



**Ndegwa v Kirui & 53 others (Environment & Land Case 26 of 2019)
[2023] KEELC 22409 (KLR) (18 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22409 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 26 OF 2019
CG MBOGO, J
DECEMBER 18, 2023**

BETWEEN

JUAN NDEGWA PLAINTIFF

AND

DANIEL JERUIYOT KIRUI & 53 OTHERS DEFENDANT

RULING

1. Before the court for determination is the Notice of Motion Application dated 23rd August, 2023 filed by the plaintiff/applicant and expressed to be brought under Section 13 of the *Environment & Land Court Act*, Sections 1, 1A, 1B, 3, 3A, 63 (c) & (e) of the *Civil Procedure Act*, Order 8 Rules 3, 5, & 8 and Order 50 Rule 6 of the *Civil Procedure Rules* seeking the following orders: -
 1. The plaintiff be granted leave to amend the plaint dated 24th April, 2019 in terms of the draft amended plaint annexed as exhibit "JN2" to the 1st plaintiff's affidavit sworn on 23rd August, 2023 in support thereof.
 2. The 2nd intended plaintiff, Silva Hosea Ng'ang'a be forthwith enjoined herein as the 2nd plaintiff, and as such necessary party.
 3. Upon the making of the order hereof in terms of prayer 1 and 2 herein, the said amended plaint be deemed as filed and duly served upon the defendants, and to be forthwith served upon with additional defendants so enjoined upon such terms as this honourable court may determine.
 4. The costs of this motion to be in the cause.
2. The application is premised on the grounds on its face. The application is supported by the affidavit of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that the naming of the defendants in the originally filed suit was not chronological so that there are in fact more defendants than originally named in the suit, and the amended plaint seeks to eliminate the confusion that may



- be occasioned in citing the defendants making the prosecution of the suit easier. Further, the plaintiff/applicant deposed that the amendments seek to bring in the 2nd plaintiff who is his father since he was the one who procured all the parcels mentioned in the plaint.
3. The plaintiff/applicant further deposed that the intended 2nd plaintiff is best placed to testify at the trial on all formalities and being unfamiliar with the legal intricacies, he could not have known the necessity of having the relevant parties before the court. Further, that the amendments he seeks demonstrate that the intended 2nd plaintiff is a necessary party and the stated amendments contained in the draft paint a clear picture of the matter upon disclosure of the persons present before the court.
 4. The plaintiff/applicant further deposed that he has sought to place before this court the accurate number of all the implicated parcels. He deposed that he has also sought orders in respect of parcels which he has not been issued with the certificate of titles in spite of his father's request to the Land Registrar with respect to parcels of land known as CisMara/Ilmashariani Morijo/ 716, 958, 868, 892, 895 and 900 which the intended 2nd plaintiff deposed to in his affidavit. Further, it was deposed that Order 8 of the Civil Procedure Rules donates wide and discretionary powers to this court to allow amendment of pleadings for purposes of determining the real questions in controversy between the parties or to correct any defect or error in the proceedings. It was also deposed that the hearing of the suit has not been concluded and this court is entitled to consider the merits of the instant application and avoid multiplicity of suits.
 5. The application was further supported by the affidavit of Silva Hosea Ng'ang'a who is the intended 2nd plaintiff sworn on even date. In his affidavit, the intended 2nd plaintiff deposed that he procured all the parcels mentioned in the plant and the draft amended plaint from members of the dissolved Ilmashariani Group Ranch for the benefit of the 1st plaintiff. That for this reason, he is a necessary party to this suit as he took part in executing all the documents pertaining to the suit properties on behalf of the 1st plaintiff who is his son. Further, that since Section 30 (1) of the Land Registration Act does provide for the Land Registrar to issue certificate of title as demonstrated, the amendment sought is intended to secure the 1st plaintiff's proprietary rights over the said properties that have been left out without a title.
 6. The intended 2nd plaintiff further deposed that since the hearing of the suit has not commenced or been concluded, the court is entitled to consider the application in order to give effect to such pleas as sought in the application as it deems fit. The intended 2nd plaintiff went on to depose that his presence in this case is indispensable and relevant for determination of the real matter in dispute in regard to acquisition of the suit parcels. Further, that no new or inconsistent cause of action has been introduced and no vested or accrued legal right is affected in any manner and as such, no injustice will be visited upon the defendants/respondents.
 7. The application was opposed by the replying affidavit of the 43rd defendant/respondent sworn on 8th November, 2023 on his behalf and on behalf of the 3rd, 4th, 5th, 7th, 8th, 9th, 11th, 12th, 13th, 15th, 16th, 17th, 18th, 21st(b), 22nd, 24th(b), 25th, 26th, 27th, 28th, 29th, 30th, 31st, 33rd, 34th, 36th, 37th, 40th, 42nd, 44th(a), 45th, 47th, 49th, 50th and 52nd defendants/ respondents. The 43rd defendant/respondent deposed that the cause of action arose from the purported sale and proprietorship of the suit properties, which was established as per the plaintiff's pleadings. Further, that it is now a gross abuse of the court process to claim that the procurement of the property was done by his father, the intended 2nd plaintiff.
 8. The 43rd defendant/respondent further deposed that the alleged new facts, were never disclosed more than 4 years since the matter was filed in the year 2019 and as such, they will suffer prejudice if the application is allowed as the amendments will change the character of the suit. Further, that the



