



**Shabani & another v Mwatakucha & 2 others (Environment & Land
Case E028 of 2022) [2023] KEELC 17766 (KLR) (31 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17766 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE E028 OF 2022**

**AE DENA, J
MAY 31, 2023**

BETWEEN

SHABANI SONGORO SHABANI 1ST PLAINTIFF

MOHAMMED SONGORO SHABANI 2ND PLAINTIFF

AND

ALI SWALEH MWATAKUCHA 1ST DEFENDANT

SAID JUMA ALI MWATAKUCHA 2ND DEFENDANT

STEPHEN KENGA BAYA 3RD DEFENDANT

RULING

1. The Plaintiffs by Plaint dated 15/6/22 claim that they are the registered owners of land parcel no Kwale/Ukunda/1152 while the Defendants are the owners of land parcel no's Kwale/Ukunda 1150,5421 and 3591 respectively. That the Defendants have erected structures and blocked the access road to the Plaintiffs property and are cultivating all the access roads leading to the Plaintiffs property. It is stated that the issue over the boundaries of the suit properties was resolved by the District Land Registrar Kwale who confirmed encroachment by the Defendants. The Plaintiffs seek for orders *inter alia* compelling the Defendants to demolish the structures erected upon the access roads through a mandatory injunction.
2. The Plaintiff through Notice of Motion application dated 24/10/2022 the subject of this ruling seeks the following orders;
 1. Spent
 2. That this honourable court be pleased to grant leave to the Plaintiffs to amend the plaint herein dated 15/6/2022.



3. That the annexed draft amended plaint be deemed to have been duly filed upon payment of the requisite court fees.
 4. That subsequent to grant of prayers 1-3 above this honourable court be pleased to strike out the 3rd Defendants statement of defence dated 4/7/2022 for disclosing no triable issues and/or defence against the Plaintiffs herein
 5. That this honourable court be pleased to assess the general damages payable to the Plaintiffs herein arising from encroachment on the suit property.
 6. That costs of this application be provided for.
3. The application is supported by an affidavit sworn by the 1st Plaintiff's Shabani Songoro Shabani on 24/6/2022 with the authority of the 2nd Plaintiff.
 4. The application is opposed by the 3rd defendant vide grounds of opposition dated 11/11/2022 as follows; -
 1. That the application is an abuse of the court process and is a waste of courts time
 2. That the amendment sought by the plaintiff/applicant are an afterthought which the plaintiffs/applicants were to factor in at the earlier opportune time.
 3. That the pleadings had closed and the matter was to proceed for hearing
 4. That the application lacks merit and should be dismissed with costs
 5. The Plaintiffs filed a supplementary affidavit by Shabani Songoro Shabani dated 20/2/2023 in response to the grounds of opposition.
 6. The 1st and 2nd defendants did not enter appearance despite being duly served.
 7. The application was canvassed by way of written submissions which parties filed and exchanged.

Plaintiffs Submissions

5. It is submitted that the boundary dispute over the suit properties mentioned herein was resolved and fixed on 14/9/2021 pursuant to the provisions of section 18 and 19 of the [Land Registration Act](#). That the 3rd Defendant was declared a trespasser in the suit property.
6. The Plaintiffs submit that order 8 rule 3 of the [Civil Procedure Rules](#) 2010 allows a party to amend pleadings so long as a matter has not been concluded. That the amendments sought are substantive in nature and cannot be dismissed as procedural technicalities. That in the event the same turns out as a technicality it then can be cured under article 159[2][d] of the [Constitution](#). The court is urged to allow the application as prayed. On striking out the 3rd Defendants statement of defence, the court is referred to the provisions of order 2 rule 15 of the [Civil Procedure Rules](#) on striking out of a defence.
7. The Plaintiffs submit that the Defendants were allowed to present their case before the Land Registrar and did not appeal the decision made thereafter. That the court has no jurisdiction to revisit the boundary issue and is only allowed to adopt or enforce the decision by the Land Registrar. That the defence is only meant to scandalize the exercise conducted by the Land Registrar to resolve the boundary dispute. The court is urged to allow the Plaintiffs application with costs.



Defendants case and Submissions

8. The 3rd Defendants case is that he is the registered owner of parcel no Kwale/Ukunda/3591 having purchased the same from Swaleh Ali Takucha. That he obtained title to the said property on 31/7/2002 and constructed his home on the said parcel. That at the time of construction the plaintiffs were already on their parcel of land and had access to the same even after such construction.
9. It is stated in the defence that the report by the District Land Registrar is not correct as the 1st Defendant is the one who has a construction bordering/encroaching on the access road. The said construction is on plot no Kwale/Ukunda/1150. That the suit is misconceived and should be dismissed with costs.
10. It is submitted on behalf of the 3rd Defendant that order 2 rule 13 of the [Civil Procedure Rules](#) provides that pleadings in a suit shall be closed 14 days after service of the reply or defence to a counterclaim. That the Plaintiffs had ample time to amend their pleadings but did not do so and it would not be in the interest of justice to bring an application for amendment.
11. Further that the statement of defence raises triable issues and the 3rd Defendant should be afforded a chance to be heard. Reliance is placed in the holding in [George Kurra Mwaura v Isaiah Lucheli & Another](#) [2015] eKLR. The court is asked to dismiss the application with costs.

