



**Mumo v Ndeke (Environment & Land Case 67B of 2019)
[2023] KEELC 21734 (KLR) (15 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21734 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE 67B OF 2019
TW MURIGI, J
NOVEMBER 15, 2023**

BETWEEN

JACKSON MUTISO MUMO PLAINTIFF

AND

MATHITU NDEKE DEFENDANT

RULING

1. By a Notice of Motion dated 3rd February, 2023 brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 8 and Order 51 of the Civil Procedure Rules 2010 and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. That this Honourable Court be pleased to enjoin Joice Nthambi Kyalaani and Anne Kaumbi Mutuku as Defendants in the Defendant's counterclaim.
 2. That the Honourable court be pleased to enjoin the personal representative and/or administrators of the Estate of Jacob Wambua Kivindio as Defendants in the Defendant's counterclaim.
 3. That the Honourable court be pleased to grant the Defendant leave to amend their statement of defence and counterclaim.
 4. That the costs of this application be in the cause.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Mathitu Ndeke sworn on even date.

The Applicant's Case

3. The Applicant averred that he purchased a portion of land from Kivindo Nduma in the year 1960 and settled with his family thereon. That the said portion of land was demarcated in the year 1967. He



averred that he later discovered that the said portion of land was registered in the year 1967 in the name of Kivindo Nduma as Land Parcel No. 257 while the portion adjacent to his land known as Parcel No. 256 was registered in his name.

4. He further averred that he lodged a caution on Land Parcel No. 257 in the year 2009 after the son and nephew to Kivindo Nduma started subdividing the land but the same was removed without his knowledge. That after several years, land parcel No. 257 was illegally subdivided into No. 708 and 704. That Parcel No. 708 was further subdivided into Parcel Nos. 1368, 1369 and 1370 and registered in the names of Jacob Wambua Kivindo(deceased), Joice Nthambi and Anne Katumbi.
5. The Applicant claims that he has acquired ownership over land parcel no 257 by virtue of adverse possession. He contended that it is necessary to enjoin the personal representatives of Jacob Wambua Kivindo(deceased), Joice Nthambi Kyaalani and Anne Katumbi Mutuku as he is challenging their ownership over the said parcels of land.
6. He averred that by inadvertent error, his case was not adequately pleaded in his defence and counterclaim hence the need to amend the defence. He contended that he will suffer irreparable loss if the orders sought are not granted. He urged the court to allow the application as prayed.

The Respondent's Case

7. The Respondent opposed the application vide the grounds of opposition dated 2nd May, 2023 and a replying affidavit sworn on 5th July, 2023.
8. The grounds of opposition are as follows:-
 1. That the Applicant has no right of audience before this Honourable court having failed, disregarded and disrespected the court order dated 7th October, 2022.
 2. The application is misconceived, bad in law and the orders sought are not capable of being granted.
 3. The application is scandalous, frivolous, vexatious and an outright abuse of the court process.
 4. The application has no basis of law and should be dismissed with costs.
9. In his replying affidavit, the Respondent contended that the application for joinder is misplaced since the intended Defendants are not in any way connected with the suit property, hence they are not necessary for determination of the real question in controversy between the parties herein. The Applicant argued that his claim against the Defendant is for land parcel No. Makueni/Kako/705. It was averred that the Applicant is seeking to reinstate Makueni Principal Magistrate Court, Civil Suit No. 209 of 2013 through the backdoor since it was dismissed for want of prosecution. It was averred that the Applicant did not seek a review of the said ruling, hence the instant application is meant to delay the hearing and determination of this suit.
10. In a further Affidavit sworn by Faith Mutio Mutuku Advocate it was averred that the joinder of the parties will enable the court to resolve the real issues in dispute regarding land parcel no 257 and the subdivisions thereof. She argued that the relevant issues in the present suit cannot be effectively determined unless the intended parties are enjoined to the proceedings herein.
11. The application was canvassed by way of written submissions.

The Applicant's Submissions

12. The Applicant's submissions were filed on 21st September, 2023.



13. On his behalf, Counsel identified the following issues for the Court's determination: -
 - i. Whether this court should grant leave to the Defendants to amend their statement of Defence and counterclaim.
 - ii. Whether the court should allow the application to enjoin a party.
14. On the first issue, Counsel submitted that his defence was not adequately pleaded to capture all the relevant factors to enable the court to make an informed decision. It was submitted that the amendment is necessary to enable the court to determine the real issue between the parties herein. To buttress this point Counsel relied on Order 8 Rule 5 of the Civil Procedure Rules and on the case of *Suleiman Vs Karasha (1989) eKLR*. where it was held that;

“.....the parties can amend their pleadings with the leave of the court at any time before judgment. Such amendment would clearly set out the issues in dispute to enable the court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just.....”
15. On whether the court should allow the application to enjoin the parties, Counsel submitted that the Defendants evidence against the Plaintiff and the proposed Defendants is similar hence it is necessary to enjoin them as parties to the suit herein. Counsel maintains that the proposed Defendants will enable the court to determine the real issues in controversy with regards to the parcel of land originally known as Makueni/Kako/257.
16. Lastly it was submitted that the Applicant has demonstrated that the proposed defendants are necessary parties to avoid multiplicity of suits. Counsel urged the court to grant the orders as prayed.

