



**Maranga v Mwangi & 2 others (Environment & Land Case
38 of 2014) [2025] KEELC 340 (KLR) (29 January 2025) (Ruling)**

Neutral citation: [2025] KEELC 340 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 38 OF 2014
SM KIBUNJA, J
JANUARY 29, 2025**

BETWEEN

NICODEMUS NYAGAKA MARANGA PLAINTIFF

AND

GRACE GATHONI MWANGI 1ST DEFENDANT

JAMES KAMAU WACHIRA 2ND DEFENDANT

LEAH MUTHONI KANUGO 3RD DEFENDANT

RULING

1. That vide the Notice of Motion dated 26th April 2023 and filed on 5th May 2023, brought under Section 1A, 1B and 3A of the *Civil Procedure Act*, Order 8 Rule 3, 4, 5, 6 and 7 of the *Civil Procedure Rules*, the defendants seeks for leave to amend their defence and counterclaim as per the annexed draft amended 2nd and 3rd defendants' defence and counterclaim and the draft amended 1st defendant's defence and costs. The application is premised on five [5] grounds on the face marked (i) to (v) and supported by the affidavit of James Kamau Wachira, the 2nd defendant, sworn on the 26th April 2023, in which he inter alia deposed that the 2nd and 3rd defendants filed a defence and counterclaim on 22nd October 2021, while the 1st defendant filed hers on 1st March 2022; that the 2nd and 3rd defendants' defence and counterclaim were filed before all material facts were within their knowledge; that the proposed amendments would bring all issues to the court for a just and conclusive determination; that the amendments application is not intended to delay the matter or to prejudice the plaintiff.
2. The plaintiff opposed the application through their five grounds of opposition dated 11th September 2024, *inter alia* stating that the defendants should be taken to have abandoned the application when the matter proceeded through the court-annexed mediation and a decision made; that the plaintiff's case has been heard and closed and it is too late to seek to amend pleadings as it might give the defendants undue advantage; that the defendants' application is an afterthought and they should not



be allowed to open their pleadings long after directions have been given and the suit marked ready for hearing; that there is nothing in the application that the defendants could not raise during the hearing.

3. The learned counsel for the defendants and plaintiff filed their submissions dated the 23rd September 2024 and 7th October 2024 respectively, that the court has given due consideration.
4. The following are the issues for the court's determinations:
 - a. Whether the defendants have met the threshold for leave to amend their pleadings to be granted at this stage.
 - b. Who pays the cost?
5. The court has carefully considered the grounds on the notice of motion dated 26th April 2023, the affidavit evidence, submissions by the learned counsel, the record and come to the following findings:
 - a. Amendments of pleadings is governed by Section 100 of the [Civil Procedure Act](#) chapter 21 of Laws of Kenya which provides that;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

Further, Order 8 Rule 3 of the [Civil Procedure Rules](#) provides as follows regarding amendment of pleadings with leave of court:

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.
2. Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
3. An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
5. An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”



From the above provisions, it is trite law that the court has wide discretion to allow amendment of pleadings at any stage of the proceedings, if doing so will aid in determining the real issues between the parties. Further, it is well settled that amendments should be freely allowed if they will not prejudice or cause injustice to the opposing party, which cannot be compensated with costs or other terms to be imposed by the court. As a matter of law, all amendments ought to be allowed which satisfy the two conditions; of not causing injustice to the other side, and of being necessary for determining the real questions in controversy between the parties.

- b. The defendants filed this application dated 26th April 2023 on 5th May 2023, but they did not take steps to prosecute it. The record confirms that when the matter came up for mention on 19th July 2023, Mr. Jengo, counsel for the defendants, moved the court to adopt the partial mediation settlement. Mr Mwanzia, counsel for the plaintiff expressed his reservation on part of the mediation report. The court considered the learned counsel's submissions and proceeded to adopt the partial mediation settlement in terms of the report dated 5th June 2023, as an order of the court. The next court attendance was on 12th October 2023, when Mr Jengo, counsel for the defendants, informed the court that the suit could be set down for hearing. The court proceeded to fix the matter for hearing on 12th February 2024 having noted that none of the parties had moved the court since 19th July 2023, when the partial mediation agreement was adopted as an order of the court. On 3rd November 2023, the plaintiff moved the court vide a Notice of Motion seeking to set aside the partial settlement agreement dated 29th May 2023 and for parties to be referred to further mediation. The court delivered its ruling on 11th April 2024 and set aside issue number 2 on the partial settlement agreement that was against an unspecified County Government and upheld the rest of the partial settlement agreement. The suit was further mentioned on 14th May 2024 when counsel agreed for the suit to be heard virtually on 23rd July 2024. On 23rd July 2024, the plaintiff testified as PW1 and was cross-examined by Mr. Jengo, counsel for the defendants, and he thereafter closed his case. After this the defendant's counsel, Mr. Jengo, informed the court that though he had the 2nd and 3rd defendants in his chambers they had misplaced their statements, and he requested for an adjournment which was allowed by the court and the suit fixed for defence hearing on 14th November 2024. It was before the said hearing date, that the defendants filed the application dated the 3rd September 2024 seeking inter alia to have the earlier application dated 26th April 2023 and filed on 5th May 2023 to be heard during the court's recess. The court on 5th September 2024 declined to certify the application urgent for hearing during the recess and directed it be served and mentioned on the 19th September 2024. On that date, the counsel for the parties agreed to canvass the application through submissions and directions were given accordingly.
- c. I have perused the draft 2nd and 3rd defendants' amended defence and counterclaim and noted that the amendments seeks to primarily introduce paragraphs 13 of the defence and 21 of the counterclaim, to the effect that the suit against the 2nd and 3rd defendants is time-barred under the Limitation of Actions Act. The defendants have pleaded a case for their proposed amendment by claiming that it was through an inadvertent error that the defendants' counsel failed to plead that fact. The plaintiff is adamant that the proposed amendments are an afterthought as the same was abandoned after its filing by dint of the defendants participating in mediation and adoption of the partial settlement agreement as an order of the court. I tend to agree with the plaintiff, the reason being the defendants filed their application on 5th May 2023 seeking amendment but never bothered to prosecute the same, and even addressed the court on 19th July 2023 with information that there was a partial settlement agreement that ought to be adopted by the court as an order of the court. The partial mediation agreement was



