



Malonza & another v Ula (Sued as the administrator of the Estate of Philip Ndolo Kilui (Deceased) & 4 others (Environment & Land Case 269 of 2017) [2023] KEELC 16593 (KLR) (22 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16593 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 269 OF 2017**

**TW MURIGI, J
MARCH 22, 2023**

BETWEEN

CHARLES KILUI MALONZA 1ST APPLICANT

PETER MALONZA KIMEU 2ND APPLICANT

AND

THOMAS MULWA NDOLO ULA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF PHILIP NDOLO KILUI (DECEASED) 1ST RESPONDENT

MARTIN MULALA KYENGO (SUED AS THE ADMINISTRATOR OF THE ESTATE OF KANUKWA KYENGO MALAI (DECEASED) 2ND RESPONDENT

JAMES KIENDI LILI 3RD RESPONDENT

DAVID MALAI LILI 4TH RESPONDENT

ESTHER KAMAN THE MWANIA (SUED AS THE ADMINISTRATOR OF THE ESTATE OF MWINA MALAI (DECEASED) 5TH RESPONDENT

RULING

1. By a chamber summons application dated March 3, 2022 brought pursuant to the provisions of sections 1A, 1B, 3A, 63 and 100 of the *Civil Procedure Act*, order 1 rule 3, 9, 10, 14 and 25, order 3 rule 15 and order 8 rules 3, 5 and 8 of the *Civil Procedure Rules* and all other enabling provisions of the law, the Applicants seeks the following orders:-

1. That this honourable court be pleased to grant the plaintiffs/applicants leave to further amend the Plaintiff and to amend their application dated September 29, 2020, filed on October 1, 2020 in terms of the annexed draft amended pleadings to add Francisca Ndanu Iluve as a party herein and also include parcels of land numbers Makueni/Kisekini/3895, Makueni/Kisekini/3896



and new diminished parcel of land number Makueni/Kisekini/412 in the Plaint herein as the same were hived off from the original suit parcel of land number 412 Kisekini Adjudication Section during the pendency of this suit.

2. That costs of this application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of the 1st applicant sworn on his own behalf and on behalf of the 2nd applicant on even date.

The Applicants Case

3. A summary of the applicants case is that the 2nd respondent, in response to the application dated June 28, 2021, averred that he had built structures on land parcel No Makueni/Kisekini/3895 which is registered in the names of Francisca Ndanu.
4. He further averred that the certificate of title for land parcel No Makueni/Kisekini/3895 was issued to Fransica Ndanu on July 5, 2018 during the pendency of this suit. The Plaintiffs averred that upon obtaining maps from the Survey of Kenya, they discovered that land parcels No Makueni/Kisekini/3895, No Makueni/Kisekini/3886 and Makueni/Kisekini/412 were hived off from the original parcel of land No 412 Kisekini Adjudication Section.
5. The Applicants further averred that upon conducting a search at the Makueni land registry, they discovered that land parcel No Makueni/Kisekini/3895 is registered in the name of Fransica Ndanu, land parcel No Makueni/Kisekini/3886 is registered in the name of Martin Mulala Kyengo while land parcel No Makueni/Kisekini/412 is owned in common by Kanukwa Kyengo Malai, James Kendi Lili, David Malai and Mwina Malai.
6. The applicants argued that it is necessary to further amend the Plaint so as to include the new party and the parcels of land. They argued that the amendment is necessary as it will enable the court to effectively adjudicate on all the questions involved in the suit.

The 2Nd Respondent's Case

7. Opposing the application, the 2nd respondent vide his replying affidavit averred that the application has been made in bad faith to defeat the ends of justice. In addition, he averred that the application is intended to scuttle the determination of the two applications pending before the court.
8. He further averred that the applicants are aware of the preliminary objection dated December 5, 2020 where parties had filed submissions. That the applicants filed an application for contempt dated June 28, 2021 in an attempt to scuttle the ruling on the preliminary objection.
9. That thereafter the applicants made an application for a site visit and a ruling date was reserved. He further averred that applicants filed the present application with a view to delay determination of the applications pending before the court. He argued that the amendment if allowed will completely change the cause of action and the parties to the suit herein. He urged the court to dismiss the application with costs to the 2nd respondent.
10. The application was not opposed by the 1st, 3rd, 4th and 5th defendants.
11. The application was canvassed by way of written submissions.

The Applicants Submissions

12. The Applicants submissions were filed in court on October 5, 2021.



13. In his submissions, counsel for the applicants reiterated the contents of the applicants supporting affidavit. To buttress his submissions counsel relied on the provisions of order 8 rule 3 of the Civil Procedure Rules.

The Respondent's Submissions

14. The Respondent's submissions were filed in court on November 21, 2021. Counsel for the respondent submitted that the purported amendment will not serve any legal purpose or aid the parties to resolve the dispute herein.

Analysis and Determination

15. Having considered the application, the affidavits and the rival submissions I find that the only issue that arises for determination is whether the Plaintiffs should be granted leave to further amend their Plaint.
16. Section 100 of the Civil Procedure Act makes provisions on the general power to amend, and gives the Court discretion on whether to allow an amendment or not.
17. Further order 8 rule 5 of the Civil Procedure Rules provides as follows;
- “(1) For purposes 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.”
18. The Plaintiffs are seeking to further amend their Plaint on the grounds that they have discovered additional evidence that was not within their knowledge. They argued that upon conducting a search at the Makueni land registry, they discovered that land parcels numbers Makueni/Kisekini/3885, Makueni/Kisekini/3886 and Makueni/Kisekini/412 were hived off from the original land parcel No 412 Kisekini Adjudication Section.
19. The 2nd defendant opposed the application on the grounds that the amendment will change the cause of action and the parties in addition to delaying this matter further.
20. The law as regards grant of leave to amend pleadings is well settled. The general rule is that amendments of pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The main principle is that an amendment should not be allowed if it causes injustice to the other side.
21. The Court of Appeal set out the principles under which courts may grant leave to amend pleadings in the case of Ochieng and others v First National Bank of Chicago Civil Appeal No 147 of 1991 where it held that:-
- a. The power of the court to allow amendment is intended to determine the true substantive merits of the case.
 - b. The amendments should be timeously applied for.
 - c. Power to amend can be exercised by the court at any stage of the proceedings.
 - d. 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.



- e. 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 reply on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of the current period of limitation.
22. The 2nd respondent has not demonstrated or indicated what particular prejudice if any that he will suffer if the amendment is allowed or he will not be adequately compensated if the amendment is allowed at this stage.
23. The court has inherent power under section 3A of the *Civil Procedure Act* to permit a party to amend his or her pleadings at any time before judgment. The overriding consideration in an application for leave for amendment is whether the amendment sought is necessary for determining the real question in controversy and whether the amendment will prejudice the opposite party. In the instant case, I find that the 2nd defendant will not be prejudiced in any way.
24. I find that the further amendment sought by the plaintiff is necessary for the determination of the real question in controversy.
25. The upshot of the foregoing is that the application dated March 3, 2022 is merited and I proceed to allow it in the following terms:-
- a. The further amended plaint and amended notice of motion be filed and served within 14 days from the date hereof.
- b. That the respondent is hereby granted leave to file an amended defence within 14 days after service.
- c. That the applicant shall meet the cost of this application.

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 22ND DAY OF MARCH, 2023.

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HON T MURIGI

JUDGE

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi

No appearance of the parties.

