



**Musyoki (Suing as the Administrator of the Estate of the Late Laban Maingi Kitele) & another v Dave & 5 others (Environment & Land Case E038 of 2023) [2023] KEELC 17501 (KLR) (24 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17501 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E038 OF 2023**

**MD MWANGI, J**

**MAY 24, 2023**

**BETWEEN**

**DAPHINE MUENI MUSYOKI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE LABAN MAINGI KITELE) ..... 1<sup>ST</sup> PLAINTIFF**

**JOHN BOSCO KYULE KITELE ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**SAPNA DAVE ..... 1<sup>ST</sup> DEFENDANT**

**PETER GIKURA MBURU ..... 2<sup>ND</sup> DEFENDANT**

**PETERSON IRUNGU KIMENYA ..... 3<sup>RD</sup> DEFENDANT**

**ADAN DENGGE ..... 4<sup>TH</sup> DEFENDANT**

**ABDILLAHI HUSSEIN ..... 5<sup>TH</sup> DEFENDANT**

**JAMAL ABDINOOR ..... 6<sup>TH</sup> DEFENDANT**

*(In respect of the Plaintiff's Notice of Motion application dated 8th February 2023 seeking orders of temporary injunction against the Defendants/Respondents)*

**RULING**

**Background**

1. In their application dated February 8, 2023, filed alongside their plaint, the plaintiffs pray for orders: -
  - a. That this application be certified as urgent and service thereof be dispensed with the first instance and the same be heard ex-parte.



- b. That pending the hearing and determination of this application inter-parties, the honourable court be pleased to grant a temporary injunction restraining the honourable defendants/respondents whether by themselves, their agents and/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiff's property being L.R. Number 36/VIII/600 (Original Number 193/2) pending the hearing and determination of this application herein.
  - c. That pending the hearing and determination of this application inter-parties, the honourable court be pleased to grant a temporary injunction restraining the defendants/respondents whether by themselves, their agents/or servants from trespassing on, wasting, constructing on, alienating or otherwise interfering or dealing with the plaintiffs' property being L.R. Number 36/VII/600(Original Number 193/2) pending the hearing and determination of this suit herein.
  - d. That the Officer Commanding Pangani Police Division do enforce compliance of the orders 2 and 3 above.
  - e. That the honourable court be pleased to make such further or other orders as it may deem just and expedient in the circumstances of this case.
  - f. That the costs of this application be provided for.
2. The plaintiffs' claim is that the late Laban Maingi Kitele was the legally registered proprietor of all that parcel of land known as L.R. No. 36/VII/600 (Original No. 193/2), hereinafter referred to as 'the suit property'. The 1<sup>st</sup> plaintiff avers that she is the administrator of the estate of the late Laban Maingi Kitele and a beneficial owner of the suit property alongside the 2<sup>nd</sup> plaintiff. The plaintiffs attached a copy of the certificate of confirmation of grant issued in Nairobi High Court Succession Cause 298 of 2017 (in the matter of the Estate of Laban Kitele Maingi) and dated 3<sup>rd</sup> June 2018.
  3. From the certificate of confirmation of grant, the suit property which is listed as one of the properties of the estate is to be shared equally amongst Elijah Musau Kitele, Mwose Kitele, Daphine Mueni Musyoki, Roy Makoma Maingi, Winfred Mutave, John Bosco Kyule Kitele and Derrick Mutwii Maingi. There are four (4) administrators of the estate who are ElizabethNgii Maingi, Elijah Musau Kitele, Mwose Kitele and Daphine Mueni Musyoka.
  4. The plaintiffs accuse the defendants of persistently interfering with their quiet possession of the suit property. They alleged that they have reported the defendants at Pangani Police Station but apparently no action has been taken. The plaintiffs further allege that the 4<sup>th</sup> defendant who is a Police Officer is the one behind the defendants' continued interference with the suit property. The defendants unlawful action has stalled the plaintiffs' project on the suit property hence the prayers for interim injunction orders.
  5. The plaintiffs purported to amend the application and filed what they referred to as an 'Amended Notice of Motion', amended on February 23, 2023. Undoubtedly, the amendment was done without leave of the court. It appears from the e-filing portal that the amended application was filed on February 24, 2023. Surprisingly, when this matter was mentioned before the court on April 13, 2023, the plaintiffs' Advocate did not bring it to the attention of the court that he had filed an amended application, neither did he seek leave for its admission.
  6. I do note from the record that the plaintiffs also filed a further affidavit sworn on May 2, 2023 by the 1<sup>st</sup> plaintiff, Daphine Mueni Musyoki on the same date.



