



REPUBLIC OF KENYA



**Ayuka v Adongo & another (Environment & Land Case 3 of 2021)  
[2023] KEELC 22480 (KLR) (21 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22480 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 3 OF 2021  
FO NYAGAKA, J  
DECEMBER 21, 2023**

**BETWEEN**

**ANDREW AMUNZE AYUKA ..... PLAINTIFF**

**AND**

**BEN MUTENYO ADONGO ..... 1<sup>ST</sup> DEFENDANT**

**JACKSON ANGAINE ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a Notice of Motion dated 31/05/2023. He brought it under Sections 3, 3A and 63(e) of the *Civil Procedure Act* and Order 8 Rules 3 of the *Civil Procedure Rules*, 2010. Through it he sought the following orders:
  1. That leave be granted to the Plaintiff to re-open the Plaintiff's case.
  2. That leave be granted to the Plaintiffs (sic) to further amend the Plaintiff.
  3. That cost of this Application be in the cause.
2. The Application was based on five (5) grounds. They were that the surveyor's report dated 05/10/2022 brought in other new developments which have necessitated, in the interest of justice, a further amendment of the Plaintiff to include new facts hence the application for leave to re-open the Plaintiff's case and further amendment of the Plaintiff. That the initial amendment was on 20/06/2021 but the Report was made on 05/10/2021. That it is only fair to grant the prayers sought in order then so that the issues raised in the Report can be fairly deliberated and a proper be arrived at. That if the prayers are not granted it will defeat the ends of justice while it is in the interest of justice to grant the orders sought.
3. The Application was supported by the Affidavit of Erick Kimokoti Amunze sworn on 31/05/2023. In it the deponent repeated the contents of the grounds in support of the application save that he added



- to it annexures of copies of the surveyor's report and the Draft Amended Plaintiff. He marked them as RNK-1 and RNK-2. He deponed that the suit was still pending hence the Application.
4. The 1<sup>st</sup> Defendant opposed the Application through a Replying Affidavit that he swore on 04/07/2023. He deponed that the Application was misconceived, vexatious, frivolous, scandalous and an abuse of the process of the Court. He stated that the Report was not only contentious but controversial and full of errors and anomalies which raised eyebrows. That the Report was a contradiction of another report dated 06/04/2022 which was prepared by the same surveyor's office. He annexed the earlier Report and marked it as BMA-1.
  5. He deponed that apart from the two Reports he too had engaged another surveyor by name Ranee Enterprise Limited pursuant to the orders of the Court made on 14/07/2022 and they too produced a report which raised a number of issues. He annexed the copy of the latter Report as BMA-2. He stated that the deceased Andrew Amunze Ayuka had filed this suit for an injunction against him and the 2<sup>nd</sup> Defendant in respect of parcel No. Kolongolo/Kolongolo Block 2/Biketi/206 but not for the amendment of the ground issues.
  6. He deponed that this Court had directed that the surveyors visit the ground and ascertain the boundaries, respective acreages and confirm whether either of the parties had encroached onto his neighbours' parcels. But instead the surveyors came up with how the boundaries should be amended and instead interfere with the original, correct and exact measurements on the ground, which is illegal and unlawful.
  7. He deponed further that No. Kolongolo/Kolongolo Block 2/Biketi/416 and 417 were curved out of parcel No. Kolongolo/Kolongolo Block 2/Biketi/3 which had its own independent register and was a subject in the succession cause of the Estate of the Hebron Amunze Ayuka (deceased) which is totally different from parcel No. Kolongolo/Kolongolo Block 2/Biketi/206 initially owned by the late Andrew Amunze Ayuka (deceased). That the latter parcel too has its own separate register and as such the issue of amendments of the respective green cards and Registry Index Maps in relation to the parcels did not arise. He annexed as marked as BMA-3(a) and (b) copies of the respective green cards.
  8. He then deponed that the (ground) points indicated in the Surveyor's Report dated 05/10/2022 were unfounded and did not arise. He stated further that the said report did not address the issue of encroachment the basis of the instant suit.
  9. His further deposition was that the excess acreage on title No. Kolongolo/Kolongolo Block 2/Biketi/3 was still under the administration of the Administrators of the Estate of Hebron Amunze Ayuka who are the ones to decide how it can be utilized and not in line with the proposal in the survey. Also, that there was no dispute as to the ownership on the ground in relation to parcel Nos. No. Kolongolo/Kolongolo Block 2/Biketi/416 and 417 so as to necessitate the amendment of the Green Cards.
  10. He swore that litigation must come to an end hence there was need for the main suit to be heard expeditiously. He deponed that he was aware that the Applicant had intention to interfere with the original Registry Index Map. He annexed said RIM and marked it as BMA-4 to show how it was before the subdivision to give rise to No. Kolongolo/Kolongolo Block 2/Biketi/206 and No. Kolongolo/Kolongolo Block 2/Biketi/3 which were the subject herein. He then swore that the Application was brought with undue delay. He deponed that the Applicant would not be prejudiced if the application was dismissed.
  11. The 2<sup>nd</sup> Respondent filed a Replying Affidavit sworn on 26/07/2023. In opposing the Application, he deponed some of the depositions of the 1<sup>st</sup> Respondent. Therefore, I will not reproduce herein again those which he repeated. But he went on to dispose further that report was prepared by the



then County Surveyor one Boaz Onduso and it was unsigned and incomplete. That the said surveyor did not undertake the exercise to completion after being irritated on being requested to ascertain the boundaries. That he drove away hence the points on the Report were unfounded.

