



REPUBLIC OF KENYA



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Earnest Omwenga (sued on his own behalf as Chairman of Amani Self Help Group & 12 others v Charles Munene Gatimu & another; The National Land Commission & 2 others (Interested Parties) (Environment & Land Case 288 of 2013) [2022] KEELC 3712 (KLR) (30 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3712 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ENVIRONMENT & LAND CASE 288 OF 2013

JO MBOYA, J

JUNE 30, 2022

BETWEEN

EARNEST OMWENGA (SUED ON HIS OWN BEHALF AS CHAIRMAN OF AMANI SELF HELP GROUP) 1ST APPLICANT
PETER KINYUA 2ND APPLICANT
ABEL OYARO 3RD APPLICANT
PROTAS MANDELA 4TH APPLICANT
JOHN NGIGE 5TH APPLICANT
CHARLES AKUNGA 6TH APPLICANT
SAMUEL MOTURI 7TH APPLICANT
EVANS OBIERO 8TH APPLICANT
FRANCIS NDIRANGU 9TH APPLICANT
PETER KIOKO 10TH APPLICANT
STEHEN KIBUNJA 11TH APPLICANT
MARY WAMBUI 12TH APPLICANT
LUCY NJERI 13TH APPLICANT

AND

CHARLES MUNENE GATIMU 1ST RESPONDENT
KAREGI CATHERINE KAMANJA 2ND RESPONDENT

AND



THE NATIONAL LAND COMMISSION INTERESTED PARTY
OFFICER NAIROBI INTERESTED PARTY
THE DIRECTOR OF SURVEY INTERESTED PARTY

RULING

Introduction and Background

1. Vide Notice of Motion Application dated November 1, 2021, the Defendants/Applicants herein has approached the court seeking for the following Reliefs;
 - I. The Defendants/Applicants be granted Leave to ammend their existing written statement of defenses upon which terms and conditions that the Honourable Court may deem fit and just to grant in the circumstances.
 - II. The annexed draft Defendants/Applicants amended written Statements of Defenses be admitted into record, subject to remittance to court fees.
 - III. The Honourable Court be pleased to grant leave to the 1st, 2nd and 3rd proposed Interested Parties to be made Parties to these proceedings.
 - IV. The exclusion of information of the three proposed Interested Parties will be prejudicial to the Defendants/Applicants.
 - V. Any other order which the court may deem fit and just to grant in the circumstances.
 - VI. Costs of this application be provided for.
2. The subject application is premised and/or anchored on the various Grounds which are enumerated at the foot thereof and same is further supported by the affidavit of one Ernest Omwenga, namely, the 1st Defendant herein, sworn on November 1, 2021.
3. Upon being served with the present Application the Plaintiffs/Respondents herein responded by filing Grounds of opposition. For clarity, the 1st Plaintiff/Respondent filed his Grounds of opposition dated March 5, 2022.
4. On the other hand, the 2nd Plaintiff/Respondent filed her Grounds of opposition dated March 8, 2022.

Submissions By The Parties:

5. The present Application came up for hearing on March 10, 2022, whereupon the Parties agreed to canvas and/or dispose of the Application by way of written submissions. Consequently, the court directed the Parties herein to file and exchange their written submissions within a circumscribed timeline.
6. It is imperative to note that all the Parties herein thereafter proceeded to and filed their written submissions. For clarity, the 3 sets of submissions, which were filed herein, form part and parcel of the record of the court.
7. Briefly, it was the Defendants'/Applicants' submissions that the intended joinder and/or inclusion of the proposed Interested Parties shall enable the court to effectively and effectually determine all the issues in dispute.



