



REPUBLIC OF KENYA



**Omusugu v Barasa & 2 others (Environment & Land Case E019 of 2021)
[2023] KEELC 22180 (KLR) (14 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22180 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUSIA
ENVIRONMENT & LAND CASE E019 OF 2021**

BN OLAO, J

DECEMBER 14, 2023

BETWEEN

PETER PANYAKO OMUSUGU PLAINTIFF

AND

PATRICK EMOIT BARASA 1ST DEFENDANT

BISANSIO ETYANG OJUMA 2ND DEFENDANT

CHRISTOPHER OMUSE ODERE 3RD DEFENDANT

RULING

1. Peter Panyako Omusugu (the Plaintiff herein) has approached this Court *vide* his Notice of Motion dated February 2, 2023 and premised upon the provisions of Sections 3, 3A and 63(e) of the [Civil Procedure Rules](#). He seeks the following orders:
 1. That this Honourable Court be pleased to grant the Plaintiff leave to amend his plaint and pleadings in terms of the draft amended plaint.
 2. That the draft annexed plaint be deemed as duly filed upon payment of the requisite Court fees.
 3. That costs be in the cause.
2. The application is premised on the grounds set out therein and supported by the plaintiff's affidavit of even dated.
3. The crux of the application is that the plaintiff has, since the filing of this suit on April 15, 2021, discovered that he did not capture crucial and material information and it is therefore prudent that he be allowed to amend his plaint. That since the case has not commenced trial, it is prudent that he be allowed to do so. Further, that the Defendant will not be prejudiced.
4. Annexed to the application is the annexed draft amended plaint dated February 2, 2023.



5. Patrick Eمويت Barasa and Bisansio Etyang Ojuma (the 1st and 2nd Defendants respectively) filed grounds of opposition dated February 27, 2023 raising the following:
 1. The application is belated and an afterthought this suit having been filed 2 years ago.
 2. The application is frivolous and ought to be dismissed with costs.
6. Christopher Omuse Odere (the 3rd Defendant and acting in person) did not file any response to the application. Instead, he has filed a letter dated June 8, 2021 and addressed to me in which he has stated, *inter alia*, that he is not a party to this dispute as he is not claiming any land from the Plaintiff. Instead, the Plaintiff should address his claim to his sister-in-law one Pascalia Asokoni Barasa. He has asked this Court to “acquit” him from this case.
7. I notice from the pleadings that the 3rd defendant has not filed any defence to the Plaintiff’s case in which he seeks the main remedy that the Defendants be permanently enjoined from alienating, encroaching, trespassing, cultivating, occupying and/or in any other way interfering with the Plaintiff’s lawful use of and possession of the land parcel No South Teso/apokor/4758.
8. I take this earliest opportunity to advise the 3rd Defendant to file his defence against the Plaintiff’s suit. The letter addressed to the Judge and dated June 8, 2021 is not a defence nor any response known in law in defence to the plaint. And since the 3rd Defendant is acting in person, I direct that the Deputy Registrar replies immediately to his aforesaid letter to the address therein. Further, both the reply and a copy of this ruling be personally served upon the 3rd Defendant so that he is well informed about these proceedings to-date.
9. The application has been canvassed by way of written submissions. These have been filed both by Mr Otsiula instructed by the firm of J. B. Otsiula & Associates Advocates for the Plaintiff and by Mr. Ashioya instructed by the firm of Ashioya & Company Advocates for the 1st and 2nd Defendants. The 3rd Defendant, as already stated above, did not file any response to the application.
10. It is also important to state that whereas the 1st and 2nd Defendants have filed the statement of their witness one Pascal Were Oundo dated 27th July 2021, I have been unable to trace a copy of their defence or their statements. If they did file them, they are not in the file and they should liaise with the Registry accordingly.
11. I have considered the application, the grounds of opposition and the submissions by counsel.
12. The 1st and 2nd Defendants opted to file grounds of opposition to the application and which I have already set out above. Grounds of opposition should address only issues of law and no more. I do not see what issues of law have been raised in the grounds of opposition. That means that the issues raised by the Plaintiff in his supporting affidavit have not been rebutted. Facts averred to on oath through an affidavit can only be controverted by way of another affidavit or by cross-examination – [Daniel Kibet Mutai & Others v A.g](#) C.a. Civil Appeal No. 95 of 2016 [2019 eKLR]. Essentially therefore, the Plaintiff’s Notice of Motion is un-opposed.
13. I have nonetheless considered the application on the basis of the applicable law and precedents.
14. Order 8 rule 3(1) of the [Civil Procedure Rules](#) provides that:

“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.”

15. Section 100 of the [Civil Procedure Act](#) states:

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

The power to allow amendment of pleadings is wide and the discretion is aimed at ensuring that the substantive issues raised in a case are brought to the fore for determination. In the case of *Eastern Bakery v Castelino* 1958 EA 461, it was stated that:

“..... amendments to pleadings sought before the hearings 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.”

In the case of [Joseph Ochieng & others v First National Bank of Chicago](#) C.a. Civil Appeal No. 149 of 1991, the Court quoting from [Bullen and Leake & Jacobs Precedents of Pleadings](#) – 12th edition stated thus:

“The ratio that emerges out of what is quoted from the said book is that powers of the Court to allow amendments is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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; the plaintiff will not be allowed to reframe his case or his claim if by any amendment of the plaint, the defendant would be deprived of his right to rely on Limitation Acts.”

The above was approved in [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) C.A. civil appeal no 81 of 2004 [2013 eKLR]. see also *Central Kenya Ltd v Trust Bank Limited* 2000 2 EA 365 where it was stated as follows on the same issue:

“... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

16. Guided by the above, I have looked at the proposed amendments and they do not offend either the law or judicial precedents. Although this case was filed in 2021, it has not commenced hearing. The plaintiff initially filed his case acting in person on April 15, 2021 before the firm of J. B. OTSIULA came on record for him on October 28, 2021. Since then, no pre-trial has been done. I have not heard the 1st and 2nd defendants allege that the proposed amendment will prejudice them in any manner.



17. The upshot of all the above is that the notice of motion dated February 2, 2023 is allowed in the following terms:
1. The Plaintiff to file and serve the amended plaint within 7 days of this ruling.
 2. The defendants will have 15 days from the date of service to file and serve their defence or amended defence (if any) together with any other documents and written statements.
 3. Both parties shall file affidavits of service.
 4. Thereafter, pre-trial before the Deputy Registrar on January 9, 2024.
 5. The Plaintiff shall meet the 1st and 2nd Defendants costs assessed at Kes 5,000.

BOAZ N. OLAO

JUDGE

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL TO THE PLAINTIFF, THE 1ST AND 2ND DEFENDANTS ON THIS 14TH DAY OF DECEMBER 2023.

The 3rd Defendant be served personally by the Court and an affidavit of service be filed accordingly.

