



Odongo (Suing on their own behalf and as members of Kiembeni Hillside Residents Association) v Ngaji t/a Salvation Hope and Restoration Ministry & 3 others (Environment & Land Petition E006 of 2022) [2023] KEELC 18343 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18343 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND PETITION E006 OF 2022**

NA MATHEKA, J

JUNE 19, 2023

BETWEEN

JAMES LUKIRI ODONGO (SUING ON THEIR OWN BEHALF AND AS MEMBERS OF KIEMBENI HILLSIDE RESIDENTS ASSOCIATION) PETITIONER

AND

**LUCY AKOTH NGAJI T/A SALVATION HOPE AND RESTORATION MINISTRY 1ST RESPONDENT
COUNTY GOVERNMENT OF MOMBASA & 2 OTHERS 2ND RESPONDENT**

RULING

1. The application is dated April 24, 2023 and is brought under Order 8 Rule 3 of the [Civil Procedure Rules](#) and Section 3A of the [Civil Procedure Act](#) Laws of Kenya seeking the following orders;
 1. That the application be certified as urgent and service of the same be dispensed with ex-parte at the first instance.
 2. That the honourable Court be pleased to grant leave to the Applicant to amend her application dated November 25, 2022 upon terms and conditions it deems fit.
 3. That upon granting prayer 2 above, the honourable Court be pleased to deem the attached amended application as duly filed.
 4. That costs of this application be provided for.
2. It is grounded on the annexed affidavit of Lucy Akoth Ngaji and is advanced on the following grounds that the 1st Respondent is now in possession of crucial evidence which will make this court arrive at a different decision. That during the trial of this matter, such evidence was not available which was



coming from the National Environment and Management Authority (NEMA) in this Petition. That it will be for the interest of justice that the orders sought be granted. That no one will suffer prejudice if the same is granted. That the Petitioners have already fixed a date for bill of cost to be taxed on April 26, 2023 and unless the orders sought are granted the 1st Respondent will suffer great prejudice and the application will be rendered nugatory.

3. This court has considered the application and the submissions therein. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others*, CA No 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

4. It is the view of this court that, it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings in the case of *AAT Holdings Limited vs Diamond Shields International Ltd* (2014) eKLR, the court cited the principles as set out by the Court of Appeal in *Central Kenya Ltd* Case No 222 of 1998 as shown below:-

- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits provided there has been no undue delay.
- (iii) Only where no new or inconsistent cause of action is introduced ie if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

5. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.
6. In *Moi University v Visha Builders Limited* - Civil Appeal No 296 of 2004 (unreported) this Court said;

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *HD Hasmani v Banque Du Congo Belge* (1938) 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd* [1974] EA 75 at P 76 Duffus P said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”



7. Looking at the circumstances of this Application it is that the 1st Respondent is now in possession of crucial evidence which will make this court arrive at a different decision. That during the trial of this matter, such evidence was not available which was coming from the National Environment and Management Authority (NEMA) in this petition. I have perused the proposed amended application and I see that no prejudice will be suffered by the parties should the amendment be allowed. The amended application seeks to introduce the issue of new evidence having been discovered. It is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated April 24, 2023 is merited and I grant it. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 19TH JUNE 2023.

N.A. MATHEKA

JUDGE

