



**Njeru v Njagi (Environment & Land Case 129 of 2017)
[2023] KEELC 22556 (KLR) (23 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 22556 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 129 OF 2017
A KANIARU, J
OCTOBER 23, 2023**

BETWEEN

HENRY MUGO NJERU APPLICANT

AND

NJERU NJAGI RESPONDENT

RULING

1. This ruling is on a Notice of Motion dated 13/06/2022 and filed on the same date. It is expressed to be brought under Order VI rule 3,4,5 of the [Civil Procedure rules](#), Section 3A of the [Civil Procedure Act](#), and all enabling laws. The applicant – Henry Mugo Njeru – is the plaintiff in the suit while the respondent – Njeru Njagi – is the defendant. It is essentially an application for amendment of Originating Summons and the prayers sought are as follows:
 - a. That the court do grant leave to amend Originating Summons dated 5th September 2016.
 - b. That the attached amended originating summons be deemed to be filed.
 - c. That costs do abide the cause.
2. The application is premised on the grounds, inter alia, that on exercise of due diligence, the applicant has found it necessary to amend the originating for purposes of determining the real question in controversy between the parties; that the applicant has found that it is necessary to add a further and alternative claim or prayer to enhance his cause of action arising out of the same facts or substantially the same facts as the cause of action in respect of which remedies have already been sought; and that it is necessary for the amendment to be made to enable determination the real questions in controversy.
3. The application came with a supporting affidavit in which it is deposed inter alia; that the plaintiff, upon perusing the Originating Summons filed herein dated 5/9/2016 noted that it requires



amendment to include two relevant alternative prayers, which are necessary to resolve the issues arising for determination. The prayers sought to be added are as follows;

- a. A declaration be issued that District Land Dispute Tribunal award no 251/1993 dated 18/6/2001 and as adopted by Siakago Principal Magistrate in LDT No 34/2002 be declared null/void *ab initio* for lack of jurisdiction.
 - b. A declaration that the respondent holds land parcel Evurore/ Nguthi/2948,2949,2950,2951,2952 and 2953 (which land parcel were formally Evurore/ Nguthi/2232 before sub division) as trustee for the applicant since 2005.
4. The application was responded to *vide* an uncommissioned replying affidavit dated 14/11/2022 filed in court on the same date. It was drawn by the Respondent - Njeru Njagi. He deposed, *inter alia*, that allowing the applicant to file the amended originating summons would be denying him justice. He urged the court to dismiss the application with costs.
 5. The application was canvassed through written submissions. The applicant's submissions were filed on 24/4/2023. While the Respondent filed his submissions on 23/5/2023.
 6. I have considered the application, the response made to it, rival submissions, and the entire court record in general. The issue for determination is whether the court should allow the application for amendment of the Originating Summons.
 7. The general power to amend pleadings draws from Section 100 of the [Civil Procedure Act](#). Parties to a suit have a right to amend their pleadings at any stage of the proceedings. But that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously. Order 8 of the [Civil Procedure Rules](#), 2010, provides for the procedure to amend. More specifically Order 8 rule 5 of the [Civil Procedure Rules](#) provides as follows: -

“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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

8. The court has the power to amend pleadings and this power can be exercised at any stage of the proceedings but before judgment. Bullen and Leake & Jacob's [Precedents of Pleading](#), 12th Edition, provides as follows concerning amendment of pleadings:

“...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...”

Similarly, in [Halsbury's Laws of England](#), 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, the following is stated about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the



proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

9. The applicants sought for leave to amend their Originating Summons so as to enhance his cause of action which will help in the determination of all the issues in controversy.
10. The respondent has objected to the amendment solely on the ground that allowing the application will be denying him justice. The respondent has not shown any prejudice that the amendment will cause to him. The fact that a claim has been filed does not mean that the court will allow it without it being subjected to procedures and rules of proof. A party who alleges must prove hence the respondent will still have an opportunity to subject the claimant to cross examination and strict proof.
11. Further, I note that the respondent has filed an uncommissioned replying affidavit. That affidavit does not amount to a competent response. The affidavit is fatally defective and the court can not rely on it. This has always been the position taken by the courts where uncommissioned affidavit are filed. An example is to be found in *Gideon Sitelu Konchella vs Julius Lekakeny Ole Sunkuli & 2 others*: [2018] eKLR and *Z-U-DG vs SJKU* [2021] eKLR. In light of this, it is indeed proper to say that the application for amendment does not have a response.
12. I therefore find that the application before me has merit and is allowed as prayed. Applicant to file amended Originating Summons within 30 days. Costs in the cause.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 23RD day of OCTOBER, 2023.

Macharia Muraguri for plaintiff and defendant in person.

Court assistant: Leadys

Interpretation: English/Kiswahili

A.K. KANIARU

JUDGE

