



**Omenda & another v POP & another (Matrimonial Cause E002 of 2022)  
[2024] KEHC 16589 (KLR) (24 December 2024) (Ruling)**

Neutral citation: [2024] KEHC 16589 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KISUMU  
MATRIMONIAL CAUSE E002 OF 2022  
MS SHARIFF & F.S IBRAHIM, JJ  
DECEMBER 24, 2024**

**BETWEEN**

**JOSEPHINE ATIENO OMENDA ..... APPLICANT**

**AND**

**JAO ..... PLAINTIFF**

**AND**

**POP ..... DEFENDANT**

**AND**

**PETER OTIENO PETE ..... RESPONDENT**

**RULING**

1. On 29th September 2023 this court pursuant to the Plaintiff's application dated 29th December 2022, issued an injunction restraining the Respondent from evicting the Applicant from the matrimonial home located on land parcel No. Kisumu/Kasule/xxxx.
2. However, in her quest to enforce the order the Plaintiff/Applicant realised it was unenforceable, as the home was actually located in Kisumu/Nyalunya/xxxx not on Kisumu/Kasule/xxxx as captured in the order.
3. In a bid to address this anomaly the Applicant has filed the current application dated 15th December 2023 seeking the following orders: -
  1. Spent
  2. That this Court be pleased to grant leave to amend the Plaintiff/Applicants Application and Originating Summons dated 29th December 2022 by amending LR No. Kisumu/Kasule/xxxx to read LR No. Kisumu/Nyalunya/xxxx



3. That upon grant of prayer 2 above, order dated 29th of September 2023 be amended to go in tandem with the Plaintiff/Applicant's application dated 29th December 2022.
4. That this court be pleased to extend time within which Plaintiff/Applicant is to comply with orders of the Court issued on 21st September 2023.
5. Costs of the application be provided for
4. In support of her application, the Applicant swore an affidavit in which she explains that she initially believed the matrimonial home was situated on LR No. Kisumu/Kasule/xxxx.
5. She asserts that she encountered difficulties in enforcing the order, leading to the engagement of a land surveyor, who confirmed that the home was actually on LR No. Kisumu/Nyalunya/xxxx
6. She deposes that at the time of filing suit she was not seized of the land registration details as they were in the custody of the Respondent.
7. The Applicant further asserts that there has been no undue delay in filing the application and the Respondent will not be prejudiced by the amendment.
8. The Application is opposed via replying affidavit dated 1st March 2024 sworn by the Respondent in which he deposes that changing the parcel number would significantly alter the pleadings, requiring the filing of a new suit.
9. He asserts that the two parcels of land quoted by the applicant are so far apart that it was impossible to confuse them, raising doubt on the authenticity of the survey report.
10. The Respondent denies being the sole custodian of the registration documents, asserting that the matrimonial home was registered in the names of his grandfather.
11. In urging that he will suffer prejudice if the amendment is done, he reiterates that the amendment will require change of averments made on oath, which is untenable.
12. The Respondent further argues that if the land in question were indeed different, he would have mounted a different defence, asserting that the application is an abuse of court process. He also affirms that the Applicant would not suffer any prejudice, as she resides in another matrimonial home in Nairobi, where she has denied him entry.
13. Additionally, the Respondent deposes that due to the volatile nature of their relationship, it would be virtually impossible for them to coexist under one roof.
14. Both parties agreed to canvass the application by way of written submissions.

### **Applicant's Submissions**

15. The Applicant submits that just like a pleading, an application can be amended, she cites the case of *Fredrick Mwangi Nyange v Garam Investments & Another* [2013]eKLR in support of this assertion. Additionally, she references sections 99 and 100 of the *Civil Procedure Act*, with section 99 specifically allowing the court to correct clerical or arithmetic mistakes in judgments, decrees, or orders arising from accidental slips or omissions.
16. The Applicant further argues that amending the parcel number is necessary for the proper determination of the real issues in controversy and would correct the errors in the proceedings and avoid multiplicity of suits. She urges the court to invoke the provisions of section 99 of the Civil Procedure Act, on its own motion, to allow the amendment. In support of this, she cites the cases



of *Steve Onyango v Techspa General Supplies Ltd & 2 Others* [2020]eKLR, *Taib A Taib Advocates v Firoz Nurali Hirji & Another* [2020]eKLR and *Kanuri Limited & 34 others v Uber Kenya Limited* [2017]eKLR.