- plaintiff in his own admission indicated that he bought the suit property with his own money and that this new cause of action does not rise from the facts of the plaint dated 24th September, 2019. Further, that the plaintiff/applicant has cunningly added other defendants/respondents in his draft amended plaint, yet he has not made an application to enjoin them in these proceedings.
9. It was further deposed that the plaintiff/applicant should seek leave to join the 6th, 8th, 40th, 41st and 42nd defendants/respondents and not sneak them in the guise of chronological order. Further, that the plaintiff/applicant has not demonstrated what prejudice he will suffer with the numbering system if it is maintained as it is. It was also deposed that no evidence has been filed to confirm that the intended 2nd plaintiff procured the suit property and the purported sale agreements are between the plaintiff and various people. Further, that the plaintiff/applicant intends to remove from his list parcels nos. Cis Mara/Ilmashariani Morijo/ 868, 892, 907, 929 and 930 which he ought to have known do not belong to him and which the defendants/respondents have incurred costs to defend and, if the application is allowed, they are entitled to costs.
 10. The plaintiff filed a supplementary affidavit in response thereto sworn on 10th November, 2023. In his response, the plaintiff/applicant, while reiterating the averments contained in his supporting affidavit deposed that there is nothing wrong in having the record clarified to the court and that there is no new cause of action being introduced in the draft amended plaint. Further, that nowhere has he sought to address or alluded to the parcels nos. Cis Mara/ Ilmashariani Morijo/ 868, 892, 907, 929 and 930. Further, that on 25th October, 2023, when this matter came up for directions, he heard the counsel for the stated defendants/respondents inform the court that he may not oppose the application for amendments by reason of which they were given another date of 6th November, 2023.
 11. The plaintiff/applicant further deposed that he has equally not seen what prejudice the defendants/respondents would suffer if the orders are granted and he has not been supplied with material evidence to justify or warrant dismissal of his suit based.
 12. The application was canvassed by way of written submissions. On 15th November, 2023, the plaintiff/applicant filed his written submissions dated 10th November, 2023. The plaintiff/applicant submitted that Order 8 Rule 5(1) of the [Civil Procedure Rules](#), confers upon this court unfettered discretion to permit amendment of pleadings for purposes of determining the real questions in controversy between the parties. The plaintiff/applicant further submitted that the same applies to order 1 rule 10 of the [Civil Procedure Rules](#). He submitted that no bad faith has been shown in seeking the amendments and the defendants/respondents had misapprehended the application on a new claim as the parcels cited are not cited in the draft amended plaint or referenced in the affidavit.
 13. The plaintiff/applicant further submitted that this court is entitled to exercise its discretion and permit his plea as no demonstrable prejudice has been proven. The plaintiff/ applicant relied on the case of [Central Kenya Limited v Trust Bank Limited & 5 Others](#) [2000] eKLR. Further, it was submitted that the original claim though suing the Narok Land Registrar, the Attorney General had not been sued and it is imperative in the circumstances to enjoin the Attorney General as a party to the suit. Further, that the intended 2nd plaintiff having been the purchaser of the suit properties and registered them in the name of the plaintiff is indeed a relevant party.
 14. The plaintiff/applicant further submitted that the intended 2nd plaintiff comes into the suit to demonstrate that he did procure the suit property at all material times and during the pendency of these proceedings. Further, that the defendants/respondents have not filed any witness statements and no pre-trial has taken place in this suit to prejudice the said defendants/respondents. Reliance was placed in the cases of [Civicon Limited v Kivuvatt Limited & 2 Others](#) [2015] eKLR, *Eastern Bakery v*



Castelino (1958) EA 461 and [*Daniel Ouma Okuku v Kenya Plantation & Agricultural Workers Union & Another*](#) [2019] eKLR.