12. He too referred to the Report dated 06/04/2022 and marked it as JA-1 and the one JA-2 the one dated 14/07/2022. He too marked as JA-3(a) and (b) the copies of the Green Cards of the parcel Nos. No. Kolongolo/Kolongolo Block 2/Biketi/206 and 3. He then added a deposition that the boundaries in relation to parcel No. Kolongolo/Kolongolo Block 2/Biketi/206 were established by one Geoffrey Ting'oria through his report dated 06/04/2022, and he placed beacons on the parcels hence the issue was settled and should not be interfered with any further.
13. The Application was disposed of by way of written submissions. It appears the Respondents read from the same script. No wonder they wrote joint submissions dated 20/09/2023. Since they filed the said document which is unknown in law for reasons that the two parties Defend the suits against them separately, this Court will not consider it. In any event submissions are neither pleadings nor evidence as was stated by the Court of Appeal in the case of Daniel Toroitich Arap Moi v. and therefore failure to consider them does not in any way prejudice them.

### **Issues, Analysis And Determination**

14. I have considered the Application, the responses thereto, the law and the submissions of the Applicant. There are only two questions before me for determination herein. The first one is whether the Application is merited. On this issue, the main question is whether the Plaintiff should be granted leave to amend the Plaintiff and reopen his case. The attendant one is, who to bear the costs of the Application.
15. The Applicant brought the Application under Sections 3, 3A and 63(e) of the *Civil Procedure Act* and Order 8 Rules 3 of the *Civil Procedure Rules*. 2010. This Court is of the view that regarding the sections of the parent Act cited are relevant in so far as they apply to the prayer for the reopening of the Plaintiff's case for adduction of the evidence he seeks to. The latter provision from the Rules is applicable regarding amendment of pleadings after they have closed. It is noteworthy herein that pleadings closed earlier and the suit proceeded to hearing.
16. The above observation having been made, regarding the prayer for amendment of the pleadings, the law and procedure thereon is settled. Amendments to pleadings can be permitted at any stage of proceedings as long as they do not prejudice any party and are for purposes of bringing before the Court for determination any real issue in controversy as between parties.
17. Regarding amendment of pleadings, this Court refers to the excerpt from the *Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76*. It states 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...”



18. Also, in *Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition*, the learned authors voice on amendment of pleadings as follows:

“...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...”

19. The objection to the amendment sought herein is that litigation must come to an end. If I understand the Respondents correctly they want to argue that the instant litigation should be speeded up so that the parties know their fate. On the part of the Applicant he argues that there is a pertinent issue between him and the Respondents which ought to be pleaded. Since the Respondents wish litigation to come to an end, and soon for that matter, it goes without saying that once the Applicant sought to amend the pleading wishes to there was no need for the objection being raised to such a straight forward prayer save for the purpose of delaying, on their part, litigation from getting to an end soon. In my view I see no prejudice that the Respondents state they would suffer if the amendment sought is allowed. I therefore grant that prayer.

20. Regarding the prayer for reopening the case of the Plaintiff, the Respondents went into great lengths opposing the grant of the prayer. They delved deep into attacking the validity and contents of the intended Report which the Applicant seeks to be granted leave to file and rely on. In essence the Respondents litigated on a non-evidentiary document. They spent their intellect and energy on issues that had not become issues before the Court. Therefore, to the extent that they threw their efforts behind a demonstration of whether or not the Report differed with others theirs were irrelevant arguments.

21. The Respondents should have taken time to poke holes into or puncture the Applicant's argument as to the merits of the prayer. In that regard the Applicant argued that fairness and the interests of justice demanded that the report be relied on and the matter be fairly deliberated and a proper decision be arrived at. Since the Respondents point out a number of contradictions in the Report that has necessitated the Plaintiff's Application for further amendment yet the Report was prepared after the earlier amendment had been made on 21/06/2021, it is the more reason why a further amendment of the Plaintiff's case is necessary to include the real issues in controversy in this matter and the reopening of the Plaintiff's case if the amendment is granted.

22. On their part the Respondents argued about litigation coming to an end and that no prejudice would be occasioned to the Applicant if the Application was dismissed. On this last point, since the Applicant had not raised the point of prejudice, it is important to note that Section 107 of the *Evidence Act* provides that he who alleges a fact. The Respondents have not discharged that burden particularly in the face of the Applicant's argument that it is in the interest of justice that the prayers sought be granted.

23. In the instant case, since the Court has granted the prayer for amending the Plaintiff's case as prayed this Court is of the humble view that justice would be served if the Applicant is granted leave to reopen his case. And the interest of justice of the instant case, when looked at in terms of just, proportionate and expeditious disposal of the same in terms of Section 1A of the *Civil Procedure Act*, the Plaintiff's case is reopened only to the extent of adducing and testifying on the amendment and adducing new evidence thereon on his part.



24. Given that time has stopped running in terms of Order 50 Rule 4 of the *Civil Procedure Rules*, the Plaintiff/Applicant is therefore given up to 24/01/2024 to file and serve a Further Amended Plaint in terms of the prayers granted herein. The Respondents shall have the usual time granted by law to amend their pleadings only and specifically in relation to the amendments that the Applicant shall make.
25. The final disposition is that the Application dated 31/05/2023 is hereby allowed on the following terms:-
- a. Leave is hereby granted to the Plaintiff to re-open his case only to the extent of adducing evidence on the new issues to be introduced by both the further amendment of his Plaint.
  - b. Leave be and is hereby granted to the Plaintiff to further amend the Plaint herein and serve the same not later than 24/01/2023.
  - c. Since costs follow the event, the Respondents shall bear those of the instant Application.
26. This suit shall be mentioned virtually on 13/02/2024 to confirm close of pleadings and fix a hearing date for further hearing.
27. Orders Accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 21<sup>ST</sup> DAY OF DECEMBER, 2023.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

