



REPUBLIC OF KENYA



Mbaru & 111 others v Nchoe & others (Environment & Land Case 520 of 2017) [2023] KEELC 21115 (KLR) (31 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21115 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 520 OF 2017
CG MBOGO, J
OCTOBER 31, 2023**

BETWEEN

HENRY MWANGI MBARU & 111 OTHERS PLAINTIFF

AND

JOHN OLE NCHOE & OTHERS DEFENDANT

RULING

1. Before this court for determination is the Notice of Motion Application dated 27th March, 2023 filed by the plaintiffs/applicants and is expressed to be brought under Order 8 Rule 3, Order 11 Rule 3 (h), Order 51 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act* seeking the following orders: -
 1. That leave be and is hereby granted to the plaintiffs herein to amend their plaint in terms of the annexed draft amended plaint.
 2. That the annexed draft amended plaint be deemed as duly filed and served upon payment of requisite court fees.
 3. That the costs of this application be in the cause.
2. The application is premised on the grounds inter alia that the subject matter of the suit has been greatly distorted owing to new numbers allocated and that the only amendments are in regards to the prayers before the court and that are not bound to change the defences filed.
3. The application was supported by the undated affidavit of Grace Muthoni Mwangi, the 34th plaintiff/applicant filed in court on 27th March, 2023. The 34th plaintiff/applicant deposed that as at the time of filing the suit, the subject matter existed as CisMara/Olopito/ 788 and during the pendency and determination of the suit, the defendants caused the subject matter to be subdivided thus creating new parcels. She further deposed that the alteration of the subject matter has created additional prayers and



the only amendment are in regards to prayers that is not bound to change the defences filed in any way. Further, that in allowing this application, the defendants/ respondents will not suffer any prejudice.

4. On 5th July, 2023, the 51st, 64th, 65th, 66th, 67th, 68th, 69th, 70th, 74th, 75th and 76th defendants/respondents filed their grounds of opposition dated 6th June, 2020 (sic) challenging the application on the following grounds: -
 1. That the intended amendment is sought to be introduced too late in the day after the plaintiffs' case is closed.
 2. That the intended amendments if allowed will require the plaintiffs' case be reopened and the plaintiffs will have to testify afresh which will only cause further delay in resolving this matter.
 3. That the intended amendments if allowed will run afoul the principle objectives of expeditious and timely disposal of disputes as enshrined both in *the constitution* and the *Civil Procedure Act* since the matter is already over ten (10) years in court.
 4. That the intended amendments will introduce a completely new cause of action to the one previously pleaded and responded to by the defendants to the prejudice of the defendants herein.
 5. That the intended amendments have been sought in bad faith and if allowed will amount to an abuse of the court process since the plaintiffs will have been allowed to use the precious judicial time for fishing expedition.
 6. That the intended amendments will not serve the purpose(s) for which amendment ought to be allowed vis; to enable the court to completely and effectually determine all the matters in controversy, since the alleged subdivisions have no titles to them and a claim for adverse possession can only be against a registered title(s) to land.
 7. That the plaintiffs have not advanced sufficient reasons to merit the order sought, inter alia, why they never pleaded those issues at the beginning since all the facts were within their knowledge before and during the proceedings so far undertaken in this matter.
 8. That the application is an afterthought only designed to delay the timely finalization of this case.
 9. That the intended amendments to the prayers are not supported by the averments in the pleadings and the evidence so far adduced and for that reason the same are without any legal basis or justification at all.
 10. That the intended amendments if allowed will greatly prejudice the defendants herein since the plaintiffs shall have mixed up causes of action in the same suit and thereby making it difficult and embarrassing to the defendants to sufficiently defend the case.
 11. That the application is thus riddled with malice and it is wholly designed to derail the conclusion in this matter.
5. The application was canvassed by way of written submissions. The plaintiffs/applicants filed their written submissions dated 3rd August, 2023. The plaintiffs/applicants submitted that the plaint was filed in Nakuru on 2nd July, 2012 as no. 233 of 2012 and was later transferred to this court. That the 112 plaintiffs moved to court when they were threatened with eviction from the plots on which they had lived for over 22 years and the original plaint captured these issues with prayers to stop wrongful eviction and repossession. They submitted that the ultimate desired outcome of the plaintiffs labour



in this case is to establish legal ownership of the land which they currently occupy and the issuance of legal documents to signify and confirm such ownership.

