



**Shah & another v Wambugu (Sued as administrator of the Estate of the Late Jacob Juma) & 2 others; Chelogoi (Interested Party) (Environment & Land Case 312 of 2009) [2023] KEELC 21191 (KLR) (31 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 21191 (KLR)

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ENVIRONMENT & LAND CASE 312 OF 2009**  
**JE OMANGE, J**  
**OCTOBER 31, 2023**

**BETWEEN**

**ASHOK RUPSHI SHAH ..... 1<sup>ST</sup> PLAINTIFF**

**HITEN KUMAR AMRITLAL RAJA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MIRIAM WAIRIMU WAMBUGU (SUED AS ADMINISTRATOR OF THE ESTATE OF THE LATE JACOB JUMA) ..... 1<sup>ST</sup> DEFENDANT**

**COMMISSIONER OF LANDS ..... 2<sup>ND</sup> DEFENDANT**

**REGISTRAR OF TITLES ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**DAVIS NATHAN CHELOGOI ..... INTERESTED PARTY**

**RULING**

1. This application arises out of LR Number 18485, Lower Kabete hereinafter referred to as the suit property.
2. The 1<sup>st</sup> Plaintiffs Notice of Motion dated 13<sup>th</sup> September, 2023 prays for the following orders;
  - a. Spent.
  - b. That this Honourable Court be pleased to grant leave to the 1<sup>st</sup> Plaintiff to amend his Notice of Motion Application dated 31<sup>st</sup> January, 2023 as per the draft amended Notice of Motion filed herewith.



- c. That the draft amended Notice of Motion Application annexed hereto be deemed as duly filed upon payment of the requisite court fees.
  - d. That costs of the application be in the suit.
3. The application is based on the grounds that vide Judgement delivered on 28<sup>th</sup> July, 2022 the Plaintiffs are bona fide owners of the suit property. The application is supported by the affidavit of Ashok Shah in which he traces the history of this 14 year old case in the corridors of justice. The 1<sup>st</sup> plaintiff contends that both the court and the Land Registrar have determined that he is the owner of suit property. He avers that in various court documents the Interested Party has averred that he or 3<sup>rd</sup> parties claiming under him are in occupation of the suit property.
4. He seeks to amend the application on two main grounds; firstly, that the court in its Ruling allowed the interested party to be enjoined in the post Judgement application and secondly that given that the interested party has severally proclaimed that he is in possession of the suit property, it is necessary that the orders sought be extended to the interested party.
5. The 1<sup>st</sup> Plaintiffs application was supported by the 2<sup>nd</sup> plaintiff, and all the Defendants. Counsel for the plaintiff submitted that the application should be amended so that the court can determine whether the 1<sup>st</sup> Defendant and the Interested Party should be evicted from the suit property in compliance with the courts Judgement. Counsel referred the court to several decisions which have pronounced several principles that a court should consider in determining an application for amendment.
6. The application for amendment was strenuously opposed by the Interested Party who in his Replying Affidavit restated the facts of this case. At the heart of his opposition is the fact is that he has never been heard in respect of the suit property hence it is prejudicial for the 1<sup>st</sup> Plaintiff to seek to amend his application to evict him from the suit property.
7. Further he alleges that the amendment seeks to introduce new evidence to the application by introducing a Ruling by the Land Registrar which he states was never availed to him. He faults the Ruling by the Land Registrar on various grounds which he highlights in his affidavit. He sums up his opposition by stating that the 1<sup>st</sup> Plaintiff is trying to dispose of the suit by way of the application. In arguing the application, counsel reiterated the contents of the affidavit, and stressed that the proposed amendment would highly prejudice the interested party who he categorically states has never been heard on the ownership of the suit property.
8. I have considered the submissions by counsel and the cited authorities. The issue before the court for determination is whether the application to amend has merit and should be allowed.
9. Order 8 Rule 5 of the Civil Procedure Rules grants the court power to amend pleadings in the following terms;  
General power to amend (order 8, rule 5)
  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.