7. On May 3, 2023, the plaintiffs filed a supplementary affidavit sworn by the same deponent.
8. The defendants/respondents oppose the plaintiffs application and pray for its dismissal with costs. The 1<sup>st</sup> defendant who is the deponent of the replying affidavit dated April 25, 2023 (filed on behalf of the 1<sup>st</sup> - 3<sup>rd</sup> defendants), deposes that Khair Din Chaudhri is and has always been the registered proprietor of all that parcel of land known as L.R. No. 36/VII/193. The 1<sup>st</sup> defendant attached a deed of conveyance of the subject property.
9. The 1<sup>st</sup> defendant further averred that she holds an irrevocable specific power of attorney dated July 24, 1990 donated by Khair Din Chaudhri, her uncle, authorizing her to deal with the suit property in any manner whatsoever. She states that she is the one who authorized the 2<sup>nd</sup> & 3<sup>rd</sup> defendants to administer the estate of Khair Din Chaudhri on her behalf.
10. The 1<sup>st</sup> defendant asserted that she has always been in full occupation of the suit property known as L.R. No. 36/VIII/193 which the plaintiffs refer to as L.R. No. 36/VII/60 (original 193), at all times enjoying quiet possession.

### **Court's Directions**

11. On April 13, 2023, the court directed that the application dated February 8, 2023 be heard first. The application was to be canvassed by way of written submissions. All the parties complied and the court has had the opportunity to read the submissions.

### **Issues for Determination.**

12. From the foregoing, the issues for determination in this matter are: -
  - a. Whether an applicant can amend his/her application without leave of the court.
  - b. Whether the orders sought by the plaintiffs can be granted by the court as framed.

### **Analysis and Determination**

#### **A. Whether an Applicant can amend his/her application without leave of the court.**

13. The 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants in their submissions termed the plaintiffs' action of filing the amended application as an attempt "to pull the rug under the feet of the court." They prayed that the same be expunged from the court's record terming it as an abuse of the court's process.
14. On their part, the 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> defendants also termed the plaintiffs' purported amendment of their application an abuse of the court process and raised a preliminary objection to the same. The basis of the Preliminary Objection by the 4<sup>th</sup> – 5<sup>th</sup> defendants however, was on the basis that the plaintiffs' application had already been dispensed with despite the court's clarification on April 13, 2023.
15. I will proceed to address the issue of the amendment of the plaintiffs' application without leave of court.
16. There are varying opinions as to whether an application, like the one before me is a pleading for purposes of amendment. Havelock J (as he then was) in the case of *Fredrick Mwangi Nyaga v Garam Investments and another* (2013) eKLR, was of the view that an application is not a pleading and cannot



therefore be amended under the provisions of Order 8 of the Civil Procedure Rules. He, in dismissing the application to amend a Notice of Motion stated that,

“First of all, let me state that I do not consider a Notice of Motion application to be a pleading. As pointed out by Counsel, section 2 of the Civil Procedure Act defines ‘pleading’ as including a petition or summons and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the plaintiff to any defence or counter-claim of a defendant.”

17. The Court of Appeal has however expressed a different opinion. In the case of Peter M. Echaria v Priscilla N. Echaria (1998) eKLR, the Court of Appeal granted leave to amend a Notice of Motion application stating that

“We agree that the Notice of Motion is defective but the defect is curable and for that reason, and Ms. Karua having applied for leave to amend the Notice of Motion, we grant leave for the respondent to amend the Notice of Motion so as to comply with the requirements of rule 42 (1) of the rules of the court.”

