



**Kioko v Kioko & another (Environment & Land Case 150 of 2010 & 294 of 2009
(Consolidated)) [2023] KEELC 17661 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17661 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 150 OF 2010 & 294 OF 2009 (CONSOLIDATED)**

A NYUKURI, J

MAY 30, 2023

BETWEEN

DANIEL KALOKI KIOKO PLAINTIFF

AND

WILLY MUASA KIOKO 1ST DEFENDANT

HOMEWARD AGENCIES LIMITED 2ND DEFENDANT

RULING

Introduction

1. Before court is a notice of motion dated February 23, 2023 filed by the plaintiff seeking leave to amend the plaint. The application is supported by the affidavit sworn by Daniel Kaloki Kioko on February 23, 2023. The applicant stated that when he conducted a search recently, he noted that parcel No Mavoko Town Block 3/2362 which was initially registered in the 1st defendant's name and later transferred to the 2nd defendant, had been subdivided into Mavoko town block 3/40092 and Mavoko town block 3/40093. He also stated that the 1st defendant had died on April 9, 2022 and had not been substituted and that therefore in view of the foregoing, there was need to amend the plaint.
2. The application was opposed. B. Munyao, Advocate for the 2nd defendant swore a replying affidavit dated March 7, 2023. He stated that the land parcel Mavoko town block 3/2362 and Mavoko town block 3/689 are the subject of this suit and that the 2nd defendant is the legal registered proprietor of the same having acquired it by way of a legally binding agreement with the 1st defendant. That the applicant did not provide proof of subdivision of the suit property and also failed to attach a draft amended plaint.
3. In a rejoinder, Andrew Nduva Kitonga, Advocate for the plaintiff filed a supplementary affidavit sworn on April 14, 2023. He stated that the subdivision of the suit property was done during the pendency of this suit and when there was a restriction of the title. He attached copies of the green cards and



searches in relation to the suit property and subsequent subdivisions thereof. He also attached a draft amended plaint.

Analysis and Determination

4. I have considered the application as well as the response and the issue that arise for determination is whether the plaintiff deserves leave to amend the plaint.
5. Order 8 rule 3 of the *Civil Procedure Rules 2010*, grants the court the jurisdiction to grant leave to any party to amend their pleadings at any stage of the proceedings on terms that are just. In considering an application for leave to amend, the court will normally consider whether the amendment will enable the court to determine the real issues in dispute between the parties conclusively, whether the amendment will result into prejudice to the opposite party and whether the prejudice can be compensated by an award of costs.
6. In the case of *Institute of Social Accountability & another v. Parliament of Kenya & 3 others* [2014] eKLR, the court held that;

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.

7. In the instant application, the plaintiff stated that after obtaining search of the suit property, he realized that the same had been subdivided during the pendency of this suit, and that the 1st defendant is deceased and therefore an amendment is necessary. The 2nd defendant's response was in regard to the merits of the suit as counsel deponed that the suit property was lawfully acquired by the 2nd defendant. The 2nd defendant has not stated the nature of the prejudice that they stand to suffer if leave to amend the plaint is granted. In the premises, having been satisfied that there is evidence that in 2014, while this suit was pending, the suit property was subdivided, it is my view that to enable the determination of the real issues in controversy between the parties herein, it is necessary that the plaint is amended.
8. In the premises, the application dated February 23, 2023 is merited and the same is allowed. The plaintiff is granted 14 days to file and serve amended plaint. Upon service, the defendants shall file and serve their amended defences. Costs of the application shall be in the cause.
9. Orders accordingly.

DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 30TH DAY OF MAY, 2023 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM

A. NYUKURI

JUDGE

In the Presence of;



Mr. Kitonga for Plaintiff
No appearance for Defendants
Josephine – Court Assistant