15. The plaintiff/applicant further submitted that an absent order enjoining the intended 2nd plaintiff in these proceedings, will result in orders issued in respect of any aspect of the suit properties to be in vain and ineffectual. To buttress on this submission, the plaintiff/applicant relied on the case of [*Zephir Holdings Limited v Mimosa Plantations Limited, Jeremiah Maztagaro & Ezekiel Misango Mutisya*](#) [2014] eKLR.
16. On 16th November, 2023, the defendants/respondents filed their written submissions dated 14th November, 2023 and while relying on the case of [*Bosire Ogero v Royal Media Services*](#) [2015] eKLR, they submitted that as a general rule, the amendment sought if allowed must be made under the following conditions: -
 1. When made in good faith.
 2. If it will not be prejudicial to the opposing party.
 3. If the said amendment will not delay or disrupt judicial administration.
 4. If it does not introduce a new cause of action.
17. The defendants/respondents submitted that it is over 4 years since the suit was filed and in a twist of events aimed at defeating justice, the plaintiff/applicant now seeks to enjoin his father on the flimsy grounds that it is in fact his father who procured the parcels of land in contention. Further, that the plaintiff/applicant has not made an application to enjoin defendants listed as number 6, 8, 40, 41 and 42 in the draft amended plaint and no reason has been given for the inordinate delay in filing the instant application.
18. The defendants/respondents further submitted that on a careful perusal of the agreements and title deed annexed to the supporting affidavit, the plaintiff/applicant has not demonstrated any dealings involving the intended 2nd plaintiff who never witnessed the sale agreements. Further, that the plaintiff/applicant who was represented by a counsel from the onset of these proceedings, ought to have seized all the opportunity to amend his pleadings which he failed to do. Further, that in allowing this application, it would mean taking the parties back to four years ago when the suit was filed since the proposed amendment will necessitate delay in bringing the case for trial and undue hardship to the defendants/respondents.
19. The defendants/respondents further submitted that there is no application to enjoin any defendants as per the draft amended plaint and for this reason, the application must fail on this ground. The defendants/respondents relied on the case of [*John Nyagaka Osoro v Reynold Karisa Charo & 5 Others*](#) [2021] eKLR.
20. I have considered the application, replying affidavit thereof and the rival submissions as well as the authorities cited by both parties and, in my view, the issue for determination is whether the application has merit.
21. I will begin with the joinder of parties in these proceedings. Order 1 rule 1 of the [*Civil Procedure Rules*](#) under which the application is brought provides as hereunder:

“ All persons may be joined in one suit as plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist,



whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”

22. Order 1 Rule 10(2) of the said Rules provides that:

“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 effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

23. The plaintiff/applicant sought amendment of the plaint seeking to allow the intended 2nd plaintiff to come on board for the reason that he is the one who procured all the parcels mentioned in the plaint for his benefit and, that he is best placed to testify at the trial on all the formalities in relation to the said parcels. For this reason, he contended that he is a necessary party to this suit and would paint a clear picture of the matter upon disclosure of the person so present before the court. On the other hand, the stated defendants/respondents through the affidavit of the 43rd defendant/respondent are opposed to this idea for the reason that it will bring a new cause of action. In support of their averments, the 43rd defendant/respondent annexed a copy of the plaintiff’s witness statement dated 24th April, 2019 which indicates/stated that the plaintiff bought each and all the parcels of land described in paragraph 2 and 4 of the plaint.

24. From the above, already there is a contrast of the averments contained in the supporting affidavit and the statement of the plaintiff in his witness statement which is contradictory. My analysis is that indeed, there is likelihood that it will alter the character of the suit as the same appears in the draft amended plaint in paragraph 4B.

25. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye, J (as she then was) in the case of Kingori v Chege & 3 Others [2002] 2 KLR 243 where the learned Judge stated that the guiding principles when an intending party is to be joined are as follows:

- “ 1. He must be a necessary party.
2. He must be a proper party.
3. In the case of the defendant there must be a relief flowing from that defendant to the plaintiff.
4. The ultimate order or decree cannot be enforced without his presence in the matter.
5. His presence is necessary to enable the Court effectively and completely adjudicate upon and settle all questions involved in the suit.