Determination

12. I have considered the application, the affidavit and grounds of opposition by the parties and the submissions both in support and in opposition thereto.
13. Order 8 Rule 5 of the [Civil Procedure Rules](#) on amendment of pleadings provides:
 - (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.”
14. The Court of Appeal set out the principles governing amendment of pleadings in [Ochieng & Others v First National Bank of Chicago](#) Civil Appeal No. 147 of 1991 (unreported) as cited with approval in [St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd](#) [2018] eKLR as follows: -
 - 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.”
15. I have perused the affidavit in support of the application for amendment. It is deponed that the amendment is to include a prayer for adoption of the Kwale Land Registrar’s report dated 14/9/2021.



From the pleadings filed, the court is able to gather that the substratum of this suit is a dispute on encroachment on the Plaintiffs parcel of land. The matter was first lodged before the land registrar since the same was a boundary dispute. The same was determined in favour of the Plaintiffs and has to date not been appealed against the Defendants. The 3rd defendant in his pleadings acknowledges the fact that the matter was before the land registrar and was resolved. He however states that he does not agree with the decision made.

16. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held in the case of *Andrew Wabuyele Biketi v Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others* [2015] eKLR. The 3rd Defendant pleads that the amendment if allowed will be prejudicial. It is however not demonstrated how the said amendment will amount to an injustice to the defendants. The objections raised are that they are an afterthought and pleadings have closed. I have seen the import of the amendment and I do not see what prejudice it will cause the 3rd Defendant as long he has an opportunity to respond further to the same if he deems necessary. Moreover, the hearing of this case has not even commenced as was the holding in *Eastern Bakery v Castelino*, (1958) E.A.461 (U.) at p.462: as was mentioned in *Peter Bogonko Onchonga v National Bank of Kenya Limited & another* [2021] eKLR where the court pronounced itself thus;

It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.

17. Order 2 Rule 15 of the *Civil Procedure Rule* deals with striking out of pleadings and provides as follows:

15. At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) It discloses no reasonable cause of action or defence in law; or
 - (b) It is scandalous, frivolous or vexatious; or
 - (c) It may prejudice, embarrass or delay the fair trial of the action; or
 - (d) It is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”

18. The principles guiding the striking out of pleadings and cases are now well settled as set out in the case of *D T Dobie & Company (K) Ltd v Muchina* [1982] KLR 1. The court held that no suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action and is so weak as to be beyond redemption and incurable by amendment. The 3rd defendant states that the decision by the Land Registrar was not merited. According to the 3rd defendant, it is the 1st defendant that had encroached on the Plaintiff's access road. This then becomes in my view a triable issue to be determined by the court and cannot be wished away on the basis of technicalities. Of importance would be to ensure parties are heard on issues of substance rather than procedural technicalities.
19. I must address the applicant's contention that the 3rd defendant cannot have audience before this court for the reason that he never appealed the decision of the Land registrar which fixed the boundary. That the 3rd defendant ought to have exhausted the process of appealing the decision under the provisions of section 91(9) of the *Land Registration Act* 2012. That as it were this court is only limited to enforce



the Land Registrar decision. Indeed, the provisions of section 18(2) of the Land Registration Act 2012 prohibit any court from entertaining any action or other proceedings relating to a dispute as to boundaries of registered land.

20. I have perused the surveyors report dated 26/10/2021 that informed the decision of the land registrar in resolving the boundary dispute. The findings contained in paragraph 7 thereof, indicate that the position of the access road to parcel 1152 was found to have been encroached into by a permanent house belonging to the neighbouring proprietor of parcel Kwale/Ukunda/3591 and who is the 3rd Defendant. This alone shows that the dispute has metamorphosed into an ownership dispute in view of the fact that parcel Kwale/Ukunda/3591 is said to be superimposed into the access road. I say so because as long as this allegation stands then a claim arises that part of the road reserve is owned by the 3rd defendant therefore going beyond a simple boundary issue thus calling into play the ELC original jurisdiction under article 162 of the Constitution as read together with section 13 of the Environment & Land Court Act. This can only be decided upon hearing the parties and with other expert evidence.
21. The court has also been invited to assess general damages which in my view can only be dealt with once the court has rendered its final verdict in the matter. The prayer for such assessment in view of the defence herein is premature.
22. The upshot of the foregoing is that the application dated 24/10/22 partly succeeds. The following orders shall issue to dispose of the same; -
 - a. That leave be and is hereby granted to the Plaintiffs to amend the plaint herein dated 15/6/2022.
 - b. That the annexed draft amended plaint be and is hereby deemed to have been duly filed upon payment of the requisite court fees.
 - c. The amended plaint to be served to the Defendants within 14 days from the date of this Ruling.
 - d. The defendants are granted corresponding leave to amend, file and serve an Amended Defence within 14 days from the date of service with the Amended Plaint.
 - e. Costs of the application be in the cause.

Orders accordingly.

DELIVERED AND DATED AT KWALE THIS 31ST DAY OF MAY, 2023.

A.E. DENA

JUDGE

Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:

Applicants present in person

No appearance for the Respondents applicants

Mr. Mazerah - Court Assistant.

