Esther Njeri Chege (Suing as the Personal Representative of the Estate of Julius Chege Kiongo (Deceased) & another v Amaingu & 5 others (Environment & Land Case 108 of 2016 & 34 of 2019 (Consolidated)) [2022] KEELC 2217 (KLR) (11 May 2022) (Ruling)

Neutral citation: [2022] KEELC 2217 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KITALE

ENVIRONMENT & LAND CASE 108 OF 2016 & 34 OF 2019 (CONSOLIDATED)

FO NYAGAKA, J

MAY 11, 2022

BETWEEN

ESTHER NJERI CHEGE (SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JULIUS CHEGE KIONGO (DECEASED) ..... PLAINTIFF

AND

JAMEN KIYAGI AMAINGU ..... DEFENDANT

AS CONSOLIDATED WITH

ENVIRONMENT & LAND CASE 34 OF 2019

BETWEEN

ESTHER NJERI CHEGE (SUING AS ADMINISTRATRIX TO THE ESTATE OF THE LATE JULIUS CHEGE KIONGO) ..... PLAINTIFF

AND

BENJAMIN KARANGATHI (SUED AS AN ADMINISTRATOR OF THE ESTATE OF JAMES WAIHARO KIONGO (DECEASED) ..... 1ST DEFENDANT

JAMIN KIYAGI ..... 2ND DEFENDANT

DIRECTOR OF LAND ADJUDICATION & SETTLEMENT .... 3RD DEFENDANT

LAND REGISTRAR TRANS-NZOIA ..... 4TH DEFENDANT

ATTORNEY GENERAL ..... 5TH DEFENDANT

RULING

(On whether to issue an order for a Further Amendment of the Plaint)

1. By a Notice of Motion dated 21/01/2022 filed on 24/01/2022, the Plaintiff/Applicant moved this Court under Sections 1A, 1B, 3, 3A, 63(e) and 100 of *Civil Procedure Act* and Order 8 Rules 3 and 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and all the other enabling provisions of the law. She sought the following specific orders:

    (1) Thatthe Plaintiff be granted leave to amend her Amended Plaint herein as per the draft annexed hereto.

    (2) Thatthe Defendants be at liberty to file an Amended Defence if they so wish upon being served with the Amended Amended Plaint.

    (3) Thatcost of this application be in the cause.

2. The Application was based on a number of grounds summarized as herein below and supported by the affidavit sworn by one, Esther Njeri Chege on 21/01/2022. The grounds were that documents filed by the Defendants during the case raised new issues which necessitated the amendment of the Amended plaint; the Plaintiff had since discovered new fraud upon being served with the Defendants' supplementary list of documents hence the need to amend the Amended Plaint to plead the new facts; the Plaintiff wished to add more documents in response to those filed by the Defendant; the proposed amendments arose from the same chain of transaction hence consistent with the claim; the discretion of the Court be exercised to amend the pleadings so as to bring out the real issue in controversy and will help the court to determine them; the amendments would not prejudice the Defendants; and that the interest of justice demanded the grant of the orders.

3. The Application was opposed strongly. The Respondent filed Grounds of Opposition dated 24/01/2022 on 31/01/2022. The grounds were that the application was an abuse of the process of the Court; it was filed without observing timelines given in the Court's Ruling of 19/11/2021; any application for amendment of any plaint was supposed to be filed within 14 days of 19/11/2021 and there was no order extending the time beyond 3/12/2021; on 10/6/2021, the Plaintiff had been granted leave to amend the Plaint by 22/6/2021 but failed to do so; the instant application was filed without obtaining leave of the court first; it offended the overriding objective in litigation for expeditious disposal of suits; the application was not clear if it intended to amend the plaint in Kitale ELC 108 of 2016 or in Kitale ELC 34 of 2019; the intended amendment purported to join new defendants to the suit without any order for the purpose under Order 1 Rule 10 of the *Civil Procedure Rules*, 2010 and no address of service of any of the intended additional parties was given; the intended amendment intends to made a claim against intended 6th, 7th and 8th Defendants for fraud without pleading any particulars of fraud, and in violation of the limitation under Section 4(2) of the *Limitation of Actions Act*, Chapter 22 of the Laws of Kenya; the application did not merit a hearing by the court; the Applicant having ignored the directions of 19/11/2021 her application was not worthy of compromise.

