



Mbori (Suing as the Administratrix of the Estate of Joseph Mbori Ojiwa - Deceased) v Oyiengo (Environment & Land Case 10 of 2022) [2023] KEELC 22170 (KLR) (6 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22170 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND CASE 10 OF 2022
GMA ONGONDO, J
DECEMBER 6, 2023**

BETWEEN

TERESA ACHIENG MBORI (SUING AS THE ADMINISTRATRIX OF THE ESTATE OF JOSEPH MBORI OJIWA - DECEASED) PLAINTIFF

AND

MICHAEL OUMA OYIENGO RESPONDENT

RULING

1. By a Notice of Motion application dated 1st March 2023, the applicant, Teresa Achieng Mbori through M/S Ochwangi & Company Advocates has sought the following orders;
 - a. That the applicant/plaintiff be granted leave to amend the originating summons and introduce plaint as in the plaint attached herewith.
 - b. Cost of this application be provided for.
2. The application is founded upon grounds 1 to 4 set out on it's face and the applicant's supporting affidavit of seven paragraphs sworn on even date. In summary, the applicant states that the pleadings are not in tandem with his physical occupation over the suit land reference number Central Kasipul/ Kawere Kamagak/1616. That she is seeking to amend the pleadings in the interest of justice and for the purpose of determining the real question in controversy between the parties herein.
3. The respondent's counsel, M/S J.V Obat and Company Advocates was duly served with the application as disclosed in affidavits of service sworn on 2nd October 23 and 2nd November 2023 by the applicant's counsel, Philemon Ochwangi. However, the respondent did not respond to the application.
4. Hearing of the application was by way of written submissions pursuant to this court's directions given on 25th July 2023.



5. Learned counsel for the applicant filed submissions dated 29th June 2023 where reference is made to orders sought in the application and submitted that the originating summons has not been heard, among other things. It was submitted that the applicant be given an opportunity to amend his pleading as sought in this application. Counsel relied on two authoritative pronouncements; *Lewar Ventures Ltd v Equity Bank Ltd* (2022) eKLR and *John Nyagaka Osoro v Reinold Karisa Charo & 5 others* (2021) eKLR and implored the court to grant the prayer to amend the originating summons.
6. The respondent did not file submissions in this application.
7. In the foregone, the duty of this court is to determine whether the applicant is deserving of the orders sought in the application.
8. The application has been brought under, among others, Order 8 Rules 3 and 4 of the *Civil Procedure Rules*, 2010 which provides for amendment of pleading with leave of court and amendment of originating process respectively. Indeed, it is common ground that the suit commenced by way of originating summons is yet to be heard.
9. Also, Sections 1A, 1B, 3 and 3A of the *Civil Procedure Act* Chapter 21 Laws of Kenya under which the application has been originated, apply in special circumstances in order to put right that which would otherwise be clear injustice. It is crystal clear that the court is not powerless and has inherent powers in it to control its process to meet the ends of justice as pointed out by Hancox JA (as he then was) in *Meshallum Wanguhu v Kamau Kania* (1987) KLR 51.
10. The courts exist for the purposes of deciding the rights of the parties and not imposing discipline; See *Philip Chemwolo & another v Augustine Kubende* (1986) KLR 492; (1982-88) KAR 103.
11. Initially, the applicant appeared in person as revealed in the court proceedings of 8th November 2022 and 1st February 2023. Notably, she has the rights of access to justice and fair hearing of this suit in entirety under Articles 48 and 50 (1) of the *Constitution* of Kenya, 2010.
12. Presently, the applicant is represented by counsel further to the notice of appointment of advocate dated 23rd January 2023. In the case of *Butt v Rent Restriction Tribunal* (1979) eKLR, the Court of Appeal held;

“.....Litigants and their professional advisors are the best judge of their own affairs.”
13. In the foregoing, it is the finding of this court that the applicant is deserving of the principal order sought in the application to attain the ends of justice. The application is meritorious.
14. Wherefore, the application dated 1st March 2023, is hereby allowed in terms of the principal prayer in the same as stated in paragraph 1 (a) hereinabove.
15. Costs of the application be in the cause.
16. It is so ordered.

DATED AND DELIVERED AT HOMA BAY THIS 6TH DAY OF DECEMBER 2023

G. M. A ONGONDO

JUDGE

Present

1. Applicant



2. Luanga, Court Assistant

