



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT MOMBASA

ELC NO. 322 OF 2015

(FORMERLY MOMBASA HCC NO. 660 OF 1994)

LAWRENCE CHALALU & 5 OTHERS.....PLAINTIFFS

-VERSUS-

TANA AND ATHI RIVER DEVELOPMENT AUTHORITY

(TARDA) & 2 OTHERS DEFENDANTS

RULING

(Application to amend plaint; application seeking to add some plaintiffs, substitute and/or add some defendants, and add a cause of action; suit filed in 1994 seeking orders to cancel an allotment of land to the 1st defendant on the basis that the same was Trust Land belonging to the residents of the area whom the plaintiffs represent; suit partly heard up to defence stage though court giving liberty to parties to reopen their cases; amendment on the addition of the plaintiffs disallowed as no evidence that they have been mandated to enter into the suit; in any event, the suit is a representative suit and does not change by the mere addition of more plaintiffs; amendments to substitute defunct institutions allowed; amendment to introduce new party, Water Resources Authority disallowed as intention is to introduce a new cause of action not there before litigated; such cause of action best ventilated in a new suit if plaintiffs inclined to so pursue it; leave thus partially granted; no orders as to costs)

1. The application before me is one dated 7 April 2021 and filed on 12 April 2021 on behalf of the plaintiffs seeking leave to further amend the amended plaint. The application is brought under Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21 Laws of Kenya, Order 8 Rules 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules, 2010, and Article 159 of the Constitution of Kenya (2010) and all other enabling provisions of the law. The application is opposed by the 1st defendant.

2. To put matters into context, this suit was instituted in the High Court at Mombasa on 27 October 1994. The plaintiffs pleaded that they are bringing the action on behalf of about 6000 persons residing in the Kulesa and Chunoni Trust Land in Tana River District (the suit land). It was further pleaded that the suit land was trust land vested in the 2nd defendant (County Council of Tana River District), holding it as trustee for the benefit of the residents under the Trust Land Act, Cap 288. They complained that the 1st defendant (Tana and Athi River Development Authority or TARDA) took over a vast portion of the suit land to implement its farming project, Tana Delta Irrigation Scheme, without the land being lawfully set aside for that use. In the suit, the plaintiffs seek judgment against the defendants severally and jointly for *inter alia* an order restraining the 1st defendant from interfering with the suit land.

3. The plaintiffs filed an amended plaint on 24 April 1995.

4. In the course of time the plaintiffs testified and closed their case. In February 2005, the 1st defendant called its witness who testified in chief but has never been cross-examined. On 11 June 2016, parties appeared before Omollo J who directed that parties are at liberty to reopen their cases with the plaintiffs to start and thereafter the defendants to follow. In essence therefore, the plaintiffs were permitted to reopen their case and they can thus adduce additional evidence pursuant to the directions of the Judge.

5. There is a further amended plaint that was filed on 29 January 2019, but I struck it out on 11 March 2021 as it was filed without leave of court. It is subsequent to that, that this application was filed.

6. The application is based on the grounds that it is necessary to add three other persons as plaintiffs who have been proposed by the Council of Elders; that the 2nd and 3rd defendants have become defunct following the 2010 Constitution and have been replaced by the County Government of Tana River and the Chief Land Registrar; that there is need to include the Water Resources Management Authority (WRMA)

as a defendant in the suit as the 1st defendant undertook construction of dykes, canals and water channels that caused Tana River to change its course which construction was done without the approval of WRMA; that there is need to include the Attorney General as party to represent the Government bodies sued; that there is need to inform the court of Malindi ELC Constitutional Petition No. 2 of 2015 where judgment was delivered on 14 September 2016 vide which the grant to LR No. 28026 registered as IR No. 152049 in favour of the 1st defendant was revoked; that there is need to amend the reliefs to include an order of cancellation or revocation of the grant to LR No. 28026 registered as IR No. 152049; an order to compel WRMA to order the 1st defendant correct the course of Tana River; an order to compel the National Land Commission to recall and investigate the entire process of allocation of LR No. 28026 and proceed to register the land in favour of the plaintiffs and the residents of Hewani, Kulesa and Wema villages under the Community Land Act; that the failure to include these reliefs was a mistake of the former advocates and that the registration of the grant was made on 20 November 2013; that the reliefs directed at WRMA could not be sought as WRMA was not in existence in 1995 and was established by the Water Act of 2002 and it was not possible to have WRMA as defendant in the amended plaint. The application is supported by the affidavit of Maurice M. Kilonzo who is advocate on record for the plaintiffs. He has more or less reiterated the above reasons outlining the need to amend the plaint. There is annexed a copy of the draft further amended plaint, a copy of the grant to LR No. 28026, and a copy of judgment in Malindi ELC Constitutional Petition No. 2 of 2015.

7. The 1st defendant opposed the application by filing grounds of opposition. The 1st defendant averred that the application lacks merit and warrants dismissal; that there is undue delay in making of the instant application; that the 1st defendant would be adversely prejudiced by grant of amendment orders sought which cannot be made good by costs; that the pleadings were long closed and the matter is in its advanced stages of hearing; that the application is an afterthought and a manifest abuse of court process.