4. The suit had been fixed for mention on 24/01/2022 to confirm the filing and service of documents in compliance of Rules, after the determination of the Application for amendment of Plaint. Whereas the Court did not give a specific timeline for the filing of the Application, it was the Court's directions that the Application should have been filed promptly after 19/11/2021 so that it be compromised and compliance with Order 11 of the *Civil Procedure Rules* be done before 24/01/2021.

5. However, the Application was filed on 24/01/2022 on which date the suit was for mention. It was mentioned in absence of counsel for the Respondent. The Court sought a written explanation for the delay by directing that the Applicant files within seven (7) days an Affidavit attaching medical evidence in support of the Applicant's contention that the delay in filing the Application was occasioned by her illness. The discharge summary showed that indeed the Applicant had been taken ill on 19/11/2021, suffering from heart complications, high blood pressure and diabetes and hospitalized in Kitale District Hospital until 19/11/2022 when she was discharged.

6. The Applicant filed the Affidavit on 31/01/2022 on which date the matter was for mention. The Court was satisfied as to the delay and then fixed the Application for 14/03/2022. Thereafter, parties were directed to file submissions which they did.

SUBMISSIONS

7. The Applicant filed her submissions dated 04/04/2022 on the same date. In them she submitted that by Section 100 of the *Civil Procedure Act* and Order 8 Rule 3(1) of the *Civil Procedure Rules* the court has unfettered discretion to allow amendments of pleadings at any stage of the proceedings on such terms as are just or it may direct so as to bring out the real issue in controversy or correct errors in pleadings. She relied on the case of *Eunice Chepkorir Soi v Bomet Water Company Ltd* (2017) eKLR which relied on the case of *Bosire Ongero v Royal Media Services* (2015) eKLR in which the court restated that amendments may be allowed at any stage of the proceedings. She then explained the proposed amendments in the Amended Amended Plaint. Her submission was that the Defendants had filed documents which raised new issues necessitating the amendments sought. Moreover, she submitted that the Plaintiff had since discovered new fraud upon being served with the Defendants supplementary list of documents. It was her submission that the proposed amendments are not inconsistent with the claim before the court. Her view was that the proposed amendments would not prejudice the Defendants in any way. She relied on the case of *Eastern Bakery -vs- Castellino* (1958) EA 461 cited in the case of *Edermann Property Limited v The Registered Trustees of the Kenya Railways Staff Retirement Benefit Scheme and another* where the Court of Appeal stated that amendments which are sought before the matter has been heard should be freely allowed if they do not occasion injustice to the respondent. She submitted that they argued that the application for amendment has been made without delay.

8. Lastly, regarding the form of the proposed amended, she submitted that Kitale ELC No. 108 of 2016 was consolidated with Kitale ELC No. 34 of 2019 hence the application is competent. Again, theirs was that the form of a pleading was not fatal as long as the error does not go to the substratum of the case. The relied on Article 159(2)(d) of *the Constitution* regarding doing justice without undue regard to procedural technicalities. They then asked the Court to exercise its power to direct on how the proposed amended pleading should be headed.

9. The Defendant filed two set of submissions, the first one dated 07/02/2022 on the same date and Supplementary ones dated 08/02/2022 on 11/02/2022. Besides restating the Plaintiff's prayer of paragraph "(b)" of the pleading in Kitale ELC No. 34 of 2019 which he submitted the Plaintiff's evidence was based, the Supplementary ones sought to amend the ones which were filed earlier as stated. Thus, this Court factored the amendments into the ones filed on 07/02/2022 and considered the two sets as one.

10. In the submissions, the Defendant stated that by its ruling of 19/11/2021, this Court noted that the Plaintiff had delayed in observing, or ignored to comply with, the order of 15/6/2021 to file an appropriate application to add parties within seven (7) days of that date. He then reproduced the said

order part of the Ruling of 19/11/2021, which gave the Applicant herein a period of fourteen (14) days to make the instant Application. Their submission was that under Order 51 Rule 6 of the *Civil Procedure Rules*, 2010, where a time has been fixed by order of the court for the doing of any act or taking any proceeding under the Rules, the court could enlarge time upon an application being made to enlarge the time of doing the act or taking the proceeding. His view was that the Applicant did not apply to enlarge time hence the application was an abuse of the court process.