10. The interpretation of the above section is clear. The court has discretion to allow an amendment on application or on its own motion if the amendment will assist the court determine the real question in controversy or the amendment will correct any defect or error in the proceedings.

11. The principles that should guide a court in considering an application for amendment are well settled. I have gone through the authorities cited by counsel for the applicant and from the four authorities I have identified the following principles that will be crucial in considering the application that is before me;

The amendment should seek to cure any defect or error in the proceedings. The amendment should assist the court determine the real question in controversy. The amendment should not introduce a new case or change the character of the case. The amendment should not prejudice the Respondent.

12. The application for amendment is not brought on grounds that there is any defect or error in the proceedings. The amendment is primarily brought on the grounds that the amendment will enable the court to determine the remaining issues in controversy. The application dated 31<sup>st</sup> January, 2023 that is sought to be amended is an application to evict the 1<sup>st</sup> Defendant and any parties claiming under the 1<sup>st</sup> Defendant.

13. The amended application seeks to introduce three prayers which are reproduced below;

a. That the interested party, his agents, servants, and or employees and any persons claiming and or retaining possession under the Interested Partys title or name and any person interfering in the Plaintiffs property LR Number 18485, Lower Kabete be forcefully evicted and or removed therefrom.

b. That the Honourable Court be pleased to issue an order permitting the Plaintiffs, their agents and or servants to forcefully demolish and or bring down any illegal and unauthorized structures constructed by the Interested Party, his agents and or servants and any person claiming the property under his title or name on the Plaintiffs property LR Number 18485, Lower Kabete.

c. That the cost of retaking back peaceful and vacant possession of the suit property, LR Number 18485, Lower Kabete, Nairobi be borne by the 1<sup>st</sup> Defendant, his agents, servants and or employees and or the Interested Party, his agents servants and or employees as may be appropriate depending on the party ultimately ascertained to be the principal, master and or employer of the persons illegitimately situate on the Plaintiffs Property.

14. The application for amendment seeks to introduce orders of eviction against the interested party who the court had directed was to be heard in respect of the post Judgement application. The post Judgement application was an application that sought to evict the 1<sup>st</sup> Defendant against whom Judgement had been entered by this court on 28<sup>th</sup> July, 2022. The effect of the amendment will be to introduce a new claim against the interested party in an application. This claim is not backed by the original pleadings in the case in respect of which the Judgement was entered.

15. This question was addressed by Justice Chepkwony in the case of Diamond Trust Bank Kenya Ltd v Invesco Assurance Company Limited [2021] eKLR in which the learned Judge cited Bullen and Leake & Jacobs Precedents of Pleading 12<sup>th</sup> Edition thus;

‘... The power to so amend can be exercised by the court at many 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 amendments must not be immaterial or useless or merely technical; that if 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.



16. The 1<sup>st</sup> Plaintiff has further sought for the amendment on the basis that given the Interested Party was allowed to be enjoined as an interested party, the pleadings should be amended. The question that then arises is if the amendment is necessary so as to effectuate the court's Ruling and order which gave the Interested Party a chance to be heard. The Interested Party's role in the post Judgement application is akin to that of an objector who the court gave an opportunity to be heard. The directions of the court as given on 20<sup>th</sup> July, 2023 was that he was to file a Replying Affidavit and leave was given to the Applicant to file a Further Affidavit if necessary. These directions were sufficient to enable all parties present their case in respect of the application dated 31<sup>st</sup> January, 2023.

17. Having considered the foregoing, I find that the application is not merited and is dismissed. Costs to abide the determination of the application dated 31<sup>st</sup> January, 2023.

**DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 31ST DAY OF OCTOBER 2023.**

**JUDY OMANGE**

**JUDGE**

**In the presence of**

**Ms Kimani holding brief for Mr. Mwangi for 1<sup>st</sup> Plaintiff**

**Mr. Orioki for Interested Party**

**Mr. Moriasi for 2<sup>nd</sup> Plaintiff**