8. Secondly, the Defendants'/Applicants' herein further submitted that the subject matter concerns ownership of the suit property and hence it is imperative for the court to include the proposed interested parties and thereafter interrogate the process leading to the allocation, transfer and registration of the suit property to and in favor of the Plaintiffs' herein.
9. Thirdly, the Defendants'/Applicants' submitted that as concerns the issue of amendments, same should be allowed so as to enable the concerned Party to bring before the court his/her case in the whole and thereby mitigate against further or other suits.
10. Further, the Defendants'/Applicants' have submitted that the intended amendments would not prejudice the Plaintiffs herein or at all, insofar as the Plaintiffs' would be at liberty to amend their Plaintiff and better still, reply to Defense and file Defense to amended Counter-claim.
11. Premised on the foregoing, the Defendants'/Applicants' have therefore implore the court to allow the application and facilitate the intended amendment.
12. On his part, the 1st Plaintiff herein relied on the Grounds of opposition dated March 3, 2022 and contended that the proposed amendments, has been made and/or mounted with unreasonable and undue delay, which in effect, dis-entitles the Defendants'/Applicants' from benefiting from the exercise of Equitable discretion.
13. Further, the 1st Plaintiff has submitted that the subject suit having been filed and mounted in the year 2014, it would be unreasonable for the court to allow the Defendants'/Applicants herein to propagate the amendments and thereby change the goal post in respect of the subject litigation. In this regard, the 1st Plaintiff has invoked and relied on the doctrine of *Laches*.
14. Thirdly, the 1st Plaintiff has equally submitted that to the extent that the Plaintiffs' case was heard and closed on September 18, 2019, the grant of the application for amendment herein, shall substantially affect and/or prejudice the Plaintiffs', in such a manner that the 1st Plaintiff shall suffer grave injustice.
15. Fourthly, the 1st Plaintiff has also submitted that the grant of the subject application shall in-effect roll back the clock to the pre-trial stage, whereby the Parties shall be required to file further pleadings and undergo another set of Pre-trial conference, given the proposed inclusion of the interested Parties.
16. In a nutshell, the 1st Plaintiff has contended that the proposed amendment would therefore culminate into wasting precious court time, including the time that has hitherto been spent in conducting the previous proceedings, up to and including the close of the Plaintiffs' case.
17. As concerns the 2nd Plaintiff, same has adopted the Grounds of opposition dated March 8, 2022 and has submitted that the proposed amendments are actually an abuse of the court process and a delaying tactic by and/or on behalf of the Defendants'/Applicants'.
18. In furtherance of the foregoing submissions, the 2nd Plaintiff has submitted that the issues pertaining to the validity or otherwise of the title in favor of the Plaintiff, has already been adverted to by the Defendants/Applicants in terms of the Statements of Defense and Counter-claim dated June 4, 2013.
19. Secondly, the 2nd Plaintiff has further submitted that the Defendants'/Applicants' herein have hitherto procured and obtained an order of witness summons to issue against the Director of Survey and the appearance of the Director of survey, pursuant to the witness summons shall enable the Defendants/Applicants to challenge the validity of the alienation, survey and ultimate registration of the suit property in favor of the Plaintiffs.



20. Other than the foregoing, the 2nd Plaintiff has also submitted that appropriate orders, including cancellation of the Plaintiff's title documents, if same are proven to be invalid, can be actualized and/or achieved without the inclusion of the proposed interested Parties.
21. Simply put, the 2nd Plaintiff has submitted that the proposed Interested Parties are Government Department and a Constitutional commission and are thus empowered to enforce and implement any orders of the court, whether or not same are made Parties to the impugned proceedings.
22. Finally, the 2nd Plaintiff has submitted that the proposed amendments, other than being mounted too late in the day, are geared towards changing and/or altering the character of the suit before the court, which is not legally tenable, given the stage which the subject matter has reached.
23. Based on the foregoing, the Plaintiffs' herein have therefore sought that the subject application be dismissed with costs and the suit/ matter be allowed to proceed, to facilitate closure of the proceedings, one way or the other.

Issues For Determination:

24. Having reviewed the Application dated November 1, 2021, the Affidavit in Support thereof and the Responses thereto and having similarly considered the written submissions filed by the Parties, the following issues are pertinent and are germane for Determination;
 - I. Whether the proposed Interested Parties have an Identifiable stake and/or Interests in the subject dispute to warrant their joinder as Interested Parties.
 - II. Whether the subject Application has been made and/or mounted with unreasonable delay and in any event, whether the delay has been explained.
 - III. Whether the Proposed Amendment shall alter and/or change the character of the proceedings and if so, whether the Plaintiffs' shall suffer grave injustice.

Analysis And Determination

ISSUE NUMBER 1. Whether the proposed Interested Parties have an Identifiable stake and/or Interests in the subject dispute to warrant their joinder as Interested Parties.

25. The gist of the subject Application is to bring forth and/or include the proposed interested parties as Parties to the subject suit, albeit under the title of Interested Parties.
26. Given that the application seeks to include Interested Parties into the matter, it is important to note that the relevant provisions that governs such joinder is therefore Order 1 Rule 10 (2) of the [Civil Procedure Rules 2010](#).
27. For convenience, it is thus important to reproduce the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules and same are reproduced as hereunder;
 - (2) 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.