11. The Respondent then attacked the content and import of both the Affidavit sworn by the Applicant on 27/01/2022 and annextures thereto about the reasons given by the Applicant for the delay in filing the Application. He relied on Court of Appeal holding in Prafulla Enterprises Limited vs Norlake Investments Limited and another [2014] EA 263, where it was stated that the mere production of documents without relevant evidential proof or corroboration of their contents is not proof of the contents thereof. He reiterated the overriding objective of the *Civil Procedure Act* as given under Section 1A (3). He also relied on the *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR (Supreme Court Application No. 16 of 2014) where the Court stated about the need to first seek leave of Court before filing a document (an appeal) in Court out of time that by filing an appeal out of time before seeking extension of time, and subsequently seeking the Court to extend time and recognize such 'an appeal', is tantamount to moving the Court to remedy an illegality. This, the Court cannot do." He submitted that the Plaintiff ought to have applied for extension of time under Order 50 Rule 6 of the *Civil Procedure Rules*, 2010.

12. He then submitted that while an amendment can be allowed at any time the discretion is not free. He relied on the High Court decision of *John Nahashon Mwangi v Kenya Finance Bank Limited (in Liquidation)* [2015] eKLR.

13. It was his further submission that there was no prayer in the instant Applicant for joining Jane Amalemba Kiyagi, Beatrice Kadenyi Kiyagi or Emily Shumi Sakwa or Joyce Wangee Waiharo and Hannah Wanjiku, and that these intended parties were merely named in the draft proposed "amended amended plaint". However, he stated that Jane Amalemba Kiyagi and Beatrice Kadenyi Kiyagi featured in paragraph 6 of the Defendant's Statement of Defence and paragraph 15 of the witness statement. His stated further that the two persons, besides ones Jamin Kiyagi Amaingu, were beneficiaries of the undisputed subdivision of Trans-Nzoia/Cherangany/13. He submitted that the Reply to the Defence pleaded fraud but not particulars thereof in the subdivision by Defendant Jamin Kiyagi Amaingu of his land.

14. He then summed about the pleaded fraud that it should have been the Reply to Defence in ELC No. 108 of 2016 that would be amended in terms of Order 2 Rules 4 and 10 of the *Civil Procedure Rules*, 2010 hence the objection that application was unclear if the intendment was of the Paint in Kitale ELC No. 108 of 2016 or in Kitale ELC No. 34 of 2019.

15. On the intended Claim of fraud, he submitted that the fraud related to the new parties Jane Amalemba Kiyagi and Beatrice Kadenyi Kiyagi whose title deeds show that the subdivision was in 2015, then in terms of Section 4(2) of the *Limitation of Actions Act*, any charge of fraud against them as a tort ought to have been pleaded before 3 years were over, which was, in 2018, or if it was discovered in 2021 or 2022 then the Plaintiff ought to have sought the necessary leave to plead fraud or fraud additional to that pleaded in the Reply in ELC No. 108 of 2016 and under Section 26 of the Act, sought and extension of time limited under Section 4(2).

16. His view was that the intended amendments were inconsistent with previous pleading. About the intended addition of Joyce Wangee Waiharo and Hannah Wanjiku by the Applicant as administrators of the estate of James Waiharo Kiongo (deceased), submitted that the supporting affidavit did not

contain information as to when and how they became administrators and legal representatives. Further, he submitted that the application failed to come within the provisions of Order 24 Rule 4 of the Civil Procedure Rules. His view was that the issues he raised were not mere matters of technicalities of procedure.

ANALYSIS AND DETERMINATION

17. I have carefully considered the Application, the Affidavit in support of the Application and the Grounds of Opposition, the Supplementary Affidavit, the annexures to both, the submissions by both parties, the law and case law cited. I find four issues for determination. These are:

    (a) Whether the instant Application was an abuse of the process of the Court;

    (b) Whether Applicant introduced parties to the suit without leave of the Court;

    (c) Whether the failure to give particulars of fraud in proposed amendments disentitle one the discretion of Court ;

    (d) Whether the Application is merited;

    (e) What orders should issue on costs?