### **Respondent's Submissions**

17. The Respondent submits that section 3A of the *Civil Procedure Act*, which the Applicant relies on, applies only to an institutive pleading such as a Complaint and not to an interlocutory application. He asserts that, unlike a Complaint or Defence, which must be accompanied by witness statements and documents, an application, along with its supporting affidavit and annexures, constitutes a standalone and self-executing document.
18. Furthermore, the Respondent submits that amendment of applications is not addressed in Order 51 of the *Civil Procedure Rules*, which governs applications. He points out that Order 8, which pertains to the amendment of principal pleadings, does not apply to applications.
19. The Respondent strongly asserts that applications and their supporting affidavits are not amendable under the law. He further contends that the Applicant's attempt to amend the description of the parcel of land, changing it from one belonging to the Applicant's grandparents to one belonging to him, would fundamentally alter the case's substratum rendering the proceedings a wild goose chase.

### **Analysis And Determination**

20. After careful consideration of the application, the replying affidavit and the rival submissions, the sole issue for determination is whether the application is merited.
21. The applicant is seeking amendment of the application and the resultant order of the court. The amendment sought can be considered under Section 100 of the *Civil Procedure Act* which grants the court the general power to amend, as well as under Order 8 Rule 5 of the *Civil Procedure Rules*. Section 100 provides that:

“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.”
22. Order 8, Rule 5(1) & (2) of the *Civil Procedure Rules* on the other hand states:
  - “(1) 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.
  - (2) This rule shall not have effect in relation to a judgment or order.”



23. The import of the foregoing provisions is that amendments can allowed at anytime before hearing. This was the reasoning of the Court of Appeal in *Eastern Bakery v Castelino* 1958 E.A 461 where it was noted that: -
- “It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed. If they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs”
24. However, what happens if the application has already been heard and determined as in the present case? Can a court amend an application that has already been heard and determined? The answer to this is definitely no. It is trite law that once a court has rendered itself on an issue it becomes functus officio and the only way it’s decision can be altered is through review or appeal.
25. If per chance the court were to amend the application and the order, what would happen to the ruling? Inviting the court to amend the application and the ruling would be inviting it to go down a rabbit hole with unknown consequences.
26. The safest course for the Applicant would have been to apply for a review, particularly if new information emerged after the filing of the suit or application.
27. The upshot of the foregoing is that the application for injunction having already been heard and determined can not be amended.
28. Turning to the amendment of the originating summons, as stated above, leave to amend is usually granted to ensure that the real question in dispute is determined or to correct any defects in the proceedings. This is necessary to avoid a multiplicity of suits and confusion regarding the cause of action.
29. Since the originating summons has not yet been heard, I see no prejudice to the Defendant if the amendment is allowed. The Defendant will have the opportunity to respond to the amended originating summons and raise any objections.
30. In conclusion, the application dated 15th December 2023 is allowed in the following terms:
- i. The Plaintiff/Applicant is granted leave to amend, within 14 days from the date hereof, the originating summons dated 29th December 2022 by replacing LR No. Kisumu/Kasule/xxxx with LR NO. Kisumu/Nyalunya/xxxx
  - ii. The Plaintiff is condemned to pay the defendant costs assessed at ksh 25,000 and shall be payable within 45 days from the date hereof and in the event of default execution to issue.
  - iii. The injunction orders made on 29/9/2023 are hereby vacated forthwith.
  - iv. The matter is set for pretrial on the 3<sup>rd</sup> February 2025.

**DELIVERED, SIGNED AND DATED AT KISUMU THIS 24<sup>TH</sup> DAY OF DECEMBER 2024**

**MWANAISHA S SHARIFF**

**JUDGE**

