELECTRONIC MAIL AS WAS ADVISED TO THE PARTIES ON 21ST FEBRUARY 2023.

BOAZ N. OLAO

JUDGE

23RD MARCH 2023