18. This Court will not take time to discuss, as it usually does on its rulings, the relevance or otherwise of the provisions relied on by the Applicant herein. Suffice it to say that the relevant ones are Section 100 of *Civil Procedure Act* and Order 8 Rules 3 and 5 and Order 51 Rule 1. All other cited ones except the meaningless unexplained phrase "all the other enabling provisions of the law" have their specific place and application in other situations and applications. Thus, I start the analysis with the first issue.

(a) Whether the instant Application was an abuse of the process of the Court

19. Upon the instant Application being filed the Respondents raised, as one of the grounds of opposition to it, the issue that it was an abuse of the process of the Court, was filed in contempt of the Court without observing the timelines set by the Court on 19/11/2021 and that the Applicant had been granted on 15/06/2021 to amend the Plaint but failed to do so. In essence the thrust of the Respondent's argument was that the application was improperly before the Court. He submitted at length on the issue, and the Applicant sought to explain herself about it.

20. This Court considers the issue, basing its finding on the events that took place between 15/06/2021 and the time of fixing the Application for ruling. On 15/06/2021 the Court gave the Applicant seven (7) days to apply to amend her pleadings. She did not do so. Subsequently the suit was fixed for hearing on 13/10/2021 when it did proceeded for hearing in part from 10.10 am until 16.07 pm. PW1 was stood down at the time for further cross-examination on 29/10/2021. On that date, the Plaintiff's counsel was taken ill and an adjournment granted to 19/11/2021. On that date Counsel for the Plaintiff raised the issue that the 1st Defendant's Advocate had filed additional documents and served them on him in Court and he needed time to take instructions thereon from his client and it also was clear that it necessitated that the Amended Plaint be amended again. He prayed for adjournment. After long and drawn-out arguments the Court granted the adjournment on condition that the Application for amendment would be filed within fourteen (14) days. The suit was fixed for mention on 24/01/2022 to confirm the filing and determination of the Application by way of hearing or compromise, and setting down the suit for hearing.

21. On 24/01/2022, the Applicant filed the in Application that morning and moved the Court in the presence of the Respondent's learned counsel but in absence of counsel for 3rd, 4th and 5th Defendant in

ELC No. 34 of 2019 the parties that it considers the Application for determination although filed late. Upon the Court considering the oral request, it noted that there was a delay in bringing the Application but would require documentary proof of the reason for the delay and decide if it was genuine, upon an Affidavit being filed explaining the dilatory conduct. The matter was fixed for mention on 31/01/2022 for this purpose. The Applicant filed the documents through the Supplementary Affidavit sworn on 27/01/2022.

22. Upon the Court considering the Supplementary Affidavit and the copies of the documents annexed thereto on 31/01/2022 in the presence of counsel for the Applicant but in absence of those of the Respondents, it was satisfied that the delay was sufficiently explained. It was then that the Court gave the 14/03/2022 for further mention to confirm the filing of submissions by all counsel. After that the date for this ruling was taken.

23. With the short summary of the proceedings leading to the delivery of this Ruling, the arguments by the Respondents about the issue for determination herein collapse. All the issues they raise now have been the subject of the step by step actions and decisions that the Court has been making up to the time this Application was fixed for Ruling. The failure by the Applicant to observe the seven (7) days' leave period granted on 15/06/2021 was considered on 19/11/2021 and ruled on. The fourteen (14) days' period granted by the Court on 19/11/2021 was also considered in January 2022 particularly on 31/01/2022 and decided on. On that date the Court exercised its discretion to deem the delay reasonable even though the Application was filed without leave of the Court, outside the timelines given. While the Supreme Court in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others [*2014] eKLR (Supreme Court Application No 16 of 2014) held that filing of an Appeal out of time without leave of the Court was not proper, there are many an instance where the Court has exercised discretion to deem a document filed out of time duly filed and served. Article 159(2) (d) of *the Constitution* cures such an error while Section 3A of the *Civil Procedure Act* grants this Court power to make such an order as it may deem just for the ends of justice to me made. If the Respondents were aggrieved of the decision of the Court on 24/01/2022 and 31/01/2022 to deem the Application proper for determination on merit they ought to have appealed against it rather than raising the issue by way of grounds of opposition to this Application later. Thus, I find the issue unmeritorious.