18. Order 8 rule 1 of the Civil Procedure Rules empowers the court, at any stage of the proceedings, on such terms as to costs or otherwise as may be just, and subject to the limitations stated therein to allow any party to amend his pleadings.

19. The clear and unambiguous import of the rule is that leave of the court is required for an amendment under Order 8 rule 1.

20. In the case of Nathan Chesang Moson & 2 others v Community Uplift Ministries (2013) eKLR, the Court of Appeal dismissed an amended Notice of Motion having found that it was irregularly filed without leave of the court, holding that the Applicant should have sought leave of the court to amend the application. The court held that: -

“The applicant should have taken cue from the decisions of this court which show that in the past, this court has emphasized the need to bring applications to amend at the earliest convenience (see Kenya Ports Authority v A P and Lightning Company Ltd (1982) KLR)40 and also pointed out that its discretionary power to grant leave to amend documents will be given where there has been inadvertent omission and where all the material necessary is before the court and there is no need for further evidence to be taken {see Kihuni v Gakunga & another (1986) KLR 572}.

21. The plaintiffs/applicants by proceeding to amend their application without leave of court have acted in clear disregard of the Civil Procedure Rules.

22. Should this court overlook and ignore the disregard of the rules by the plaintiffs? To answer this question, I am guided by the pronouncement of Kiage J.A in the case of Nicholas Kiptoo Arap Korir Salat v IEBC & 6 others where he categorically stated as follows in regard to the practice of circumventing rules; -

“I am not in the least persuaded that article 159 of the Constitution and the oxygen principles which both command courts to do substantial justice in an efficient, proportionate and cost-effective manner and to eschew defeatist technicalities were ever meant to aid in the overthrow or destruction of rules of procedure and to create an archical free-for-all in the administration of justice. This court, indeed all courts, must never provide the succor and



cover to parties who exhibit scant respect for rules and timelines. These rules and timelines serve to make the process of Judicial adjudication and determination fair, just, certain and even handed. Courts cannot aid in the bending or circumventing of rules and shifting of goal posts for while it may seem to aid one side, it unfairly harms the innocent party who strives to abide by the rules. I apprehend that it is in dispassionate application of rules that courts give assurance that there is a clear method in the manner in which things are done so that outcomes can be anticipated with a measure of confidence, certainty and clarity where issues of rules and their application are concerned.”

23. I wholly associate myself with the above assertion. Consequently, I hereby proceed to strike out the plaintiffs’ ‘Amended Notice of Motion Application’ amended on February 23, 2023, the same having been filed without leave of the court and further expunge from the record of the court the supplementary affidavit sworn and filed on May 3, 2023, the same also having been filed without leave of the court contrary to the provisions of Order 51 rule 14(3) of the *Civil Procedure Rules*.

**B. Whether the orders sought by the plaintiffs can be granted by the court as framed.**

24. Having struck out the Amended Notice of Motion, what is left before the court now is the plaintiffs’ Notice of Motion application dated February 8, 2023 as filed before the purported amendment. The plaintiffs under prayers (b) and (c) of their application seek temporary injunction orders, ‘pending the hearing and determination of the application inter-parties’. That is the way the prayers (b) and (c) in the are framed.
25. I believe that was the reason why the plaintiffs found it necessary to amend prayer (c) to read, ‘pending the hearing of the suit’. Unfortunately, the plaintiff proceeded without leave of the court as already explained above.
26. This court has variously held that parties are bound by their pleadings. As framed, the said prayers cannot be granted. I am left without any other choice but to strike out the plaintiffs’ application dated February 8, 2023 with costs to the defendants, which I hereby do.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24<sup>TH</sup> DAY OF MAY 2023**

**M.D. MWANGI**

**JUDGE**

In the virtual presence of:

Mr. Oduor holding brief for Mr. Noor for the plaintiffs/Applicants.

Mr. Jama for the 4<sup>th</sup>, 5<sup>th</sup> & 6<sup>th</sup> defendants/respondents.

Mr. Derrick Bruno for the 1<sup>st</sup>, 2<sup>nd</sup> & 3<sup>rd</sup> defendants/respondents.

Court Assistant –Yvette.

**M.D. MWANGI**

**JUDGE**

