



**Vale Royal Trust & another v Rwika Aggregates Company Ltd & 6 others
(Land Case 49 of 2020) [2023] KEELC 18858 (KLR) (17 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18858 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
LAND CASE 49 OF 2020
LA OMOLLO, J
JULY 17, 2023**

BETWEEN

VALE ROYAL TRUST 1ST PLAINTIFF

DELAMERE ESTATES LTD 2ND PLAINTIFF

AND

RWIKA AGGREGATES COMPANY LTD 1ST DEFENDANT

CABINET SECRETARY MINISTRY OF LANDS 2ND DEFENDANT

DIRECTOR OF PHYSICAL PLANNING 3RD DEFENDANT

DIRECTOR OF SURVEY 4TH DEFENDANT

GILBERT OKETCH AYO O 5TH DEFENDANT

REGISTRAR OF LANDS 6TH DEFENDANT

ATTORNEY GENERAL 7TH DEFENDANT

RULING

Introduction

1. This ruling is in respect of the Plaintiffs/Applicants Notice of Motion Application dated 24th May, 2022. It is expressed as being brought under the provisions section 3, 3A and 100 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya and Order 8 Rule 3,5 & 8 of the [Civil Procedure Rules](#) 2010.
2. The application seeks the following orders:
 - a. That this Honorable Court be pleased to grant leave to the Applicant/Plaintiff herein to amend the plaint.



- b. That the annexed draft amended plaint be deemed as duly filed upon payment of requisite court fees.
 - c. That costs of the application herein be in the cause.
3. The Application is based on the grounds on its face and is supported by an affidavit sworn by one Nelson Rotich.

Factual Background

4. The Plaintiffs/Applicants commenced this suit vide a plaint dated 31st August, 2020. They seek judgement against the Defendants/Respondents in the following terms:
 - a. A declaration That the Plaintiff (sic) is the legal and sole proprietor of all That parcel of land known as 9362/5 and measuring approximately 42,563 Acres and mores specifically as described in the land survey plan number 66865.
 - b. A permanent and perpetual injunction stopping the Defendants herein from in any way interfering with the quiet and peaceful possession of the suit property by the plaintiff herein without legally sanctioned means.
 - c. A permanent injunction stopping any illegal and/or unlawful sub-division, alienation by the Defendants or their agents, of the suit property registered in the name of the Plaintiff.
 - d. A declaration That the allotment letters issued to the 1st Defendant any subsequent survey, process and and/or action leading to the issuing of title documents based on the allotment letters was void ab initio and illegal.
 - e. A declaration quashing the allotment letters and/or any sale agreements, transfers, title documents and processes emanating from the illegally acquired allotment letters.
 - f. A permanent injunction stopping the 6th Defendant from opening up a register and/or registering any parcels of land emanating from the impugned letters of allotment held by the 1st Defendant.
 - g. Costs of the suit.
5. The 2nd, 3rd, 4th, 6th and 7th filed a statement of defense on 15th October, 2020 wherein they deny all the allegations in the plaint.
6. The 1st Defendant filed a statement of defense and counterclaim on 7th December ,2020 wherein he denies all allegations in the plaint.
7. On 14th February, 2022, the Plaintiffs' case was heard; two witnesses testified.
8. On 5th May, 2022 the suit came up for further hearing of the Plaintiffs' case but their counsel sought an adjournment on grounds That they could not produce the original title as they had learnt That the suit property had been sub-divided and on account of this sub-division, the original title had been surrendered to the registrar and further That the Plaintiffs were awaiting issuance of a new certificate of title. Counsel for the Plaintiffs intimated to court That they would be seeking leave to amend their plaint.
9. Subsequently the instant application was filed and the 1st Defendant filed a notice to cross-examine one Nelson Rotich who had sworn the affidavit in support of the instant application.



10. Nelson Rotich was cross examined on 14th November, 2022 and this court- delivered its ruling on 8th December, 2022. The court found That there was no sufficient reason to disregard the affidavit sworn by Neslon Rotich and directed That the instant application proceeds to hearing.
11. On the same day, 8th December, 2022, the court directed That the instant application be heard by way of written submission.
12. On 27th February, 2023, the 1st Defendant and Plaintiffs confirmed having filed submissions and the application was reserved for ruling.

Plaintiffs/applicants Contention.