(b) Whether Applicant introduced parties to the suit without leave of the Court

24. The Respondents raised a nuanced argument that the Applicant had, by way of the proposed amendment, introduced parties to the suit without leave of the Court. This argument requires the Court to analyze the Application and the draft Amended Amended Plaint and compare them to the law on addition of parties to a suit. The Applicant seeks leave of the Court to amend the Amended Plaint as per the draft annexed to the Application. It is clear from the Application that there is no specific prayer for the addition of the parties to the Suit. What is also not disputed is that the annexed draft of the Amended Amended Plaint includes persons sought to be introduced as parties. These can only be parties if the Application herein succeeds. What I understand the Applicant to be 'saying' is that, "Court grant me leave to amend my Amended Plaint to add X, Y and Z as parties to this suit". She may not have stated it in the prayers of the Application that that is what she wants to do. But it is clear from her intention that it is the end result of what she requests the Court to do.

25. Order 8 of the *Civil Procedure Rules* provides for Amendment of Pleadings. Rule 3 thereof is on amendment with leave of the Court. That I will discuss herein shortly hereafter. Order 1 Rule 10 provides for addition of parties to a suit where they are necessary so that the Court may determine the issues at hand effectively. The procedure thereto is also clearly laid out and has been restated by Courts

many times over. To analyze the Rule here will stretch the determination of this Ruling beyond its scope. Be that as it may, it is clear to my mind that in the instant Application, and as things stand, there are no parties that have been added to the instant suit as consolidated with Kitale ELC No. 34 of 2019. There is only a proposal to have them added by way of amendment of the pleadings. That can only be done if the Application is found to be meritorious. Again, there is no specific provision that the party seeking the addition of a party specifically prays in the Application that he he/she needs to add certain persons as parties. That is a technicality that goes to the form of the application and not the substance. Justice demands that the Court looks at the Application in a holistic manner and in the spirit thereof and not merely mechanically. In the end I find this issue not holding any water.

(c) Whether the failure to give particulars of fraud in proposed amendments disentitle one the discretion of Court

26. I will look at this issue together with the related point that was raised in the Respondents' submissions that it was not clear which of the Plaints or pleadings the Applicant wanted to amend through the leave she sought, and that she out to have applied to amend the Reply to Defence to include particulars rather than the Amended Plaint. I found this submission that the Applicant should have amended the Reply to Defence rather curious and least understandable. Perhaps the Respondents should have sought to enlighten the Court and the Applicants whether the purpose of a Reply to Defence in the realm of the legal system has since changed. The purpose of a Reply to a Defence is to join issues of the parties. I may be wrong, but it cannot stand in the place of a Plaint, Claim. It basically replies to issues which are raised in a Defence so much so that in its absence or failure to file it, the Plaintiff or Claimant is deemed to have admitted the issues raised in the Defence. Would this Court call it lightly a shield against an attacking defence or claim? I think so. It cannot base an attack, if an action by the Plaintiff or Claimant were to be loosely referred to as an attack. Thus, with due respect, I do not find the argument by the Respondents that it was the Reply to Defence that should have been the target of the amendment sought tenable simply because it mentioned the issue of fraud.

27. The other submission was that it was not clear which of the pleadings was sought to be amended. When I looked at the Court record I noted the following: that the suits under reference herein were consolidated on 04/11/2019 vide a Ruling delivered the same date. The record also shows that so soon thereafter the parties adopted the heading of the pleadings as it is presently in the instant Application. One of the first documents to adopt the heading was the Application dated 27/01/2020 filed by the Defendant in this suit (ELC No. 108 of 2020) which is the lead file. It is further borne out in the record that most of the documents and proceedings, except those that relate to the 3rd - 5th Defendants in ELC No. 34 of 2019, basically gravitated towards and in the lead file.

