



**Motende & 4 others v Mang'ong'o & 6 others (Environment & Land Case 11 of 2021) [2023] KEELC 20821 (KLR) (18 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20821 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 11 OF 2021**

**M SILA, J**

**OCTOBER 18, 2023**

**BETWEEN**

**CHARLES NYABENGI MOTENDE ..... 1<sup>ST</sup> PLAINTIFF  
JOSEPH ONDIBA MONGONDI ..... 2<sup>ND</sup> PLAINTIFF  
GIDEON ONDARA OBURE ..... 3<sup>RD</sup> PLAINTIFF  
SAMWEL OGIRI MOSIRIMANI ..... 4<sup>TH</sup> PLAINTIFF  
HEZEKIEL OMBASO OCHEGO ..... 5<sup>TH</sup> PLAINTIFF**

**AND**

**ONKEO MANG'ONG'O ..... 1<sup>ST</sup> DEFENDANT  
MONANDI MANG'OMG'O ..... 2<sup>ND</sup> DEFENDANT  
SAMWEL ONYANGO OMBUI ..... 3<sup>RD</sup> DEFENDANT  
LUKAS MIRUKA OMBUI ..... 4<sup>TH</sup> DEFENDANT  
MOKORO OICHOE ..... 5<sup>TH</sup> DEFENDANT  
JAMES SIAMBE ..... 6<sup>TH</sup> DEFENDANT  
ISAAC NYAKANGI A.K.A ISAAC LUCAS ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. I have before me an application dated 2 May 2023 filed by the plaintiffs vide which they seek leave to amend the plaint. The application is opposed.
2. To put matters into perspective, the applicants commenced this suit through a plaint which was filed on 13 April 2021. In that plaint, they pleaded to be the respective registered owners of the land



parcels Majoge/Magenche/1280, 1281, 1282, 1283 and 1284. They complained that the defendants/respondents had encroached into their parcels of land and carved out some portions from each parcel, being 1.04 acres out of the land parcel No. 1280; 0.14 acres out of the land parcel No. 1281; 0.57 acres out of the land parcel No. 1282; 0.84 acres out of the land parcel 1283; and 0.52 acres out of the land parcel No. 1284. In the suit, they sought a declaration that they are the registered proprietors of the suit properties; an order to direct the District Land Registrar and Surveyor to visit the land and fix the boundaries thereof; an order of eviction of the defendants; a permanent injunction to restrain them from the parcels of land; general damages for trespass; costs and interest. They acknowledged in the plaint that there had been a previous suit, Kisii ELC No. 17 of 2018 which had been struck out.

3. The 1<sup>st</sup> to 6<sup>th</sup> defendants filed a joint statement of defence. They pleaded to be residing in the land parcels Majoge/Bokimonge/1, 2, 10 and 14 which are registered in names of their deceased family members and which are separated from the suit properties by a road. They denied trespass. They further pleaded that the plaintiffs first ought to have sought the intervention of the Land Registrar before coming to court and that the court lacked jurisdiction to hear the case. They added that in the plaintiffs failed to heed the advice given in Kisii ELC No. 17 of 2018 by filing this suit.
4. On 2 December 2022, the defendants filed an application dated 30 November 2022 seeking to have the case of the plaintiffs struck out. In that application, they averred that the plaintiffs are no longer the registered proprietors of the suit properties as their titles had been cancelled. They contended that the plaintiffs had obtained registration of the suit properties in their names by forging grants of letters of administration, which fraud was discovered, leading to the cancellation of their titles and reversion of the same to the names of the erstwhile proprietors who were deceased. They annexed extracts of the registers which show that the cancellation took place on 28 November 2022. This application was not only opposed by the plaintiffs, but the plaintiffs filed the present application, seeking leave to amend the plaint. I directed that the application to amend be heard first.
5. In the application, what the applicants state is that they filed this suit while they were the registered proprietors of the suit properties. They acknowledge that their titles have since been cancelled. They state that they proceeded to obtain grants of letters ad litem and now wish to proceed with the suit as legal representatives of the estates of the deceased owners of the suit properties. They have annexed the grants ad litem which were issued on 22 February 2023 at Ogembo Magistrates' court.
6. In response to the application, the defendants assert that the grants ad litem were obtained more than one year after filing suit and cannot apply retrospectively so as to be used for this suit. They aver that this application is meant to counter the issues they raised in their application dated 30 November 2022. They have also raised issue that the applicants are guilty of having forged the earlier grants, which led them to being registered as proprietors of the suit properties, and contend that they should be investigated and charged for their illegal acts.
7. I invited counsel to file written submissions to address the application and I have seen the submissions of Mr. Ochwangi, for the applicants, and Mr. Obure for the 1<sup>st</sup> to 6<sup>th</sup> respondents. The 7<sup>th</sup> defendant has not filed any appearance so far.
8. What is before me is an application seeking to amend the plaint. In essence what the applicants want is to amend the capacity in which they sue. They had filed suit as registered proprietors of the suit properties but now wish to change that capacity so that they be recognized as suing on behalf of the estates of the deceased persons who are now indicated as proprietors in the register. Is there any bar to that? I don't think so.



