



Omollo & 2 others v Attorney General & another; Kenya Airports Authority (Interested Party) (Petition 958 of 2012) [2023] KEELC 21062 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
PETITION 958 OF 2012
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

**ARTHUR OMOLLO 1ST PETITIONER
JOSHUA AYIEKO 2ND PETITIONER
GLADYS MAGEKA 3RD PETITIONER**

AND

**THE HON ATTORNEY GENERAL 1ST RESPONDENT
THE COMMISSIONER OF LANDS 2ND RESPONDENT**

AND

KENYA AIRPORTS AUTHORITY INTERESTED PARTY

RULING

1. Vide a Notice of Motion dated 19th October, 2022 brought pursuant to the provisions of Articles 22 and 48 of *the Constitution* of Kenya, 2010, Rules 3, 18 & 19 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013, Sections 1A, 1B & 3A of the *Civil Procedure Act* and Order 8 of the Civil Procedure Rules, the Petitioners/Applicants seek the following reliefs;
 - i. That the Petitioners /Applicants be granted leave to further amend their Amended Petition as set out in the draft Further Amended Petition annexed herein.
 - ii. That the Draft Further Amended Petition be deemed as duly filed and served.
 - iii. Any order that the Court may deem fit to grant in the circumstances.



2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Arthur Omollo, the 1st Petitioner, duly authorized by the other Petitioners. The 1st Petitioner deponed that the Judgement rendered by Justice Okong’o on 12th April, 2021, in consolidated suits ELC Suit Nos 489 of 2004 and 206 of 2004 has a direct bearing on the present suit and that the judgement relates to the same subject matter as the proceedings before this Court.
3. It was deposed by the 1st Petitioner that the Judgement by Justice Okong’o is to the effect that Kenya Airports Authority, the Interested Party herein, is the lawful owner of all that parcel of land which forms the subject matter of this suit and that as a result thereof, the Applicants are apprehensive that there is need to further amend their Petition lest the same be struck out as some crucial matters in the present proceedings may fall victim of the res judicata principle.
4. Mr Omollo deponed that there being an Appeal against the Judgement of Justice Okong’o, some issues if litigated in this Court may be tantamount to holding parallel proceedings; that there cannot be parallel proceedings before this Court and the Court of Appeal and that consequently, there is need to further amend the Petition in order for the Petitioners to confine their claim to matters that were not determined in the above mentioned consolidated suits.
5. In response to the application, the 1st Interested Party through its Corporation Secretary, filed a Replying Affidavit in which she deponed that vide the draft Further Amended Petition annexed, the Petitioner has altered the prayers sought; that the amounts claimed by the Petitioners are grossly excessive and unsubstantiated and that if the amendments are allowed, they will have the effect of saddling the public with unwarranted claims in its books which will undermine its budgeting capacity and rationale and affect the wider public interest.
6. It was deposed that the Petitioners/ Applicants herein have been aware of the suits that were dismissed by Okong’o J for a period of 8 years when the 1st Interested Party herein filed an application seeking stay of the current proceedings pending hearing and determination of the abovementioned suits.
7. According to the 1st Interested Party, it is apparent that the Petitioners were not only aware of the aforesaid proceedings but were parties thereto and cannot use the same to justify the amendments; that the quotient for res judicata was satisfied two years ago when Judgment in the above-noted matter was rendered and that the present application constitutes an abuse of Court process which covers situations where two actions are commenced.
8. The 1st and 2nd Respondents stated that they were not opposed to the Application. The parties filed submissions which I have considered.

Analysis and Determination

9. Having analyzed the pleadings and submissions by the parties, the sole issue for determination is whether the application for amendment is merited.
10. Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 provides as follows:

“a party who wishes to amend its pleadings at any stage of the proceedings may do so with the leave of the court.”



11. In *Humanity Action Knowledge Integrity in Africa Trust (Haki Africa) & 19 Others vs Attorney General & 3 Others; Kenya National Commission on Human Rights (KNHCR) & 2 Others (Interested Parties)* [2020] eKLR, the court observed as follows:

“Rule 18 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereafter “the Mutunga Rules”) should be the starting point for purposes of the instant application.

The Rule allows parties to amend their pleadings, and in particular, the Petition, with leave of the Court at any stage of the proceedings. Amendment of petitions once filed can only be done with the permission of the court. Additionally, the permission and consequent amendment may be granted and made respectively at any time or stage of the proceedings.”

12. The principles upon which a court acts in an application to amend a pleading were set out by the Court of Appeal in *Central Kenya Limited vs Trust Bank limited* (2000) eKLR which referred to commentaries on the Indian Civil Procedure Code by Chittaley and Rao where the learned authors stated as follows with regards to the rule to amendment of pleadings;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state: A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

13. More recently, the Court of Appeal in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR affirmed that the law applicable to amendment of pleadings is 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 vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 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.”

14. It is apparent that the courts’ discretion to amend pleadings at any stage of the proceedings is wide and unfettered, except that it should be exercised judicially upon the defined principles so as to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.

