



**Kiseet v Moi & 3 others (1st & 2nd Defendants being sued as administrators of the Estate of the Late Jonathan Kipkemboi Moi); Kabogo (Interested Party) (Environment and Land Case Civil Suit 7 of 2021) [2023] KEELC 16854 (KLR) (17 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 16854 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KILGORIS  
ENVIRONMENT AND LAND CASE CIVIL SUIT 7 OF 2021  
EM WASHE, J  
APRIL 17, 2023**

**BETWEEN**

**PARMET OLE KISEET ..... PLAINTIFF**

**AND**

**SYLVIA MOI ..... 1<sup>ST</sup> DEFENDANT**

**BEATRICE MBULI KIPKEMBOI MOI ..... 2<sup>ND</sup> DEFENDANT**

**CLINT MOI ..... 3<sup>RD</sup> DEFENDANT**

**FRANCIS THUITA KIMEMIA ..... 4<sup>TH</sup> DEFENDANT**

**1ST & 2ND DEFENDANTS BEING SUED AS ADMINISTRATORS OF THE  
ESTATE OF THE LATE JONATHAN KIPKEMBOI MOI**

**AND**

**NDEGWA KABOGO ..... INTERESTED PARTY**

*(Formerly Narok Elc Case No. 1 Of 2020)*

**RULING**

1. The plaintiff (hereinafter referred to as “the applicant”) herein filed a Notice of Motion application dated October 25, 2022 (hereinafter referred to as “the present application”) seeking for the following Orders; -
  - i. That this honourable court be pleased to grant the plaintiff/applicant leave to amend the Plaintiff dated 20<sup>th</sup> day of December 2019 in terms of the draft Amended Plaintiff annexed herein.



- ii. That the amended Plaintiff annexed hereto be deemed as duly filed and served upon the Defendants on payment of the requisite court fees.
  - iii. That the defendants/respondents be at liberty to file a reply to the amended Plaintiff if they so pleased.
  - iv. That the costs of this Application be in the cause.
2. The main grounds adduced by the applicant in support of the present Application were as follows; -
    - a. The proposed amendments would give better and full particulars of the transactions between the parties in this suit.
    - b. The proposed amendments would place before the court all the necessary facts necessary for the full and final determination of the controversy between the parties herein.
    - c. The defendants would not suffer any prejudice if the amendments were allowed at this stage.
    - d. It was in the interest of justice and proper determination of the issues before the court that the amendments should be allowed as sought in the present application.
  3. The present Application has been supported by the affidavit of one Parmet Ole Kiseet who is the applicant herein sworn on the October 25, 2022 which also annexed a draft Amended Plaintiff dated October 25, 2022, a draft amended plaintiff's witness statement and a further list of documents by the applicant dated October 25, 2022.
  4. The present applicant was not opposed by the 1<sup>st</sup>, 2<sup>nd</sup> and 4<sup>th</sup> defendants save that they sought leave to file a response to the amended Plaintiff if the court indeed granted the present Application.
  5. On the other hand, the 3<sup>rd</sup> defendant opposed the present Application by filing a replying affidavit dated 17/11/2022.
  6. The 3<sup>rd</sup> defendant in his submission opposed the present Application on the ground that it had been filed almost one year after the joinder of the interested party on the 30<sup>th</sup> of November 2021 and therefore the delay was unreasonable, unconscionable and inexcusable.
  7. In addition to the above, the 3<sup>rd</sup> defendant opposed the present Application on the ground that the applicant and the interested party were not involved in any financing transactions and there was no evidence to that effect before the court.
  8. The 3<sup>rd</sup> defendant was of the view that the present Application for amendment was an afterthought keeping in mind that the ruling of November 30, 2021 did not allow for the amendment of the Plaintiff herein.
  9. In conclusion therefore, the 3<sup>rd</sup> defendant stated that the present Application would be prejudicial to him and should be dismissed with costs.
  10. The Applicant herein proceeded to file their submissions on the 24<sup>th</sup> of January 2023 while the 3<sup>rd</sup> Respondent filed his submissions on the 30<sup>th</sup> of November 2022.
  11. The issue for determination in the present application is whether or not leave should be granted to the applicant to amend the Plaintiff dated December 20, 2019.
  12. The applicant has relied on the provisions of Order 8 Rule 3, 5 and 7 of the *Civil Procedure Rules*, 2010.



13. Order 8 Rules 3 and 5(1) of the *Civil Procedure Rules* stipulates as follows: -

“(3) (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4,5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

“3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

General power to amend

“5(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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

14. In the case of *Central Bank of Kenya -versus- Trust Bank* (2000) EALR 365 the Court of Appeal made the following observation while dealing with applications for amendments; -

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”

15. In another case of *Saint Patrick’s Hill School Limited-versus- Bank of Africa Kenya Limited* [2018] eKLR the Court of Appeal set out guiding principles courts should apply while making determinations on applications for amendment of pleadings; -

- a) The power of the court to allow amendments 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 rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

16. On the guidance of the above-mentioned principles, this court will now proceed to apply the facts of this case to these principles in its determination of the present application.