9. The rules on amendment are generally in order 8 of the [Civil Procedure Rules](#). The purpose of amendment is outlined in rule 5 which provides as follows :-

5. General power to amend

- (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. From the above, it will be observed that the core purpose of allowing an amendment is to have the real question in controversy determined. In so far as amendments with leave of court are concerned, rule 3 provides as follows :-

3. Amendment of pleading with leave

- (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) An amendment to correct the name of a party may be allowed under subrule (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 subrule (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 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.

11. It will be observed from sub-rule 3, that there is no bar to amendment in order to alter the capacity in which the person sues. In our case, the suit was filed when the applicants held title to the suit properties. Their titles were revoked while this suit was pending. They of course cannot now continue with the suit in the capacity of owners of the properties. The titles have reverted to the names of deceased persons and the suit can only be continued on behalf of the estate of the said deceased. The applicants have obtained grants of letters ad litem meaning that they can now file suit on behalf of the respective estates. It is not correct to state that the grants will apply retrospectively. The grants will be effective for purposes of this suit from the time the plaint is amended. And it is not the case that the plaintiffs lacked locus standi when they filed suit. They had locus, as by then they were the registered proprietors of the suit property, so it cannot be argued that when commenced, the suit was null and void for want of locus standi. It would have been a different matter if at the time of filing suit, they had no locus standi for the suit would then be null and void ab initio and incapable of amendment. For example, if at the time of filing suit the suit properties were in name of the deceased and the plaintiffs had no grant to represent the respective estates, then the suit would be null and void. But this is not what we have here, because as I have elaborated before, the properties were in the names of the applicants when they filed suit on their own behalf, and they were fully entitled to do so at the time.
12. As far as I can see, the cause of action remains the same, i.e, whether the respondents have trespassed into the suit properties and the respondents will have a chance to contest that position. There is no prejudice that they are going to suffer by this court allowing the amendment. I am aware that in his submissions, Mr. Obure submitted that the applicants failed to heed advice given in the suit Kisii ELC No. 17 of 2018 and that the applicants have a criminal history. To me, all these have nothing to do with whether or not leave to amend should be given.
13. . From the above discourse, it will be observed that I am persuaded to allow this application to amend and I hereby allow it. I direct the applicants to amend their plaint within the next fourteen (14) days. I make no orders as to costs since the application was necessitated by a change of registration of the title while the suit was ongoing.
14. Orders accordingly.

**DATED AND DELIVERED AT KISII THIS 18 DAY OF OCTOBER 2023.**

**JUSTICE MUNYAO SILA**

**JUDGE, ENVIRONMENT AND LAND COURT AT KISII**