15. The Petitioners seek to amend their Petition aforesaid. They claim that the Judgement rendered by the Court in consolidated suits ELC Suits 489 and 206 of 2004 was to the effect that Kenya Airports Authority is the lawful owner of the parcel of land which forms the subject matter of this suit and



that there being an Appeal against the Judgement of Justice Okong'o, some issues if litigated may be tantamount to holding parallel proceedings.

16. It is the Petitioners' case that consequently, there is need to further amend the Petition in order for the Petitioners to confine their claim to matters that were not determined in the above mentioned consolidated suits to wit: the non-joinder of crucial parties to the suit-Mlolongo Brothers Association, National Land Commission and Ministry of Interior and Co-ordination of National Government and the issue of compensation for unlawful evictions.
17. In response, the 1st Interested Party asserts that Justice Okong'o has already addressed himself on the matter of damages in the Judgment quoted above; that the Petitioners' are attempting to rehash the issue of damages herein in what amounts to an abuse of court process and that further, the Petitioners/Applicants herein having been parties to the proceedings in ELC Suit No. 206 of 2004 ought to have ventilated their claims (if any) with regard to damages in that matter.
18. The Petitioners plea for amendment is predicated on what they deem an attempt to avoid the doctrine of res judicata on account of the decision of the Court in ELC 489 of 2004 as consolidated with 206 of 2004.
19. The substantive law on res judicata is found in Section 7 of the Civil Procedure Act Cap 21 which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Explanation. (1) -The expression “former suit” means a suit which has been decided before the suit in question whether or not it was instituted before it.

Explanation.(2) -For the purposes of this section, the competence of a court shall be determined irrespective of any provision as to right of appeal from the decision of that court.

Explanation. (3) -The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other.

Explanation. (4) -Any matter which might and ought to have been made ground of defence or attack in such former suit shall be deemed to have been a matter directly and substantially in issue in such suit.

Explanation. (5)—Any relief claimed in a suit, which is not expressly granted by the decree shall, for the purposes of this section, be deemed to have been refused.

Explanation. (6)-Where persons litigate bona fide in respect of a public right or of a private right claimed in common for themselves and others, all persons interested in such right shall, for the purposes of this section, be deemed to claim under the persons so litigating.”

20. In outlining the rationale behind the doctrine of res judicata, the Supreme Court in *John Florence Maritime Services Limited & Another v Cabinet Secretary for Transport and Infrastructure & 3 Others* [2021] eKLR stated thus;

“We reaffirm our position as in the *Muiri Coffee* case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality



is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the courts, apart from occasioning unnecessary costs to the parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively. To further bolster our position we borrow from the decision from India in *Karam Chand another v Union Of India and others* on 24 April, 2014 where it was restated the principles upon which the doctrine of res judicata is founded as follows:29.....it is clear that the rule of res judicata is mandatory in its application and should be invoked in the interest of public policy and finality. The matter which have actually been decided would also apply to the matters which have been impliedly and constructively decided by the court. These principles are to be applied to preserve the doctrine of finality rather than frustrate the same. The doctrine of res judicata is the combined result of public policy so as to prevent repeated taxing of a person to litigation. It is primarily founded on the following three maxims:(1)nemo debet bis vexari pro una et eadem causa: no man should be vexed twice for the same cause.(2)interest republicae ut sit finis litium: it is in the interest of the State that there should be an end to a litigation; and(3)res judicata pro veritate occipitur: a judicial decision must be accepted as correct.....The doctrine of res judicata is conceived not only in the larger public interest which requires that all litigation must sooner than later come to an end but is also founded on equity, justice and good conscience.”

21. The Court went on to set the parameters for the plea of res judicata thus;

“For res judicata to be invoked in a civil matter the following elements must be demonstrated: a) There is a former Judgment or order which was final; b)The Judgment or order was on merit; c)The Judgment or order was rendered by a court having jurisdiction over the subject matter and the parties; and d)There must be between the first and the second action identical parties, subject matter and cause of action.”

22. The Court is also alive to the principle that Courts should guard against parties attempts to re-litigate through the cosmetic and ingenious changes to the pleadings. This was succinctly expressed by Majanja J in *E.T. vs Attorney General & Another* [2012] eKLR where he held as follows;

“ 57. The courts must always be vigilant to guard against litigants evading the doctrine of res judicata by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit trying to bring before the court in another way and in a form a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi v National Bank of Kenya Limited and Others* [2001] EA 177 the court held that, ‘parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit.’ In that case the court quoted Kuloba J., in the case of *Njangu v Wambugu and Another Nairobi HCCC No. 2340 of 1991 (Unreported)* where he stated, ‘If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift on every occasion he comes to court, then I do not see the use of the doctrine of res judicata”

23. By way of brief background, vide the amended Petition, the Petitioners had sought, inter-alia, declarations that the Government’s decision to demolish the Petitioners’ houses amounted to