6. Further that the proposed amendments in the body of the plaint is to add paragraph 13 (a) and 17 (a) to buttress the plaintiffs claims and this does not amount to a new cause of action. In addition, that the period of occupancy of over 22 years in the suit land gives the plaintiffs certain rights which were stated generally but now wish to be specifically pleaded as the rights have now crystallised and are being stated succinctly and more precisely.
7. The plaintiffs further submitted that the intended amendments are not inconsistent with the previous pleadings and they will not prejudice the defendants/respondents in any way. Further that the suit land/plots were genuinely allocated to the defendants some of whom were the original members of Olopito Group Ranch and other defendants/respondents were wrongly and illegally allocated portions of plots which had been hived off plots belonging to some plaintiffs.
8. The plaintiffs submitted that to grant or refuse leave to amend is at the discretion of the court dependent on the circumstances of each case but the discretionary power must be exercised judicially. Further, that the application has not been made too late in the proceedings as the defence case is yet to be heard. They submitted that the instant application although lodged late at this stage had been raised orally in court sometime early in the proceedings and due to the insistence by the defence, the application appears to have been delayed.
9. The 51st, 64th, 65th, 67th, 68th, 69th, 70th, 74th, 75th and 76th defendants/respondents filed their written submissions dated 26th July, 2023. They submitted that the general rule of amendment of pleadings is that when amendments are sought before the case has commenced, such application will be readily granted. However, it becomes difficult as the matter progresses or if the proposed amendment is inconsistent with the previous pleadings as was observed in the cases of *Kyalo versus Bayusuf Brothers Limited* [1983] KLR 229 and *Eastern Bakery versus Castelino* [1959] EA 461.
10. The 51st, 64th, 65th, 67th, 68th, 69th, 70th, 74th, 75th and 76th defendants/respondents submitted that the proposed amendments will have the effect of introducing a new cause of action with different legal principles and procedure that would be highly prejudicial. They relied on the cases of *Bwana versus Said* [1991] KLR 454 and *Joseph Tireiti versus Jacob Kipsugot Arap Lagate & Another* [2013] eKLR.
11. I have analysed and considered the application, the grounds of opposition and the written submissions filed by the parties and, in my view, the issue for determination is whether the application of amendment of plaint is merited.
12. Section 100 of the *Civil Procedure Act*, provides as follows:

“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”.
13. Order 8, Rules 3 and 5 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.



- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (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 subrule if it thinks just so to do.
- (3)
- (4)
- (5) An amendment may be allowed under subrule (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.”

14. Further, Order 8, Rule 5 of the Civil Procedure Rules provides: -

- “(1) For the purpose of determining the real question in controversy between the parties, or of 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 costs or otherwise as are just.
- (2) This rule shall not have effect in relation to a judgment or order.”

15. My reading of the above provisions shows that indeed an amendment may be allowed at any time of the suit. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. Having said that, it is preferable that applications to amend come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

16. In the instant case, the plaintiffs contended that the proposed amendments in the body of the plaint is to add paragraph 13 (a) and 17 (a) to buttress their claims and that it does not amount to a new cause of action. In addition, that the period of occupancy of over 22 years in the suit land gives the plaintiffs certain rights which were stated generally but now wish to be specifically pleaded as the rights have now crystallised and are being stated succinctly and more precisely.

17. The application has been made at a time when the plaintiffs had already closed their case and since the defence is yet to present their case, the plaintiffs were of the view that no prejudice will be suffered. I also noted that the counsel for the plaintiff indicated that he had intimated his intention to amend the plaint at the early stages of the proceedings and due to the insistence of the defence, the application seemed to have caused the delay.

18. The principle upon which the court exercises the discretion to allow amendment was summarized by the Eastern African Court of Appeal in the Case of Eastern Bakery v Castellino [1958] EA 461. The



object and rationale behind this principle was outlined by the High Court in the case of Institute for Social Accountability and Another versus Parliament of Kenya and 3 others (2014) eKLR as follows:

“The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461; *Ochieng and others v First National Bank of Chicago* CA Civil Appeal Number 149 of 1991, *Kenyatta National Hospital v Kenya Commercial Bank Limited & Another* [2003] 2EA.

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.”

19. The instant application in my view, has been brought late in the day. The plaintiffs’ failure to specifically plead their rights that have now crystallised in a more precise manner cannot be the reason for amendment. Consequently, I will not exercise my discretion to allow the application as it will occasion prejudice on the part of the defendants.
20. Arising from the above, the notice of motion application dated 27th March, 2023 lacks merit and it is hereby dismissed. Costs to be in the cause. Mention on 8th November, 2023 for further directions. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 31ST DAY OF OCTOBER, 2023.

HON. MBOGO C.G.

JUDGE