26. In, Civicon Limited v Kivuwatt Limited and 2 Others [2015] eKLR the court observed as follows:

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and



proper party, and should be enjoined from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

27. Let me also add that, joinder of parties is permitted by law and it can be done at any stage of the proceedings. But, joinder of a party may be refused where such joinder: will lead into practical problems of handling the existing cause of action together with the one of the party being joined; is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other words, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that a common question of fact or law would arise between the existing and the intended parties.
28. The plaintiff/applicant contended that the intended 2nd plaintiff procured the parcels of land on his behalf. However, no evidence or material has been placed before this court to prove the same. How then, can this court confirm such allegations if the same has not been tabled. The intended 2nd plaintiff does not appear anywhere in the documents annexed to the application. There is no direct claim that can be said to be existing or pointed towards the intended 2nd plaintiff. My view is that the intended 2nd plaintiff can participate in these proceedings as the plaintiff’s witness where his evidence and testimony will be considered.
29. The 43rd defendant also made mention of additional defendants/respondents’ numbers 6,8,40,41 and 42 who were sneaked in without an application for their joinder in these proceedings. In the draft amended plaint, the plaintiff/applicant sought to bring in some order on the numbering of the parties who in his view would make reference to the parties much easier. In the plaint dated 24th April, 2019, the defendants listed appear to have the identification of their position in the suit as either (A) or (B). In the amended plaint, the 6th defendant is now Dominic Ngumo, the 8th defendant is Faith Mumbua, the 40th defendant is Kundai Ole Kishoyan, the 41st defendant is Samuel Njoroge Kaniu and the 42nd defendant is David Mwaura Ndung’u. In the plaint dated 24th April, 2019, there is Dominic Ngumu Gicheru as the 41st defendant, Faith Mumbua, Kundai Ole Kishoiyan, Samuel Njoroge Kaniu and David Mwaura Ndung’u are not listed as defendants. It would also not be possible for this court to state that Dominic Ngumo and Dominic Ngumu Gicheru are one and the same person. On this, I fully agree with the stated defendants/respondents that the plaintiff/applicant is sneaking in new parties without following due process which is gross and an abuse of the court process.
30. Order 8, rule 5 of the [Civil Procedure Rules](#) stipulates 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”



31. The principles guiding the grant of application to amend pleadings are now trite and the same can be summarized as follows as was observed in *Gladys Nduku Nthuki v Letsbego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR:
- “ 1. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See *Tidelsay v Harpic* [1878] 10 CH.D. 393 at 396.
 2. The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See *Eastern Bakery v Castellino* [1958] EA 461.
 4. The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See *British India General Insurance Co. Ltd v G.M. Parmar* [1966] EA 172
 4. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. 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 and no injustice caused if the other side can be compensated by costs. See *British India General Insurance Case (supra)*.”
32. The plaintiff/applicant sought an amendment to place all the accurate number of all the implicated parcels of land as stated in paragraph 2A of the amended plaint. In their response the 43rd defendant/respondent contended that the draft amended plaint sought to remove parcels nos. Cis Mara/ Ilmashariani Morijo/ 868, 892, 907, 929 and 930 from his list of properties which, if the court is inclined to allow, the application, they would be entitled to costs. From the draft amended plaint, the parcels of land deleted from paragraph 2 of the plaint is parcels nos. 868, 892 and 907. Parcels nos. 929 and 930 are still maintained. In assessing whether or not allow or disallow such amendment, there is no particular defendant/respondent said to be affected by the removal of the said parcels of land and in the absence of such, it would not be possible to disallow this particular amendment. It would only be prudent if the plaintiff/applicant abandons such claim on his own motion.
33. Arising from the above, the notice of motion application dated 23rd August, 2023 partially succeeds in the following terms: -



- i. The plaintiff/applicant is hereby granted leave to amend and serve the plaint dated 24th April, 2019 as regards the suit properties within the next seven days from the date hereof.
- ii. The defendants/respondents to file their amended statement of defence if need be within seven days from the date of service.
- iii. The joinder of the intended 2nd plaintiff is hereby rejected.
- iv. Costs to be in the cause.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 18TH DAY OF DECEMBER, 2023.

HON. MBOGO C.G.

JUDGE

18/12/2023

In the presence of:-

CA:Meyoki