- compulsory acquisition of their properties and that the actions of the Government in aiding to acquire and develop the suit parcel is evidence that the suit properties belonged to the Petitioners.
24. On 19th October, 2015, the Interested Party instituted a motion seeking a stay of the present proceedings. The Interested Party's contention was that the present suit was substantially similar to ELC No 206 of 2004 in which the Plaintiff and the Defendants were the officials of Mlolongo Brothers Association. This application was opposed by the Petitioners who claimed that the two suits were not related.
 25. The Court found in favour of the Interested Parties stating as follows:

“The Petitioners claim to compensation is predicated on sale of land to them by Mlolongo Brothers Association who are parties in the former suit. In the present suit, the Interested Party has filed pleadings in which it contends that the title being claimed by Mlolongo Brothers Association was illegally acquired. This is what is also in contention in the former case...Any finding in the previous suit will have an impact on the present dispute. The dispute in both suits centres on the rights to the other Petitioners. It would therefore be a waste of judicial resources to have parallel proceedings going on. I find this is a proper case where stay of the present suit should be granted.”
 26. On 12th April, 2021, the Court in the consolidated suits delivered its Judgement. Of relevance to this matter was the determination of the proprietorship of L.R No 13512, the suit property herein. The Court categorically made a finding that the suit property herein fell within the boundaries of the property owned by Kenya Airports Authority- L.R No. 21919.
 27. The Court also stated as follows:

“...The purported allotment of L.R No. 13512 to Mulolongo was illegal, fraudulent, null and void. The purported RTA and RLA titles issued to Mulolongo are similarly nullities...”
 28. It is therefore apparent from the foregoing that this Court would be precluded from determining the question of ownership of the suit property.
 29. Vide the proposed amendments, the Petitioners are seeking, inter-alia, declarations that the demolitions and evictions by the Respondents violated a host of their fundamental rights and freedoms guaranteed by *the Constitution*, statute and International Conventions; and that the 2nd and 4th Respondents' issuance of approvals allowing sub-divisions and authorizing developments violated their rights to legitimate expectation; general damages for the violation of the human rights; and special damages as particularized thereunder.
 30. The 1st Interested Party maintains that these proposed amendments are res judicata. Its argument in this respect is that the Petitioners were aware of the consolidated suits and as such, the issues they seek to raise vide the amendments were issues that should have been raised therein.
 31. ELC No. 206 of 2004 was instituted by the Interested Party herein as the Plaintiff against Peter Muinde Mbiti, Agnes Njeri, James Njoroge Murigi, Solomon Mwau, Stephen Mwau, Stephen Mwanja, and Dominic Katua, as officials of Mlolongo Brothers Association. The Plaintiffs' case was the Mlolongo Brothers Association was illegally holding out as the registered owner of L.R 13512 and was sub-dividing and selling the same.
 32. The Defendant in that suit, Mlolongo Brothers, maintained that they were the proprietors of the suit property which it had sub-divided amongst its members.



33. The present suit has been instituted by the Petitioners on behalf of 510 other persons and in the public interest. The 510 persons are persons with interest in the suit property. Amongst the 510 persons are Peter Mbiti, Agnes Njeri, James Njoroge, and Stephen Mwanja who are some of the officials of the Mlolongo Brothers Association.
34. Whereas a number of the officials of Mlolongo Brothers Association as sued in ELC 206 of 2005 are listed as some of the Petitioners herein, their capacity in these proceedings appears to be as individual persons who purchased parcels of the property. Indeed, without evidence to show that all the Petitioners were part of Mlolongo Brothers Association, the Court cannot state at this juncture that they could claim under the Association's title.
35. As to the nature of the amendments sought, they revolve around the alleged constitutional violations resulting from the sale and evictions from the suit property, and whether the evictees are entitled to damages. These particular issues were not canvassed in ELC 206 of 2004 which was dealing with the ownership of the suit property herein.
36. Whereas it is trite that applications seeking amendments of pleadings ought to be brought within reasonable time, it is a general principle that delay in itself is not sufficient ground for refusing an application for amendment. This position was re-affirmed by the Court of Appeal in *Central Kenya Limited vs Trust Bank Limited* (supra) where it was stated as follows:
- “...mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”
37. In this case, the application for amendment has been brought two years after the determination of the Court in ELC 206 of 2004. This is not timeous. However, the Court is of the view that any prejudice occasioned to the Respondents/Interested Party is one that can be compensated by an award of costs.
38. In the end, the Court finds that the application is merited. The Court accordingly makes the following orders:
- i. The Petitioners are granted leave to Further amend their Petition.
 - ii. The Further Amended Petition to be filed and served within 14 days from the date of this Ruling.
 - iii. The Respondents and the Interested Party are granted corresponding leave to file Further Affidavits in response to the Further Amended Petition.
 - iv. The Petitioners to bear the costs of the application.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH DAY OF OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Allan Kamau for Attorney General.

Mr. Mwangi for Interested Party

Mr. Munyua for Petitioners/Applicants*



Court Assistant - Tracy