28. I have compared the record as summarized above with that the instant Application together with the draft Amended Amended Plaint. First, the Court notes that the Amended Plaint sought to be amended was filed on 27/05/2019 in ELC No. 34 of 2019 following the service of a Statement of Defence filed on behalf of the 2nd Defendant on 13/05/2019. It was the said Amended Plaint that was annexed to the Application filed on 11/06/2019 which sought the Consolidation of the two files and was granted on 04/11/2019. The heading of the then proposed Amended Amended Plaint was in respect of ELC. No. 108 of 2016 now lead file in which this Application is made whereas the entire body of the content was in respect of ELC No. 34 of 2019. To that extent I agree with the Respondents that it is not clear which of the pleadings are sought to be amended. In this Court, the rule of thumb is that each party should accept responsibility for their actions, be accountable for their results and take ownership of their mistakes. On this rule of thumb, I noted that in response to the objection as to the form of the heading of the proposed amendments, the Applicant submitted the heading is proper since consolidation was done hencec the indication of the heading of ELC No. 108 of 2016 as consolidated with ELC No.

34 of 2019 and then the body of the entire and only ELC No. 34 of 2019, and that the error is not fatal. I agree the error is not fatal to the suit. But what would happen if the Plaintiff/Applicant now in ELC No. 108 of 2016 amended her Plaint, not once but twice as it is being done in ELC No. 34 of 2019? There will be a similar heading having and the Court shall have two similar Amended Amended Plaints which will have the same heading but different contents in their body. In the instant situation where the Applicant sought to amend the pleadings of ELC No. 34 of 2019, there was an error in the heading, particularly of the draft Amended Amended Plaint.

29. I know that there still rages a serious controversy in regard to the form of pleadings after consolidation of suits is done. It is time that the Rules Committee or the judges in their College looked at the issue and formulated clear guidelines on the format of pleadings after the consolidation. There is need for Courts to get organized on how to go about this aspect. This is because it may be easy to indicate in the heading of two or three consolidated suits or claims "as consolidated with" and move on to draw pleadings. But what happens to the specific files. Supposing the Court is called upon to consolidate ten (10) matters and they have different parties? What form do the pleadings take in such a situation? I may be wrong but in my view, drawing a pleading in the lead file to state that this matter is Consolidated with matter O, P, Q, R, S etc to the tenth number without indicating the parties may bring more confusion than it was meant to be.

30. How does the Court resolve the confusion in the instant two suits that were consolidated? It is my understanding that the confusion in regard to the pleadings sought to be amended arose from the fact of consolidation as ordered by the Court on 04/11/2019. In the interest of justice and expeditious disposal of this matter, since the two suits were consolidated but the prayer for leave to amend is sought in the lead file, being ELC No. 108 of 2016, this confusion (and that is relation to the subsequent filing of all documents generally) could be resolved by this Court giving directions. But that can only be after the Court considering the remaining issues first. This turns me to the next and main issue as to whether the failure to give particulars of fraud in proposed amendments disentitle one the discretion of Court.

31. This issue is simple and straight forward and will not take much of the Court's time in deciding it. The Respondents contended that the Applicant failed to particularize the fraud she alleged against the intended additional parties. Their contention, in my view, was that failure to do so should cause the denial of the discretion of the Court to grant the order sought. The Respondent put his argument forth in the eighth ground of opposition where he failure to do so was in violation of the Section 4(2) of the *Limitation of Actions Act*. He submitted as much.

32. I have considered the issue. First, on the issue of particularizing fraud, it is a matter of law provided for under Order 2 Rule 10 (1) (a) of the *Civil Procedure Rules* and not the *Limitation of Actions Act*. In my view failure to give the particulars of fraud will not necessarily defeat the Claim: it can only be a basis for amendment of pleadings if need be. However, in regard to the instant Application, the situation is different, and the argument by the Respondent that particulars were not given is erroneous. This is because paragraph 22 of the draft Amended Amended Plaint which is on particulars of fraud is clear. It adds the proposed parties as the 6th, 7th and 8th Defendants as the parties against whom the particulars of the fraud given therein apply. Thus, the issue raised by the Respondent fails in its infancy. The Application was made before the order of Consolidation being given.