8. I directed that the matter be canvassed by way of written submissions but only counsel for the applicants filed submissions. He submitted that it is trite law that amendments of pleadings is a right available to a party in a suit and can be freely allowed at any time and/or stage before delivery of judgment. Counsel relied on the case of *St. Patricks Hill School Limited vs. Bank of Africa Kenya Limited (2018) eKLR* which cited with approval the case of *Ochieng and Others vs. First National Bank of Chicago Civil Appeal No. 147 of 1991*. Counsel submitted that the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. He further submitted that the amendments captured in the draft further amended plaint are necessary to determine the true substantive merits of the case. He added that there is nothing foreign that is inconsistent with the cause of action that was in the amended plaint dated 24 April 1995. Counsel submitted that the amendments in the draft further amended plaint stems from the original cause of action, which is illegal, unprocedural and unlawful taking of large tracts of land by the 1st defendant measuring about 10,000 hectares comprised in the suit land. He submitted that the amendments are necessary to help the court to understand the developments that have occurred. He added that the amendments will save the court's time and resources to prevent future review applications. On the question of delay in making the application, counsel submitted that this suit cannot be concluded without making the further amendments to the amended plaint, and there has been no delay in further amending the amended plaint. He submitted that his law firm of M/s Kilonzo & Aziz came on record for the plaintiffs on the 7 November 2018 and informed the court that there was need to amend the amended plaint. Lastly, Mr. Kilonzo submitted that the defendants will not face any prejudice if the application is allowed. He added that the hearing of this case was never concluded, and parties were at liberty to adduce additional evidence in the case, and the plaintiffs took the opportunity to seek to amend the amended plaint.

9. I have considered the application, the grounds of opposition by the 1st defendant and the submissions of counsel and also the record of the case. The case so far has been heard and continued on the basis of the amended plaint dated 24 April 1995. That amended plaint contains the cause of action herein and the prayers sought which are :-

(a) An order restraining the first defendant, its agents or servants from entering, occupying and/or carrying on any farming or other activities on any part of the Kulesa and Chunoni Trust Land.

(b) A declaration that the first defendant has no power or authority to encroach upon or to carry on any farming or other activity on the said trust land.

(c) An order restraining the second defendant, its servants or agents from permitting or allowing the first defendant to carry out any farming or other activities on the said Trust Land.

(d) A declaration that the Third defendant cannot allocate and/or grant to the first defendant any part or portion of land occupied by the plaintiffs.

(e) General damages.

(f) Costs.

(g) Such further or other relief as this Honourable Court may deem fit to grant.

10. In the draft amended plaint annexed to the subject application, there is proposal to add and substitute parties. This comprises of intention to amend to add three other persons as plaintiffs; substitution of the 2nd defendant (County Council of Tana River District) with the County Government of Tana River; substitution of the Commissioner of Lands with the Chief Land Registrar and National Land Commission; addition of the Attorney General; and addition of Water Resource Management Authority. There is also intention to amend the body of the plaint, to plead that there is a grant of the suit land being LR No. 28056 IR No. 15249 to the 1st defendant and to have the same declared illegal; and to add that there was the suit Malindi ELC Constitutional Petition No. 2 of 2015. In the prayers, there is proposed to add prayers to declare the grant of the suit land as illegal and to have it revoked and for the National Land Commission to register the land in the name of the plaintiffs; and an order to compel WRMA to restore the course of Tana River by permanently closing canals, furrows, and dykes done by the 1st defendant.

11. I appreciate that there is great latitude given by courts to allow a party to amend its pleadings. I have in fact read the case of *St. Patrick's Hill School Limited vs Bank of Africa Kenya Limited (2018) eKLR* which cited the case of *Ochieng and Others vs First National Bank of Chicago (supra)*. At the end of the day, amendments ought to be allowed unless there is prejudice to the other party. Nevertheless, where the cause of action may change, and new parties are being introduced, care needs to be taken, especially where the case has already proceeded and the court needs to weigh whether it is best that a new case be filed against the new parties or whether they can still be accommodated in the proceedings at hand. It follows that each case needs to be considered in light of its own unique circumstances.