The Plaintiff's/Respondent's Submissions.

17. The Plaintiffs submissions were filed on 12th October, 2023.
18. On his behalf, Counsel outlined the following issues for determination:-
 - i. Whether the application dated 3rd February, 2023 is merited.
 - ii. Who is to bear the costs.
19. Counsel reiterated the contents in the replying affidavit in support of his submissions. It was submitted that the Applicant has not pleaded fraud in the registration of parcel no 257.
20. According to Counsel, the Applicant has not presented any documents, sale agreement or title. Counsel asserted that the proposed amendments have been brought late in the day seek to introduce a completely new cause of action. Counsel submitted that it will be wrong to impose upon the Respondent the proposed Defendants as he has no issue with them
21. It was submitted that the Applicant has not satisfied the principles for the grant of an order for amendment of pleadings set out in the case of *Ronald Kimeu Kituli Vs County Government of Machakos (2021) eKLR*. It was submitted that the application to amend the defence was brought in bad faith as the same was filed 5 years after the filing of the initial defence on 3rd July, 2018.
22. On the issue of costs Counsel asserted that the court should be guided by Section 27 of the [Civil Procedure Act](#) in determining the issue of costs. Counsel submitted that the application is an abuse of the court process and the same should be dismissed with costs to the Plaintiff/Respondent.



Anlysis and Determination

23. Having considered the application, the respective affidavits and the rival submissions, the only issue for determination is whether the orders for amendment and joinder are merited.

24. The Applicant is seeking to amend the defence and counter claim to join co-defendants. The law on amendment of pleadings is anchored on the provisions of Order 8 Rule 5(1) of the Civil Procedure Rules which provides as follows;

“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 cost or otherwise as are just.”

25. Further Order 8 Rule 3(1) and (5) of the Civil Procedure Rules provides as follows;

1. subject to Order I, 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 as it may direct, allow any party to amend his pleadings.

26. It is evident from the above provisions that an amendment of pleadings may be permitted at any stage for purposes of determining the real question in controversy between the parties.

27. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously.

28. In the case of Ochieng and Others Vs First National Bank of Chicago Civil Appeal Number 149 of 1991 [1995] eKLR cited with approval in St. Patrick’s Hill School Vs Bank of Africa LTD [2018] eKLR the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. They were enunciated as follows:-

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings;
- d) 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;
- e) 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

29. The factors to be taken into account in the exercise of the court’s discretion were summarized in the case of Kassam Vs Bank of Baroda (Kenya) Limited (2002) 1 KLR 294. They are:-

- a. The party applying is not acting mala fides;



- b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
 - c. The amendment is not a device to abuse the court process;
 - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
 - e. And that the amendment will not alter the character of the suit.
30. It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs.
31. The Defendant contends that the proposed amendment is necessary because his defence was not adequately pleaded.
32. The Applicant states that the parties whom he intends to enjoin are the current owners of land parcels numbers Makueni/Kako/1368, Makueni/Kako/1369 and Makueni/Kako/1370. He averred that he is challenging their ownership over the said properties.
33. On the other hand, the Respondent contended that his claim is premised on land parcel number 705. He maintains that the intended Defendants are not necessary parties as his claim is based on land parcel No. Makueni/Kako/705.
34. On whether the intended Co-Defendants should be allowed to join this suit, the Applicant contended that the proposed defendants are necessary parties since his claim against the Plaintiff is the same as the intended Defendants. The law governing the joinder of parties is grounded on Order 1 Rule 10(2) of the Civil Procedure Rules which provides as follows;
- “The Court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court to effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
35. As rightly submitted by the Respondent, a party cannot force a Plaintiff to sue persons that they do not have a claim against. The Plaintiff is categorical that he does want other parties imposed upon him. In the case of Carol Construction Engineers Ltd Vs Naomi Chepkorir Langat [2019] eKLR where in dismissing the Defendants application to enjoin other persons as co-defendants stated that;
- “it will be wrong for this court to impose upon the Plaintiff some persons as Defendants when in fact the Plaintiff has no issue with such persons.”
36. The Defendant alleged that he is challenging the ownership of the suit property by the proposed Defendants. He can issue a third party notice to the proposed Defendants if he feels that he has a claim against them.
37. In the end I find that the application dated 3rd February, 2023 is devoid of merit and the same is dismissed with costs to the Respondent.

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HON. T. MURIGI

JUDGE

RULING SIGNED, DATED AND DELIVERED VIA MICROSOFT TEAMS THIS 15TH DAY OF NOVEMBER, 2023.

IN THE PRESENCE OF: -

Court Assistant – Mr. Kwemboi.

Munyasya for the Respondent.

Ms Owino holding brief for Mutuku for the Applicant.