adopted by the court as an order of the court and is still in force to date. The defendants even went ahead to persuade the court to fix the suit down for hearing of the plaintiff's case. On the hearing day, counsel for the defendants participated by cross-examining the plaintiff, PW1, before the plaintiff closed his case. At no point did the defendants' counsel move the court on their application. I wonder why they chose to bring it up at this stage, and the only explanation given is that it was simply a mistake of the counsel that should not be visited upon the litigant.

- d. The court in the case of *Angelina Chepng'etich Kimaiti versus Tom Mong'are Nyariki & Another* [2021] eKLR held that:

“As to the first issue, amendments of pleadings can be allowed at any stage before Judgment. But it is most ideal to allow pleadings before tendering of evidence starts in order to avoid the recalling of witnesses which may at times be inevitable particularly where the amendments introduced affect the evidence already tendered. The only amendments that can be allowed after the witnesses are put on the witness box are minor amendments, say those to do with clerical errors, correct spelling of people's names, places, anomalies in the dates, typographical errors, spelling mistakes, minor inaccuracies in measurements or quantities, slight inexactness in colours, impressions and such other minor things which do not substantially alter the substratum of the case. Such are excusable. But it would be an abuse of the process of the court to allow a party to amend his case after evidence has been adduced so that the amended pleadings suit the evidence on record. This, in my view, is not what the provisions of order 8 Rule 3 of the *Civil Procedure Rules* were meant to achieve. The purpose of amending pleadings was to ensure that nothing is left out of the case since should one not include all the causes of action in the suit, he cannot file another suit for the cause of action that ought to have been included in the suit. Such would be Res Judicata. Order 8 Rule (5) of the *Civil Procedure Rules* gives the court powers to allow an amendment notwithstanding that its effect will be to add a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

This suit has been certified ripe or ready for defence hearing, as the plaintiff has adduced evidence and has even closed his case.

- e. Through the amendment application, the defendants are seeking to introduce a new cause of action, which is that the suit was time-barred. In my view that could not qualify for an issue that was outside the knowledge of the defendants' counsel at the time of filing the defence and counterclaim. Indeed, Order 8 Rule 3 (5) allows amendments, which introduce a new cause of action in appropriate cases. However, each case will be determined on its own merits and in the instant case, I find that the defendants are abusing the amendment process. The Court of Appeal in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies versus First National Bank of Chicago* [1995] eKLR held that:

“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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that



the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

An amendment is granted as a matter of discretion, and this court is led by its assessment of where justice lies. The parties herein have willingly engaged in a mediation process that culminated in a partial settlement agreement which was adopted by the court as an order of the court. During this entire process, the defendants conveniently declined and or neglected to prosecute the application for amendment, only for them to bring it up when it made sense for them to do so. In my view that is not justice, in as much as the court may order the defendants to pay costs as a condition in allowing the amendments.

- f. It is vital for the court to consider the litigation constraint on the plaintiff since this case is that of personal litigants. The defendants had the opportunity to bring up this amendment before the suit was certified ready for hearing, but failed to do so. If anything, from the court proceedings, the counsel for the defendants, Mr. Jengo, was the one who addressed the court to the effect that the suit was ready for hearing knowing very well his clients' amendment application though filed, had not been prosecuted to its logical conclusion.
 - g. At this point, allowing the defence to amend their pleadings, more than a year after they sought the same, and after the plaintiff has closed his case, would be giving them an unfair advantage over the plaintiff. If indeed the suit is time-barred, the defendants are at liberty to object the same under a preliminary objection, which would ideally have been at the earliest point of the suit. Justice works both ways, an amendment is not a right but a discretion of the court, and in this case the court is of the view that the plaintiff is entitled to as much protection by the court as the defendants. I find the application dated 3rd September 2024 that seeks to have the application dated 26th April 2023 heard is devoid of merit and in the same spirit, the application dated 26th April 2023 is not equally not merited.
 - h. In the spirit of section 27 of the *Civil Procedure Act* chapter 21 of Laws of Kenya, the defendants having failed in both applications should meet the plaintiff's costs.
6. As a consequence of the determinations set out above in respect of the two applications, the court finds and orders as follows:
- a. That the two applications by the defendants are without merit and are hereby dismissed.
 - b. That the defendants will pay the plaintiff's costs.

It is do ordered.



DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 29TH DAY OF JANUARY 2025.

S. M. KIBUNJA, J.

ELC MOMBASA.

In the presence of:

Plaintiff : M/s Mwanzia

Defendants : Mr Jengo

Shitemi – Court Assistant.

S. M. KIBUNJA, J.

ELC MOMBASA.