**The power of the court to allow amendments is intended to determine the true substantive merits of the case.**

17. Indeed, the court is satisfied that Order 8 Rule 3 of the *Civil Procedure Rules*, 2010 provides for the statutory powers to allow for an amendment of pleadings in a suit at any stage of the proceedings.
18. In this present case, the applicant has submitted that the amendment proposed in the draft Amended Plaintiff is to give further and clear facts on how the transaction which has given rise to this suit was structured.
19. The applicant's prayer for amendment is therefore to provide clarity of facts, produce further documents and amend the witness statement in a manner that would assist the court in determining the true and substantive merits of the case before this court.
20. The 3<sup>rd</sup> defendant in his replying affidavit has not disputed the significance of the amendments in assisting the court to deal with the true and substantive merits of the case.
21. The 3<sup>rd</sup> defendant's opposition is based on the inordinate delay in filing the said application and possibly the prejudice that the proposed amendments would occasion the 3<sup>rd</sup> defendant.
22. The two grounds advanced by the 3<sup>rd</sup> respondents will be dealt with substantively hereinafter below.
23. The court looking at the proposed amendments in the present application is of the considered view that the applicant is simply bring forth more and better particulars about the disputed transaction between the parties herein to enable the court appreciate the circumstances and intention of the parties therein.
24. Such particulars, documents and/or evidence from the parties is crucial in the determination of the issues in the Plaintiff and would greatly assist in the determination of the true and substantive merits of this case.
25. In conclusion therefore, the court makes a finding that indeed the amendments proposed by the applicants are meant to assist the court in determining the true and substantive merits of this case.

**The amendments should be timeously applied for;**

26. The second principle for determination of an application for amendment is whether the same has been filed timely.
27. The 3<sup>rd</sup> respondent submits that the present application has been filed almost one year after the ruling of joinder pronounced on the 30<sup>th</sup> of November 2021.
28. The ruling pronounced on the 30<sup>th</sup> of November 2021 related to the joinder of the interested party into this suit.
29. Thereafter, the interested party filed some pleadings and/or documents including the list of documents dated 25<sup>th</sup> of July 2022.
30. It is these pleadings and/or documents filed by the interested party on or about July 25, 2022 that has prompted the Applicant herein to file the present application dated October 25, 2022.
31. Consequently therefore, the issue for determination in this principle is whether or not the period between July 25, 2022 and October 25, 2022 can be termed as inordinate to cause a prejudice to the 3<sup>rd</sup> defendant.



32. In the court's considered opinion, the period between July 25, 2022 and October 25, 2022 is only 3 months apart and it cannot be said to be inordinate at all to warrant any prejudice to the 3<sup>rd</sup> defendant.
33. The applicant herein moved with considerable speed upon service of the interested parties pleadings and/or documents to file the present application to align his case with the new facts and/or documents presented in court.
34. In conclusion therefore, the court's finding is that this present application has been filed timely and without any inordinate delay.

**Power to amend can be exercised by the court at any stage of the proceedings.**

35. Order 8 Rule 3 expressly provides that pleadings can be amended any stage of the proceedings before judgement is pronounced by the court.
36. In this present application, the applicant herein has filed the same even before the pre-trial conference has been done and the matter listed for a hearing.
37. Consequently therefore, the present application has been brought within the permitted time under Order 8 Rule 3 and is properly before the court.

**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.**

38. In this principle, the Court of Appeal was of the view that even if a party was late to make an application for amendment, courts should always look at substantive justice and allow the same if it was brought in good faith.
39. The Court of Appeal's position is that costs to compensate the other side would be sufficient in the event there has been inordinate delay by the party making such an application while substantive justice should be the ultimate goal.
40. In this suit, the court has made a determination that the applicant herein has brought the present Application timely and there is not delay to warrant any costs to the 3<sup>rd</sup> defendant herein.

**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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.**

41. The last principle relates to the issue of prejudice which might be caused to a party through an amendment.
42. Looking at the above principle, one of the substantive prejudice would be the reframing of a cause of action through an amendment to defeat the limitation of time under the *Limitation of Actions Act*, cap 22.
43. In this present case, the cause of action emanates from an Agreement For Sale dated October 25, 2011.
44. The suit herein was filed on the 20<sup>th</sup> of December 2019 before the expiry of the 12 years period provided under the *Limitation of Actions Act*, cap 22 for recovery of land.



45. In essence therefore, this suit against the 3<sup>rd</sup> defendant was filed before the expiry of the limitation period and therefore the reframing and/or amendments proposed herein by the applicant cannot be said to have been brought to deprive the 3<sup>rd</sup> defendant his reliance to the right of limitation thereof.

**Conclusion.**

46. In conclusion therefore, the court hereby makes the following Orders appertaining to the Application dated October 25, 2022; -

- A. The plaintiff is granted leave of 21 days from the date of this Ruling to prepare, file and serve its amended plaint.
- B. The defendants and/or interested party is granted leave of 14 days upon service of the amended plaint to prepare, file and serve their responses thereof.
- C. The plaintiff shall have leave of 7 days upon service of the responses by the defendants and/or interested party to file any reply thereof.
- D. Costs of this application shall abide the outcome of the main suit.

**DATED, SIGNED & DELIVERED Virtually in KILGORIS ELC Court on 17<sup>TH</sup> APRIL, 2023.**

**EMMANUEL.M.WASHE**

**JUDGE**

In The Presence Of:

Court Assistant: Ngeno/Mempe

Advocate For The Plaintiff: O.M Otieno

Advocate For The Defendants: Munene H/B Koech for 1<sup>st</sup>

Defendant

Lukou for 2<sup>nd</sup> Defendant

Lyonah for 3<sup>rd</sup> Defendant

Otingo H/B Musyoka for Interested Party