13. The Plaintiffs/Applicants contend That they filed the instant suit seeking among other orders, a declaration That the Plaintiff is the legal owner of all That parcel of land known as L.R.No. 9362/5 and an order of permanent injunction restraining the Defendants form interfering with the peaceful and quiet enjoyment of the Plaintiffs' rights to the said property.
14. It is the Plaintiffs' contention That during the pendency of this suit, the suit property was sub-divided which in turn caused the number to change.
15. The Plaintiffs contend That the subdivision was occasioned by compulsory acquisition of some portion of the suit property by the government to pave way for construction of a road and another subdivision of the suit parcel into seven portions, by the Plaintiffs, for private development by them.
16. It is also That their contention That the sub division of the suit property meant That in their plaint became obsolete as land parcel number L.R 9362/5 no longer exists.
17. It is their further contention That on account of the sub- division, the certificate of lease pertaining to the suit property was surrendered to the registrar and closed.
18. They contended That upon the surrender of title to LR NO 9362/5 to the registrar a new title was issued and it is known as L.R No 9362/7.
19. The Plaintiffs/Applicants contend That the amendments to the plaint would be just for the purposes of reflecting the new land registration number and state That the excisions did not affect the boundaries That are in dispute in the present suit.
20. The Plaintiffs further contented That the Defendants herein shall not suffer any prejudice should the application herein be allowed and the plaint be amended to the extent explained.
21. It is their further contention That the amendments have not introduced any new cause of action and/ or introduced any new aspects to the case.
22. They end by stating That the amendment is necessary and will enable this court to determine the real issues in controversy.

The 1st Defendant/respondent's Response.

23. In response to the application the 1st Defendant/Respondent filed a Replying Affidavit sworn on 27th June, 2022 by one Samuel Nairoshi.
24. The 1st Defendant/Respondent contends That with regard to paragraph 1 of the deponent's Affidavit he has failed to attach a copy of his authority of either the 1st Plaintiff, the 2nd Plaintiff nor the trustees to swear the affidavit on their behalf.



25. He deposes further That the deponent has not annexed any document to confirm That he is the 2nd Plaintiffs General Manager adding That on the 14th February, 2022 he testified on oath That he retired from the employment of the 2nd Plaintiff after having served for 14 years from the year 2002-2021. He contends That it is therefore doubtful That he has full authority of any of the Plaintiffs and Trustees to the 1st Plaintiff or even the Board of Directors of the 2nd Plaintiff and thus lacks the capacity to support the application before court.
26. He also contends That he has been advised by his advocates on record which advise he verily believes to be true That none of the said paragraphs are supported by any documentation nor specific coordinates given to stipulate the size of L.R.9363/7 nor does the deponent provide any supporting documentation on L.R 9363/5.
27. It is his further contention That the title documents were registered under the Registration of Title Ordinance (CAP 160) whose certificates are conclusive proof of title of the land in question. He takes issue with deposition by the Plaintiffs That the titles were surrendered to the registrar adding That titles referred to are not titles under the Registration of Lands Act.
28. The 1st Defendant/Respondent contends That the Plaintiffs have not produced the title to the land which they claim ownership over adding That the amendment being sought has not been made in good faith and should not be allowed unless original documentation is produced.
29. He ends his deposition by stating That unless with concrete supporting proof is placed before court the application herein lacks merit and should be dismissed with costs.

Plaintiffs/applicants Response to the 1st Defendant/respondent's replying Affidavit

30. In response to the 1st Defendant/Respondent's Replying Affidavit, the Plaintiffs/Applicants filed a Further Affidavit sworn by one Nelson Rotich on 18th July, 2022.
31. It is his contention That he retired as the general manager of both the Defendants according to his testimony to this Honourable Court, and there was a typographical error on the descriptive part of his affidavit That indicated he was still the general manager.
32. He deposes That he retired from service of the two Plaintiffs and is still tasked with the duty and responsibility of acting/representing them in this matter because he is the person who was well versed with the facts and issues surrounding the suit herein. He deposes That the duties still bestowed upon are according to the authorities annexed.
33. It is his further contention That the issues raised in the replying affidavit of the 1st Defendant are true and That the suit property was sub divided and new title created as a result but the boundaries of the disputed area were never interfered with during the sub divisions as can be properly deduced from the copy of the new title to L.R NO 9362/7 which title and its deed plan he has annexed.
34. He contends That there is no basis of opposing their application for amendment since the said amendment is only geared towards amending the parcel number of the suit properties.
35. He further contends That any reservation That the 1st Defendant would have with regards to his authority to act can be interrogated during the hearing of this suit adding That the record shows That he was stood down as a witness and is awaiting cross-examination.
36. He deposes That the Plaintiffs/Applicants reiterate the contents of their Supporting Affidavit and he ends his deposition by praying the court to allow their application.