(d) Whether the Application is merited

33. The Applicant moved the Court asking for leave to amend her pleadings. The basis for her application was that documents that were filed by the Defendant necessitated the amendments as shown in the draft Amended Amended Plaint. The Applicant relied on Section 100 of the *Civil Procedure Act* and Order 8 Rules 3 and Order 51 Rule 1 of the *Civil Procedure Rules*. First, it is clear that the power to

grant an order to amend pleadings generally is discretionary. Courts have without number restated the law on not only this issue but the point that amendments should be freely allowed and can be done at any stage of proceedings save where it is shown that the prayers would prejudice the other party(ies) and they are basically an abuse of the Court process.

34. In *Halsbury's Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, the learned authors have given the purpose and process of amendments of pleadings and it is worth reproducing an excerpt of the relevant part here below as follows:-

> " ...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.
>
> .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...".

35. Based on that detailed exposition as relates to the issue before me, I now proceed to analyze it. Section 100 of the Act provides that, "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." Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendment of pleadings with leave of the Court. It may be done at any stage of the proceedings, on such terms as to costs or otherwise as may be just. Order 51 Rule 1 is on the format of the Application if formal.

36. Amendments sought before the hearing should be freely allowed as long as they do not cause injustice to the other parties. This Court is guided by the case of Eastern Bakery v. Castelino, (1958) E.A.461 (U.) at p.462 where the Court stated that:

> " It will be sufficient, for purposes of the present case, to say 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."

37. In the same authority, the Court stated as follows:

> " It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing 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.... The court will not refuse leave to allow an amendment simply because it introduces a new case.... But there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of amendment, the subject matter of the suit... The court will refuse leave to amend where the amendment would change the action into one of a substantially different character; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ."

38. In the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago* Civil Appeal No. 149 of 1999, the Court stated as follows:

> "The ratio that emerges out of what was quoted from the same book is that powers of the Court to allow amendment 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 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, that the Plaintiff will not be allowed to reframe his case or claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on Limitation Acts."

39. In the instant case, the Plaintiff had begun testifying when she was stood down during cross-examination, as a result of the Defendant introducing a set of documents which prompted the Application being determined herein. Since her testimony had not gone far, it may not prejudice the defence if the amendments are granted. In the case of such amendments costs are an appropriate appeasement to the other party (ies). However, I am alive to the fact that where the amendments sought are inconsistent to the original pleadings then they would not be permitted by the Court. The Court of Appeal in *Abdul Karim Khan v Mohamed Roshan* (1965) EA.289 (C.A) stated as much. I have considered the amendments sought and I find no inconsistency of the same with the original pleadings.

40. In short, having analyzed the reasons for the proposed amendments, the circumstances under which they are proposed to be made, the pleadings in the two consolidated matters and the law, I am of the view that the Application is meritorious and is hereby allowed. As stated in paragraph 30 above there seems to be confusion in this matter relating to the drawing of the headings and filing of documents in the instant suit and the one consolidated with it. I therefore direct that the parties heed to the order of the Court made on 04/11/2019 on consolidation and that any pleadings and documents filed in the matters to reflect the order of the Court. So much so that if filing is to be done in Kitale ELC No. 108 of 2016 the heading should start as it was in originally and then immediately below it to include "As Consolidated with" and then insert the heading of the ELC No. 34 of 2019. Where the filing is in relation to ELC No. 34 of 2019, the heading should begin as it was originally and be followed with that of ELC No. 108 of 2016 as has been explained.

41. For purposes of the instant Application which has succeeded, in order to save time and further the interest of justice, leave is hereby granted to the Applicant to file an Amended Amended Plain in ELC No. 34 of 2019 whose content the Application for leave touched on. This should be done within the next fourteen (14) days of this order and all parties served within the said period and an Affidavit of Service thereto be filed before the mention date herein. However, in case the proposed amendments now granted touch also on the Plaint in the lead file, that is to say ELC No. 108 of 2016, then leave for amended is extended to that file on the same terms. This matter shall be mentioned on virtually 14/06/2022 to confirm compliance of the orders herein.

(d) What orders should issue on cost?

42. In regard to costs, it is my view that owing to the circumstances surrounding the Application, each party should bear own costs.

Orders accordingly.

RULING, DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 11TH DAY OF MAY, 2022.

DR. IUR FRED NYAGAKA

JUDGE ,ELC, KITALE.