



**Gathuna v Njenga & 3 others (Environment & Land Case E047 of 2020)
[2023] KEELC 21960 (KLR) (30 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21960 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E047 OF 2020
MD MWANGI, J
NOVEMBER 30, 2023**

BETWEEN

BETTY NYOKABI GATHUNA PLAINTIFF

AND

ROBERT GICHURA NJENGA 1ST DEFENDANT

GRACE WAIRIMU 2ND DEFENDANT

CHIEF LAND REGISTRAR 3RD DEFENDANT

NAIROBI CITY COUNTY 4TH DEFENDANT

RULING

(In respect of the Plaintiff's application dated 24th July 2023 seeking to amend her plaint and include two new Defendants after closing her case)

Background

1. On 17th July, 2023, when this matter was coming up for Defence hearing and after the court had confirmed the hearing for 11.30 a.m. in open Court, Mr. Ondieki Advocate for the Plaintiff rose and made an application to adjourn the hearing for two reasons. The first reason was that he wished to re-open the Plaintiff's case. The second reason was that he intended to join two other persons as Defendants. He told the Court that the two intended Defendants' allege to have bought the suit property from the late Simon Gathuna – deceased, the original proprietor of the suit property.
2. The application was strenuously opposed by Mr. Wachira advocate for the 1st and 2nd Defendants. He pointed out that when the matter was called out earlier in the morning, all parties had confirmed their readiness to proceed with the hearing. He further stated that his clients had in their statement of Defence and Counter-claim dated 8th July 2021 put it clearly that they were the registered proprietors of the suit property having bought the suit property from its then registered owners, Prof. Teresia



Nungari Kiama and Prof. Stephen Kiama Gitahi way back in the year 2005. The Plaintiff should have taken action then, the moment she was served with the statement of Defence.

3. In response to Mr. Wachira's sentiments, Mr. Ondieki averred that this is a Court of justice which is further enjoined under Article 159 of the *Constitution* to do justice and fairness. The joinder of the two intended Defendants would allow the court to make a fair and just determination of this matter. He further argued that the Court has the discretion to allow the Plaintiff's application. Any inconvenience caused to the Defendants can be compensated by an award of costs.
4. The Court, with a heavy heart allowed the Plaintiff's prayer for an adjournment of the matter and directed the Plaintiff to file a formal application in the next 7 days.
5. However, instead of the application to re-open the case, the Plaintiff filed this application to amend her plaint, dated 24th July, 2023. That is the application under consideration in this ruling. It does not address the aspect of reopening the Plaintiff's case which had been closed on 15th March 2023 after the Plaintiff called three witnesses.
6. The Plaintiff in the application before the court avers that the proposed amendment will help the court to make a fair and just determination of the dispute between the parties in this matter. The application is supported by the affidavit of the Plaintiff sworn on 24th July 2023 and the lengthy further affidavit sworn on 3rd October 2023.
7. The 1st and the 2nd Defendants are opposed to the application. They relied on the replying affidavit of Robert Gicharu Njenga sworn on 19th September, 2023. They termed the Plaintiff's application frivolous and vexatious. They further asserted that it lacked merit and amounted to an abuse of the process of court. The 3rd Defendant though represented by the office of the Attorney General did not participate.

Issues for determination

8. Having carefully considered the Plaintiff's application alongside the supporting and further affidavit and the replying affidavit by the 1st and 2nd Defendants, I am of the view that the sole issue for determination is whether the Plaintiff's application to amend the Plaint and introduce new parties at this stage of the proceedings should be allowed.

Analysis and Determination

9. In the proposed amendment, the Plaintiff seeks to introduce 2 new Defendants as the 5th and 6th Defendants. The Plaintiff's claim against the intended 5th and 6th Defendants is based on fraud, illegality and misrepresentation which have been particularized at paragraphs 12A and 12B of the draft Amended Plaint. The Plaintiff, inter alia, proposes to plead that there was no sale agreement between the deceased Simon Gathuna and the proposed 5th and 6th Defendants. She further accuses the proposed 5th and 6th Defendants of intermeddling with the property of the Estate of the Deceased, Simon Gathuna.
10. The proposed prayers against the 5th and 6th Defendants are a declaration that the title deed issued to them was invalid and void & should therefore be canceled and the register rectified to restore the title to the name of the Deceased, Simon Gathuna.
11. The general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. The right to amend is not absolute but is subject to the discretion of the Court. The criteria for allowing and



or disallowing such an amendment is provided for under Order 8 rule 3 of the [Civil Procedure Rules](#) which provides that:

“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.”

12. The [Halsbury's Laws of England](#), 4th Edition (re-issue), Vol. 3(6) at paragraph 76 provides as follows:

“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...”

13. [Bullen and Leake & Jacob's Precedents of Pleading](#), 12th Edition, also 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...”

14. In the case of *Eastern Bakery v Castelino* (1958) 1 EA 461 (CAK) the court held that: -

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case.....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

15. I have carefully considered the application by the Plaintiff in this matter. It must be noted that this is an amendment that has been proposed after the close of the Plaintiff's case. Allowing the amendment as precedent means allowing the introduction of two new defendants at this stage. The obvious implication is that the matter will have to start afresh. Summons to enter appearance will have to be extracted and served upon the two new Defendants. They will, as a matter of right be entitled to file their statements of Defence and probably Counter-claims.



16. Allowing the application means going back to ground zero. It will not only be a big inconvenience on the 1st and 2nd Defendants but an obvious injustice.
17. Secondly, whereas the Plaintiff's cause of action against the current Defendants was one of trespass, the proposed amendments introduced a new cause of action based on fraud, illegality and misrepresentation. She further prays for cancellation of titles and rectification of the registers. This will definitely and substantially change the character of the suit entirely into one of a substantially different character which should more conveniently be made the subject of a fresh suit.
18. I am not the least persuaded that this application has been made in good faith, rather, my discernment is that it is a well-orchestrated move calculated to fill evidential gaps in the Plaintiff's case brought out during cross-examination by the 1st and 2nd Defendants.
19. Accordingly, the application dated 24th July 2023 is hereby dismissed with costs to the 1st and 2nd Defendants.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 30TH DAY NOVEMBER, 2023.

M. D. MWANGI

JUDGE.

In the virtual presence of:

Mr. Wachira for the 1st and 2nd Defendants

No appearance for the Plaintiff, and 3rd & 4th Defendants