12. In our situation, this is a 1994 case. It has partly proceeded. I do not know why the plaintiffs deem fit to amend the plaint in order to introduce new plaintiffs. The proposed amendment is to include Joel Amuma Ruhu, Matan Hedi Joel, and John Benjamin Luku as additional plaintiffs. It is said in the supporting affidavit of Mr. Kilonzo that these three persons have been proposed by the Council of Elders of Hewani, Wema and Kulesa villages known as "Ngatana Gasa" as the other plaintiffs have aged and suffer memory loss hence not possible to call them as witnesses in the event that this case is reopened. In addressing this, I am not persuaded on the competency of Mr. Kilonzo to depose to such issues. He is not one of the plaintiffs but is merely counsel. In fact, strictly speaking, I doubt the competency of Mr. Kilonzo to swear an affidavit in respect of the amendments. Such ought to have come from the plaintiffs themselves as it is them who wish to amend their plaint. Be that as it may be, Mr. Kilonzo has not annexed any proposal or resolution by the said Council of Elders of Hewani, Wema and Kulesa villages to have the three said persons added to the suit as plaintiffs. None of the three proposed additional plaintiffs have presented any affidavit to say that they have been appointed or that they wish to come into the suit as additional plaintiffs. I cannot simply add parties and remove them based on the affidavit of counsel. I might end up adding persons who will later come and say that they had no interest in being plaintiffs in the case and never authorized anyone to have them introduced into the case. In any event, from what I can see, the suit is filed by six persons on behalf of all residents of Kulesa, Wema and Hewani villages. Not all villagers need to be added as parties for they are already represented. If it is an issue of evidence, nothing bars the six plaintiffs from presenting another person or any of the residents represented in the suit from being witnesses. In other words, in such a case, you do not need to be mentioned as plaintiff in order for you to be a competent witness or to be allowed to adduce evidence. In such case, you also need to guard the suit from stalling because there is potential for continuous applications for amendment to add persons as plaintiffs when they are adequately represented by the ones who filed suit. For the above reasons, I am not persuaded to allow the amendment of the plaint to add Joel Amuma Ruhu, Matan Hedi Joel and John Benjamin Luku as plaintiffs.

13. I will next turn to the amendments to substitute and/or add defendants. It is trite that following the 2010 Constitution, some institutions ceased to exist. We no longer have County Councils. What we now have are County Governments. We also no longer have the office of the Commissioner of Lands. What we have is the office of the Chief Land Registrar and some functions taken over by the National Land Commission. I am not therefore averse to allowing further amendment of the plaint to substitute the County Council of Tana River District with the County Government of Tana River, and to substitute the Commissioner of Lands with the Chief Land Registrar and the National Land Commission. The Attorney General is constitutionally mandated to act on behalf of the Government and since the Chief Land Registrar is a Government office I will allow the addition of the Attorney General as party to the suit. That aspect of amendment is allowed.

14. I now turn to whether leave should be granted to add the Water Resource Management Authority. Actually Water Resources Management Authority (WRMA) no longer exists, following the new Water Act, 2016, which repealed the Water Act, 2002. What we have is Water Resources Authority (WRA) pursuant to Section 11 of the said statute. It is of course said in the application herein that WRMA was not in existence in 1994 when the amendment to the plaint was done and that it came into being in the year 2002. That may be the case but no reason has been given why WRMA was not introduced into the suit in the year 2002 or shortly thereafter if the plaintiffs thought that they have a cause of action against WRMA. No amendment to introduce WRMA was ever made until WRMA ceased to exist in the year 2016. The proceedings were continued and evidence taken without the involvement of WRMA. On what basis can the plaintiffs now seek to introduce the successor to WRMA (WRA) more than 18 years after it came into being? I see that the plaintiffs want orders to compel WRA to reinstate the Tana River water channel. To me this is a completely new cause of action. The cause of action that the plaintiffs presented was that the allocation of the suit land to the 1st defendant was wrongful and that the allocation should be cancelled and for them to be permanently restrained from the suit land. That is what has been in issue and what evidence has been presented about. Before this proposed amendment, we have not had any cause of action regarding restoration of the river channel. In my view, introducing that issue at this stage of the case will be prejudicial to all parties who have been defending a case concerning allocation of the land. In my opinion, it is best that the issue of reverting of the river channel be through separate proceedings. I will therefore disallow the part of the amendment that seeks to introduce WRA as a party to this suit and disallow all claims or prayers touching on the alleged diversion of the river channel. Let this suit be restricted to the issue of whether or not the suit land was properly allotted to the 1st respondent. If the plaintiffs wish to bring a cause of action on diversion of the river channel, they can file a fresh suit on it.

15. There are amendments proposed to the body of the plaint to introduce pleadings that a grant to the suit land was issued being IR No. 152049 to LR No. 28026. This amendment is tied to the cause of action in the suit and I will allow the same. The prayers for revocation of the said title and for the same to revert to the benefit of the plaintiffs or the persons they represent are also allowed. The proposal to plead Malindi ELC Constitutional Petition No. 2 of 2015 also touches on the cause of action herein and is allowed.

16. Thus leave to amend is allowed to the extent pointed out above and the amended plaint must conform to the leave granted above or else the same will be struck out. I further direct that the amended plaint be filed and served within 14 days. If this is not done within the time frame given, then leave to amend will lapse and the suit will be continued based on the amended plaint of 1995. If the further amended plaint is filed and served as directed above, the defendants will be at liberty to amend their defences within 14 days. I will then give directions on the hearing of the case after this is done.

17. The only issue left is cost. There will be no orders as to costs.

18. Orders accordingly.

DATED AND DELIVERED THIS 13TH DAY OF JANUARY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA