



**Bigogo v Marita & 3 others; Nduko & another (Interested Parties) (Environment & Land Case 208 of 2017) [2022] KEELC 3918 (KLR) (12 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3918 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISII  
ENVIRONMENT & LAND CASE 208 OF 2017  
JM ONYANGO, J  
MAY 12, 2022**

**BETWEEN**

**KENNEDY KENYANZA BIGOGO ..... PLAINTIFF**

**AND**

**CLEMENT MARITA ..... 1<sup>ST</sup> DEFENDANT**

**DOYLE ANGWENYI ..... 2<sup>ND</sup> DEFENDANT**

**CONCEPTA OMBACHI ..... 3<sup>RD</sup> DEFENDANT**

**JOYCE KWAMBOKA NYARANGI ..... 4<sup>TH</sup> DEFENDANT**

**AND**

**ESTHER NYANCHAMA NDUKO ..... INTERESTED PARTY**

**CHARLES NYAKEBAKA ..... INTERESTED PARTY**

**RULING**

**Introduction**

1. This ruling is in respect of the applications dated September 29, 2021 and September 30, 2021. In the application dated September 29, 2021, Esther Nyanchama Nduko and Charles Nyakebaka, the 1<sup>st</sup> and 2<sup>nd</sup> applicants respectively are seeking leave to be joined to this suit as defendants while in the application dated September 30, 2021, the 1<sup>st</sup> defendant seeks leave to amend the defence to include a counterclaim.
2. The application dated November 29, 2021 is based on the grounds that the 1<sup>st</sup> applicant is the proprietor of a parcel of land known as LR No West Kitutu/ Bogusero/8139 (parcel 8139) while the 2<sup>nd</sup> applicant is the proprietor of LR No West Kitutu/ Bogusero/8134. The two parcels were derivatives of LR No West Kitutu/ Bogusero/7001 which was cancelled pursuant to a court order



issued in Kisii HC Succession Cause No 596 of 2012 on October 23, 2014 following a consent. The said parcels are now subsumed in LR No West Kitutu/ Bogusero/9701 which is currently registered in favour of the plaintiff. The applicants are both in occupation of their respective parcels and they are apprehensive that they may end up losing their hard earned investments in the said pieces of land without compensation. The application is supported by the supporting affidavits of Esther Nyanchama Nduko and Charles Nyakebaba sworn on September 29, 2021.

3. In her affidavit, Esther Nyanchama Nduko depones that she purchased land parcel number 8139 at a price of Kshs 1,050,000/= pursuant to a sale agreement dated December 15, 2015 between her and one Evelyn Moraa Oira. Following the said purchase, she was registered as the owner of parcel number 8139 after which she took occupation of her land parcel.
4. She depones that she subsequently learnt from her neighbours, the 2<sup>nd</sup> and 4<sup>th</sup> defendants that a suit had been filed by the plaintiff seeking to evict them from their respective parcels of land on the allegation that they were trespassers. She depones that parcel No 8139 had been created following the sub-division of land parcel No 7100. Parcel No 7100 was subsequently cancelled pursuant to an order dated October 17, 2014 in HC Succession Cause No 596 of 2012. Following the said cancellation, the parcel reverted to Parcel Number 589 which was sub-divided to create parcels numbers West Kitutu/ Bogusero/9699, 9700, 9701, 9702 and 9703. The import of the restoration of parcel No 589 and the its sub-division thereof to create parcels 9699-9703 is that her title is non-existent as it is unsupported by records held at the lands registry.
5. She further depones that she is interested in the subject matter of litigation which is parcel No 9701 as the orders made in this suit will affect her interest in what was formerly parcel No 8139 as she is in occupation thereof. She contends that the respondents deliberately failed to include her in the proceedings even though they were aware that she had acquired the said parcel. She therefore contends that as an innocent purchaser for value, she ought not to be condemned without being accorded a hearing as she has the same interest as the defendants who have already been sued.
6. In his supporting affidavit, the 2<sup>nd</sup> applicant deponed that he entered into a sale agreement dated July 9, 2015 with one Duke Nyarango in respect of land parcel No 7100 measuring 0.09 hectares at an agreed purchase price of Kshs 1,000,000/= as per the annexed sale agreement. Following the said purchase, he was registered as the owner of land parcel No 8134. He then took possession and he has planted napier grass and trees on the said parcel.
7. He depones that he later learnt through his neighbours that the plaintiff had filed suit against them seeking to evict them from their respective portions. He subsequently learnt that his title had been cancelled pursuant to a court order and the parcel had reverted to land parcel No 589 which was sub-divided to create parcels numbers West Kitutu/ Bogusero/9699, 9700, 9701, 9702 and 9703. The import of the restoration of parcel No. 589 and its sub-division thereof to create parcels 9699-9703 is that her title is non-existent as it is unsupported by records held at the lands registry. He therefore needs to be included in the suit as a defendant as the orders that will be made in the suit are likely to affect him.
8. The application is opposed by the plaintiff/respondent through is replying affidavit sworn on November 10, 2021. in which he depones that the intended counterclaim does not disclose a cause of action against him. He depones that he is not party to the illegal and fraudulent dealings between the applicants and 3<sup>rd</sup> parties. It is his further contention that the applicants have not complied with the provisions of the *Government Proceedings Act* and that the intended joinder of parties is being sought after an unreasonable delay which will prejudice him as he had already testified. He depones that the applicants are guilty of laches and they have come to court with unclean hands.



9. The application dated September 30, 2021 is based on the grounds that the pleadings have closed and the 1<sup>st</sup> defendant/applicant is desirous of amending his defence and counterclaim to incorporate a liquidated claim.
10. In his supporting affidavit sworn on September 29, 2021, the applicant depones that by a sale agreement dated April 19, 2016 him and his wife purchased land parcel number 8138 measuring 0.17 Hectares at a purchase price of Kshs 1,800,000/=. The said parcel was a sub-division of parcel number 8133 which in turn was a sub-division of parcel number 7100. Parcel 7100 was derived from parcel number 589. He later learnt that his title had been cancelled pursuant to a court order in HC Succession Cause No 596 of 2012 without his knowledge.
11. He depones that by the time his title was cancelled, he was already in occupation of parcel No 8138 and he had developed it by constructing a maisonette which he is currently occupying. He therefore prays that he be allowed to amend his counterclaim to enable him seek redress with respect to the value of the developments on his land parcel which he risks losing.
12. In response to the application, the plaintiff/respondent relies on his replying affidavit sworn on October 21, 2021 in which he depones that the issue of compensation and cancellation of the irregular title held by the applicant and his co-defendants over his parcel of land title No West Kitutu/Bogusero/9701 is res judicata as the same issue was raised in Kisii HC Succession Cause No 596 of 2012, in the matter of the estate of Andaraniko Bigogo - deceased.
13. He further deponed that the applicant brought a similar application before the High Court in the said succession cause, but the court cautioned them against raising issues that were res judicata. A copy of the said application is annexed to his affidavit as annexure "HB".
14. It is the respondent's contention that there has been unreasonable delay in bringing the application and that the same would occasion prejudice and injustice to the respondent who has already testified.
15. He depones that the proposed amendment would introduce a new suit that would cause this matter to start afresh and yet the facts giving rise to this application have been within the knowledge of the applicants from the inception of this suit. He is of the view that the application is brought in bad faith and is merely intended to obstruct the speedy determination of this suit.
16. He depones that he is not party to the illegal and fraudulent transactions of sale of land that the applicants are alleging, hence there is no cause of action between him and the applicants. He is of the view that the applicants are at liberty to institute a separate suit against the persons who sold them non-existent land, subject to the Limitation of Actions Act and the Government Proceeding Act.
17. The court directed that the 2 applications be heard concurrently and that they be disposed of by way of written submissions. Both parties have filed their submissions which I have considered.

### **Issues for Determination**

18. The main issues for determination are:
  - i. Whether the intended interested parties should be made parties to the suit.
  - ii. Whether the 1<sup>st</sup> defendant should be granted leave to amend his defence and counterclaim.



## Analysis and Determination

19. With regard to the first issue, the law governing joinder of parties is set out in order 1 rule 10 of the [Civil Procedure Rules, 2010](#) which provides as follows:

“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”

20. The court therefore has discretion to include a party whose presence is necessary to assist the court in adjudicating all the questions involved in the suit, even in the absence of an application by either of the parties. The emphasis here is whether that party will enable the court adjudicate all the issues in the suit. See [Pius Mbugua Ngugi & 2 others v Chief Land Registrar & 7 others](#) [2018] eKLR. It is therefore important for the court to evaluate the pleadings and discern the issues that need to be determined.

21. In the case of [Central Kenya Limited v Trust Bank & 5 Others](#) (2000) eKLR the Court of Appeal held as follows:

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be compensated for in costs.”

22. Further, in the case of [Kenya Commercial Bank Ltd v Titus Kilonzo Mutua T/A Mbwala Agencies & 24 Others](#) (2006) eKLR the court stated as follows:

“The relevant law can be found in the code of *Civil Procedure Mulla 12<sup>th</sup> Edition* pages 497 and 549, the Indian provisions are in all respects similar to those in Kenya. At page 498 of the code of Civil Procedure under the rubric “New Rule” appears the following:

“Under the present rule all persons may be joined as defendants against whom any right to relief in respect of the same act or transaction is alleged to exist, where if separate suits were brought against such persons, any common question of law or fact would arise, though the causes of action against the defendants may be different, a plaintiff is entitled under these rules to join several defendants in respect of several and distinct causes of action subject to the discretion of the court to strike out one or more of the defendants on the analogy of O.1 R2 , if it thinks it right to do so. “Whatever the law may have been when *Smurthwaite v Hannay* was decided, joinder of parties and joinder of causes of action are discretionary in this sense, that if they are joined, there is no absolute right to have them struck out, but it is discretionary in the court to do so if it thinks right’. As a general rule, where claims against different parties involve a common question of fact bearing sufficient importance in proportion to the rest of the action to render it desirable that the whole of the matter be disposed of at the same time, the court will allow the joinder of defendants, subject to its discretion as to how the action should be tried”



23. What can be gleaned from the above-cited authorities is that the court has a discretion to allow parties to be joined to a suit as long as there are common questions of fact between the plaintiff and the parties seeking to be joined in order to determine all the issues in dispute.
24. In the instant suit, the applicants are in the same position as the 1<sup>st</sup> defendant who has been sued for trespass in respect of Parcel Number 8133 as their titles were extinguished after Parcel Number 7100 was cancelled pursuant to a consent order in HC Succession Cause No 596 of 2012. Since the applicants are currently in occupation of their parcels number 8139 and 8134, they are likely to be affected by orders that may be made against the defendants.
25. Learned counsel for the plaintiff has submitted that joinder of the applicants at this late hour when the plaintiff has testified will result in delaying the finalization of this matter. Although that is a valid concern, order 1 rule 10 permits joinder at any stage of the proceedings and in exercising its discretion, the court must weigh the interests of both parties. In this case the only other option that would be open to the applicants is for them to institute a new suit against the defendants. This would result in a multiplicity of suits and offend the overriding objective of the *Environment and Land Court Act* which is to facilitate a just, expeditious, proportionate and affordable resolution of disputes.
26. In the premises, I am inclined to exercise my discretion in favour of the applicants and allow them to be joined to the suit as defendants.
27. The second issue whether the 1<sup>st</sup> defendant should be allowed to amend his defence and counterclaim to include a liquidated claim.

Order 8, rule 3 of the *Civil Procedure Rules* provides as follows:

Amendment of pleadings with leave

- (1) 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.
28. The principles that should guide the court in dealing with applications for amendments are elaborated in Mulla, the *Code of Civil Procedure*, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752 which has been cited in various authorities including the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* (2014) eKLR where it is stated as follows:
    - i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
    - ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
    - iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
    - iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
    - v. Amendments of a claim or relief barred by time should not be allowed;



- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time
  - vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties
  - viii. The delay in filing the petitions for amendment should be properly compensated by costs
  - ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”
29. In the case of *Central Kenya Ltd v Trust Banks Ltd & 5 Others* (2000) e KLR the Court of Appeal stated that:
- “The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated for in costs.”
- 30. In the instant suit, the plaintiff has complained that allowing the proposed amendment would result in delay as he has already testified. He has also raised the issue that the applicant had previously been granted leave to amend and that the proposed amendments are *res judicata*.
  - 31. As pointed out in the Central Kenya case (supra), mere delay is not a ground for declining to grant leave to amend as long as the opposite party is compensated with costs. As regards *res judicata*, the court advised the defendants to file suit in the Environment and Land court as their issues could not be adjudicated within the succession cause as the High Court did not have jurisdiction. The issue of *res judicata* therefore does not arise.
  - 32. Finally, even though the applicant was granted leave to amend his defence in February 2020, for whatever reason, the same was not acted upon. I however note from the proceedings that counsel for the Plaintiff had conceded to the application for leave to amend the defence.
  - 33. Having considered the application dated September 30, 2021, the rival submissions, the law on amendment of pleadings and the relevant authorities and taking into account the circumstances of this case, I am of the view that justice would be served if the applicants are allowed to amend the defence and counterclaim in order for the court to determine all the issues in controversy once and for all. However, I am cognizant of the fact that the plaintiff had testified and the amendments will cause some delay and inconvenience to the plaintiff and he must therefore be compensated by way of costs.
  - 34. The upshot is that both applications are granted and I make the following orders:
    - a) Esther Nyanchama Nduko and Charles Nyakebaka, the 1<sup>st</sup> and 2<sup>nd</sup> applicants in the application dated September 29, 2021 shall be made parties to this suit as defendants.
    - b) The pleadings herein shall be served upon them within 14 days to enable them file their responses within 14 days after service.
    - c) The applicants shall bear the costs of the application dated September 29, 2021 which shall be paid to the plaintiff/respondent.



- d) The 1<sup>st</sup> defendant in the application dated September 30, 2021 is granted leave to amend his defence and counterclaim within 14 days.
- e) The 1<sup>st</sup> defendant shall pay thrown away costs assessed at Kshs 25,000/= to the plaintiff/respondent before the next hearing date.

**DATED, SIGNED AND DELIVERED AT KISII THIS 12<sup>TH</sup> DAY OF MAY, 2022.**

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**J.M ONYANGO**

**JUDGE**

