



**Ngalo & 2 others (Suing as the Chairman, Secretary and Treasurer Respectively of Githunguri Riverside Dwellers Self Help Group) v Njoroge (Environment and Land Appeal E028 of 2021) [2023] KEELC 17961 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17961 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT AND LAND APPEAL E028 OF 2021**

**A NYUKURI, J**

**MAY 31, 2023**

**BETWEEN**

**ABSALOM NGALO ..... 1<sup>ST</sup> APPELLANT**

**MICHAEL KONDI ..... 2<sup>ND</sup> APPELLANT**

**MUTHONI MWANGI ..... 3<sup>RD</sup> APPELLANT**

**SUING AS THE CHAIRMAN, SECRETARY AND TREASURER  
RESPECTIVELY OF GITHUNGURI RIVERSIDE DWELLERS SELF HELP  
GROUP**

**AND**

**MARGARET WAIRIMU NJOROGE ..... RESPONDENT**

**RULING**

**Introduction**

1. Before court is a Notice of Motion dated March 16, 2023 filed by the Appellant seeking leave to amend the Memorandum of Appeal dated July 5, 2021 and filed on July 7, 2021. The application is predicated on the affidavit sworn on March 16, 2022 by Absalom Ngalo, the Chairperson of the Appellant. The Appellant/Applicant stated that on January 19, 2022, the court directed parties to file submissions in respect of appeal in 30 days. That while preparing submissions for the appeal, the Appellant realized that they had left out certain fundamental issues which had been left out in the Memorandum of Appeal and therefore desires to amend it. He stated that the application had been brought in good faith and without undue delay and that there will be no prejudice suffered by the Respondent if the orders sought are granted. He attached a draft amended Memorandum of Appeal.
2. The application is opposed. Margaret Wairimu Njoroge filed a replying affidavit sworn on 19<sup>th</sup> April 2022 in opposition to the application herein. It was the Respondent's case that upon the court



directing the parties to file submissions, the Respondent filed and served their submissions on 22<sup>nd</sup> February 2022. That the Appellant did not file their submissions but almost 30 days upon service, they filed the instant application.

3. The Respondent maintained that the application was an abuse of the law and they cannot amend the Memorandum of Appeal after being served with the Respondent's submissions. Counsel maintained that this is unknown in law, is an abuse of the court process and that the amendment is malicious and meant to defeat justice as the Appellant intends to ask prayers in the main suit. She stated that allowing the amendment would mean parties be heard on the issue of cancellation of the certificate of title and issuance of a new certificate of title in favour of the Plaintiff which was not an issue addressed in the lower court. That the role of this court as a first appellate court is to re-evaluate, re-assess and re-analyze the evidence in the trial court and reach its own independent conclusion but what is intended to be brought through amendment is new and this court cannot address it without evidence.
4. In a rejoinder, Absalom Ngalo representing the Appellant/Applicant swore supplementary affidavit dated May 17, 2022 in response to the replying affidavit. He stated that the application is lawful and not an abuse of the court process, the same having been brought pursuant to order 42 rule 3 (2) of the Civil Procedure Rules 2010. According to the Applicant, the amendment is necessary for purposes of determining real issues in controversy and that should this court find that the title in issue was obtained unprocedurally and in contempt of court, the court has power to grant the orders sought in the draft amended Memorandum of Appeal.
5. The application was canvassed by way of written submissions. On record are the Applicant's submissions filed on October 24, 2022 as well as the Respondent's submissions filed on October 7, 2022.

### Submissions

6. Counsel for the Applicant submitted that the prayer sought to be introduced in the amended Memorandum of Appeal for cancellation of the Respondent's title and issuance of a new title to the Respondent was related to the initial prayer in the Memorandum of Appeal for a declaration that the Appellant is the lawful owner of the suit property and that therefore the new amendment does not in any way introduce a new matter or change the character of the suit. Counsel argued that the Respondent will not be prejudiced in any manner.
7. Counsel argued that the main issue for determination in this appeal is the validity of the Respondent's title and that when the matter was pending in court and in contravention of the directive of the trial court that no party was allowed to deal in any manner in the suit property, the title acquired by the Respondent was in contempt of the court directive. Counsel argued that if the appeal is allowed, it was obvious the Respondent's title would be declared illegal.
8. It was further submitted that this court has unfettered discretion to allow an amendment. Reliance was placed on Section 100 of the Civil Procedure Act for the proposition that an amendment ought to be allowed for purposes of determining the real questions in dispute. To buttress their submissions above, counsel referred the court to Order 8 Rules 3 (1) and 5 (1) of the Civil Procedure Rules 2010 and the cases of Suresh Kumat Sofat & Another v. Trustees of Kenya Assemblies of God & another [2022] eKLR, Ochieng v. First National Bank of Chicago Civil Appeal No. 147 of 1991 and Josiah Magena v. Wakenya Pamoja Sacco Society Ltd Nrb ELRC Cause No. 510 of 2014.
9. On their part, counsel for the Respondent submitted that considering the plaint filed by the Appellant, the prayer sought to be introduced in the proposed amended Memorandum of Appeal, for an order for cancellation of the Respondent's certificate of title is a new prayer and was not made an



issue before the trial court and neither did the Appellant give any evidence in respect of that issue which this court can re-evaluate as an appellate court. Counsel referred to the case of *George Gikubu Mbuthia v. Consolidated Bank of Kenya Limited & Another* [2016] eKLR, for the proposition that in circumstances where a new or inconsistent cause of action is sought to be introduced through an amendment, the court should decline to allow such amendment. Counsel argued that the amendment sought is meant to waste court's time and delay justice.

### Analysis and Determination

10. I have carefully considered the application, supporting and supplementary affidavits as well as the replying affidavit and respective submissions. My view is that the issue for determination is whether the Appellant/Applicant deserves leave to amend the Memorandum of Appeal as proposed in the draft amended Memorandum of Appeal.
11. Order 42 Rule 3 of the *Civil Procedure Rules 2010* empowers this court to allow an Appellant to amend their Memorandum of Appeal where directions have already been issued.
12. Therefore the court has unfettered discretion to grant leave for amendment of the Memorandum of Appeal if the amendment will enable the Appellant bring forward all their grievances concerning the findings of the trial court for purposes of enabling this court effectually address all the issues in the suit. However, an amendment should not be allowed where a new cause of action is sought to be introduced.
13. In the case of *Institute of Social Accountability & Another v. Parliament of Kenya & 3 Others* [2014] eKLR, it was held as follows;

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.....the court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.

14. In the instant appeal, the Appellant has sought to amend the Memorandum of Appeal, not to introduce a new ground of appeal but to add a prayer, stated as follows;

An order for the cancellation of the certificate of title that was issued to the Respondent in respect of the suit property known as LR. No. 7340/22 and for issuance of a new title for the said parcel of land in favour of the Plaintiff.

15. I have considered the plaint which was filed by the Appellant in pursuit of their claim and, I note that the prayer sought to be introduced in the Memorandum of Appeal was never sought in the plaint dated May 22, 2018. Although the Appellant says that that prayer is closely linked to the prayer for a declaration that the Appellant is the owner of the suit property which prayer is sought in the Memorandum of Appeal as well as the plaint, by virtue of the fact that that specific prayer was not sought in the plaint, is a new cause of action, which in my view cannot be introduced at this stage. The Appellant tried to justify the inclusion of that prayer arguing that the Respondent obtained registration of the suit property during the pendency of the suit before the trial court and



in contempt of a court order that no party should interfere with the property. In my considered view, that cannot be a ground to allow the proposed amendment. To begin with, the Respondent in her defence and counterclaim dated 4<sup>th</sup> May 2018 pleaded in paragraph 10, 11 and 12 thereof that the suit property belonged to the Respondent by virtue of being a shareholder at Githunguri Njiru Farm [1966] Limited, which company owned Parcel 7340 and that the said company was in the process of issuing the title deed to the Respondent. In the amended defence and counterclaim dated 8<sup>th</sup> March 2021, the Respondent pleaded in paragraph 4 thereof that title for the suit property was issued in her name in the year 2019.

16. Therefore if the Appellant intended to make the issue of issuance of title in the Respondent's name as having been issued in contempt of the orders of court, nothing stopped them from amending the plaint to contest the legality of the issuance of title on grounds of contempt of court. That was not done. It is therefore not proper for the Appellant to raise the issue of contempt in this court at this stage when none was raised before the lower court. At any rate, the Appellants have not even proved their factual averments as no order which was allegedly violated by the Respondent was attached to both the supporting and supplementary affidavits.
17. This court sitting as an Appellate court as moved by the Appellant, has the duty to consider what transpired before the trial court, re-evaluate the evidence and make its own independent conclusions of course bearing in mind that it did not see or hear the witnesses adduce evidence, and therefore make an allowance for that. In that regard therefore, what was never raised as an issue before the trial court as per the pleadings filed in that court, cannot be made an issue before this court as that would amount to unprocedurally using the appellate court to allow a party to amend their primary pleadings filed before the trial court. That would be prejudicial to the opposite party who cannot introduce evidence or amend their pleadings as they do not have pleadings before this court that are capable of being amended in the same way the Memorandum of Appeal is amended. This court is a court of justice and justice is both procedural and substantive and therefore I find that allowing the proposed amendment would result in procedural injustice against the Respondent who will have no opportunity to respond to the amendment.
18. In the premises, I find and hold that the application dated March 16, 2022 lacks merit and the same is dismissed with costs to the Respondent. As both parties have filed submissions in respect to the appeal, the matter shall be reserved for judgment on a date to be fixed in court.
19. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 31<sup>ST</sup> DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the Presence of;**

Mr. Kitunya for Appellant/Applicant

Ms Kerio for Respondent

Josephine – Court Assistant