Issues For Determination.

37. The Plaintiffs/Applicants filed their submissions on 6th February, 2023 wherein they reiterate the contents of their Supporting Affidavit and supplementary Affidavit.
38. They identify one issue for determination; whether the Applicants should be granted leave to amend their plaint.
39. They cite the provisions of section 100 of the *Civil Procedure Act* and order 8 Rule 3, 4 and 5 and state That the said sections grant parties to a suit a right to amend their pleadings at any stage of the proceedings and further That the court has discretion to allow such amendments on such terms as are just and being guided by principles laid down on amendment of pleadings.
40. They further cite the decision in *Central Kenya Limited vs Trust Bank and 4 Others* CA No. 22 of 1998 (2000) KLR in support of their submission That amendments should be freely allowed at any stage of the proceedings provided That the amendment is necessary for determining the real question in controversy.
41. They also cite the decision in *Elijah Kipnegeni Arap Bii vs Kenya Commercial Bank Limited* (2013) eKLR and *Institute for Social Accountability and another vs Parliament of Kenya and 3 others* (2014) eKLR which decisions set out the principles to be taken into considerations in determining an application for leave to amend.
42. They conclude by submitting That the amendment sought should be allowed as it will make way for the just and effective resolution of the dispute. They cite the decision in *Lucia Kibui Muchiri vs Kotton Mwandabe & Another* (2016) eKLR.
43. The 1st Defendant/Respondent filed his submissions on 24th February, 2023 and identifies a single issue for determination That is;

Whether the applicant should be granted leave to amend the plaint.

44. The 1st Defendant/Respondent relies on the case of *Daniel Ngetich & Anor Vs K-Rep Bank Limited* (2013) eKLR wherein it was held That leave to amendment should not be granted where the court is of the opinion That the amendment would cause injustice or if it is a devise to abuse the process of the court.
45. The 1st Defendant further submits That the ownership of land parcel LR 9362/5 is still in dispute in this matter and That the Applicant has not provided any documentation stipulating the size of LR 9363/7 nor supporting documentation to prove it was the registered owner of LR 9362/5 prior to the alleged mutation.
46. It also submits That the amendment will obfuscate and not clarify the issues pending determination before court as the Applicant is yet to prove ownership of land parcel LR 9362/5 but is seeking an amendment over the same land.
47. The 1st Defendant submits That the Applicant failed to avail documentation to prove That the alleged portion of land was acquired by the government to construct a road. He further submits That no evidence has been adduced before court to demonstrate That the alleged compulsory acquisition nor the sale of land was during the pendency of this suit.



48. He also relies on the decision in *Kassam v Bank of Baroda* [2002] eKLR wherein it was held That a late amendment may be done but the Applicant must show why the application is late and must satisfy to court That the delay is not deliberate.
49. The 1st Defendant submits That the Application is made in bad faith and aimed at altering the cause of action before the court and therefore seeks That the application be dismissed with cost to it.

Analysis and Determination.

50. I have taken into consideration the supporting affidavit, supplementary affidavit and the replying affidavit filed herein, documents annexed to the affidavits and the oral submission filed herein.
51. The single issue for determination is whether leave should be granted to the Plaintiffs to amend Their Plaintiff.
52. Order 8 Rule 3(1) of the Civil Procedure Rules provides as follows:
 1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
53. In *Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limited* [2013] eKLR; the court of appeal restated the law relating to amendment of pleadings as stated in Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others v First National Bank of Chicago* (supra) thus:

“The ratio That emerges out of what was quoted from the said book is That powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; That the proposed amendment must not be immaterial or useless or merely technical; That if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; That 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 Limitation Acts.”
54. In the case of *David Jonathan Grantham & Another –Vs National Social Security Fund* [2007] eKLR the court held as follows:

“The court’s power to allow amendments is donated under Order VIA Rules 3, 5 and 8 (now Order 8 under the 2010 Civil Procedure Rules). The court can allow amendments at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the Defendant /Respondent and whether the amendment is material and not merely technical.”
55. The court in the case of *Eastern Bakery –vs Castelino* [1958] E. A 461 set out the principles the court has to consider in determining whether or not to allow an application for amendment as follows:



- (a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.
- (b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.
56. Order 8 Rule 5 provides as follows:
- For the purpose of determining the real question in controversy between the parties, or 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 cost or otherwise as are just.
57. The Defendants/Applicants are seeking leave to amend their plaint. They have explained That the suit property has since been sub-divided and a new document of title bearing a new number has been issued being L.R No 9362/7.
58. The Plaintiffs/Applicants have explained That That the amendments to the plaint would be just for the purposes of reflecting the new land registration number and further That the excisions did not affect the boundaries of the parcels in dispute in the present suit and That the Plaintiffs shall not suffer any prejudice should the application herein be allowed.
59. The Defendants, on the other hand, have chosen not to address their minds on whether the Plaintiffs/Applicants have met the criteria for grant or refusal of leave to amend pleadings. They have instead called for evidence That the suit was parcel compulsorily acquired hence necessitating the sub-division. They allege That the amendment alters the cause of action without explaining how it does so.
60. The 1st Defendant also addresses the court on the issue of late amendment and state That the new certificate of title was issued on 31/8/2020 prior to the filing of this suit and That failure to capture the said change was deliberate.
61. I note That the submissions by the 1st Defendant express frustration of its part and I agree That this amendment might set parties and the court back. However, inconvenience cannot be a parameter for disallowing an amendment. The 1st Defendant does not state what prejudice might be occasioned to it save for inconvenience caused to it which can be compensated through costs.
62. I Have also noted That the 1st Defendant in its replying affidavit raises issues such as existence or validity of the title, authority of the person swearing the affidavit in support of the application for leave to amend to do so and they also state unless there is proof of such authority or existence of the new title document placed before this court then the application should be dismissed with costs.
63. These issues, as raised by the 1st Defendant, have been addressed in the supplementary affidavit filed by the Plaintiffs. They have annexed the title deed bearing the new number. Further, the question of authority of the deponent of the affidavit in support of the instant application was addressed during his cross examination on the contents of the said affidavit and a ruling made by this court.
64. I am further guided by the judicial decision in *Lucia Kibui Muchiri vs Kotton Mwandabe & another* [2016] eKLR. The Learned Judges of Appeal held as follows:
- The amendments sought clearly concern a change in the description of the dispute parcel, which according to the appellant is central to the resolution of the dispute, the object of



which is intended to create a direct nexus between the disputed parcel as previously known, and the disputed parcel as currently described. (Emphasis Mine) Without determining the issue substantially, as this will be the preserve of the trial court, we consider That, such an amendment should be allowed as it will make way for the just and effective determination of the case in the trial court.- (Emphasis Mine) By declining to exercise his discretion to grant the amendment, and to instead delve into the substantive suit at this stage of the proceedings, which reasons formed the basis upon which leave was declined, we are of the view That the learned judge misapprehended the nature of the amendment sought, and the applicable law on amendment of pleadings. In the circumstances, we consider it necessary to interfere with the decision of the High Court and allow the appeal.

65. Bearing this background in mind and the principles set out in the numerous decisions cited in the forgoing paragraphs, I find That this application has been made in good faith, and causes no prejudice to the 1st Defendant. The amendment is necessary to effectively determine the issues in dispute between the parties and to create a nexus between the suit parcel as previously known and as currently described. It is therefore merited.

B. Which party shall bear the cost of this preliminary objection?

66. On the question of costs of the application, the general rule is That costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.
67. I have observed That the instant application causes a setback to these proceedings and has greatly inconvenienced the 1st Defendant. I award thrown away costs of Kshs. 15,000 to it.

Disposition.

68. In the result I find That the application is merited and is allowed in the following terms
- a. Leave is hereby granted to the Plaintiffs/Applicant to amend their plaint dated 31st August, 2020 in terms of the draft Amended Plaint annexed to this application.
 - b. The Amended Plaint shall be filed and served within 7 days from the date of this ruling.
 - c. The Defendants are hereby granted corresponding leave to amend their pleadings within 14 days upon service of the Amended Plaint.
 - d. The Plaintiffs shall bear own costs of this application.
 - e. The Plaintiffs shall pay the 1st Defendant thrown away costs of Kenya Shillings Fifteen Thousand Only (Kshs. 15,000).
69. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 17TH DAY OF JULY, 2023.

L. A. OMOLLO

JUDGE

In the presence of: -

No appearance for the Defendants/Applicants.

No appearance for the Plaintiffs/Respondents.



No appearance for the 2nd Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