28. To my mind, where an existing Party seeks to join and/or include another party, the latter who was not a Party to the suit at the onset, it behooves the Applicant to underscore and or exhibit the nature of interest that the proposed party has in respect of the subject proceedings, dispute and/or disputed property.
29. Based on the foregoing principles, it was therefore incumbent upon the Defendants' to show what Interests, claim and/or affinity, that the Proposed interested Parties have to the subject matter, to warrant same being admitted and/or joined to the subject proceedings.
30. Perhaps, at this juncture it is imperative to discern who then is an Interested Party, who can be admitted and/or joined into existing proceedings and/or suit.
31. To be able to answer the foregoing question, one needs to take cognizance of the decision of the Supreme Court Of Kenya vide the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR, where the court stated as hereunder;
- (18)] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a 'friend' of the Court, his cause is to ensure that a legal and legitimate decision is achieved.
32. The legal circumstances belying the admission of a Party as an Interested Party was again re-visited by the Supreme Court in her decision in the case of *Francis Kariuki Muruatetu & another v Republic & 5 others* [2016] eKLR, where the court held as hereunder;
- (42) Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.
33. From the foregoing decision, it is common ground that before a party is admitted as an Interested Party, the Applicant must establish that same has an interest and/or identifiable stake in the matter before the court and/ or Disputed Property, which is the subject of the civil proceedings beforehand.
34. To my mind, it was therefore incumbent upon the Defendants'/Applicants' to depose to and/or explain in the supporting affidavit, the nature and kind of stake that the proposed Interested Parties do have in respect of the subject suit and the suit property.



35. On the other hand, it also behooves the Defendants'/Applicants' to show that the orders arising from the subject proceedings would prejudice and/or otherwise adversely affect the rights and/or interests of the proposed interested parties.
36. Unfortunately, the supporting affidavit that has been sworn by the 1st Defendant/Applicant is limited in scope and Contents. Besides, same has not adverted to the interest and/or claim of the proposed interested parties.
37. Nevertheless, I am aware that the proposed Interested Parties are Government Department and a Constitutional commission and that same are disposed and/or otherwise amenable to enforcing and/or implementing any orders of the court, irrespective of whether same are Parties to or otherwise.
38. Premised on the foregoing, it is therefore evident and/or apparent that were the Defendants'/Applicants' to succeed in their counter-claim dated June 4, 2013, the resultant orders would be implemented and effectuated regardless of the Non-joinder of the proposed Interested Parties.
39. To vindicate the foregoing observation, it is imperative to take note of the provisions of Order 1 Rule 9 of the Civil Procedure Rules 2010, which provides as hereunder;
 9. Misjoinder and non-joinder [Order 1, rule 9.]

No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it
40. In a nutshell, I find and hold that the Defendants'/Applicants' have not demonstrated that the proposed interested Parties have any identifiable stake and/or interests in the subject matter and/or dispute to warrant their joinder in the manner proposed.

ISSUE NUMBER 2 Whether the subject Application has been made and/or mounted with unreasonable delay and in any event, whether the delay has been explained.

41. It is imperative to recall and/or take cognizance of the fact that the subject suit was mounted in the year 2013 and that upon service, the Defendants'/Applicants' herein duly appreciated the nature of the claim that was mounted by and/or on behalf of the Plaintiffs.
42. In any event, having appreciated and internalized the nature of the dispute that was placed before the court, the Defendants'/Applicants' proceeded to and filed a Statement of Defense and Counter-claim which essentially mirrors the issues at foot of the intended amended statement of defense and counterclaim, save for the proposed Interested Parties.
43. Other than the foregoing, the subject matter has proceeded before the court in the presence of and participation of the Defendants/Applicants, up to and including the close of the Plaintiffs' case.
44. For clarity, even though the Defendants/Applicants knew and/or were aware of the fact that the Letter of allotment, the Part Development Plan, the Deed plan, as well as the certificate of lease emanated from the concerned Government department, it never occurred to the Defendants/Applicants that it was necessary to join the said Government Departments.
45. At any rate, after the close of the Plaintiff's case, the Defendant's/Applicant's counsel applied for and obtained an order for issuance of Witness summons to the Director of Survey.



46. In my humble view, by procuring and obtaining the witness summons in respect to the Director of Survey, the Defendants/Applicants, were seeking to have same attend court and produce certain documents under his/her custody.
47. Notwithstanding the foregoing, what remains curious and therefore necessary to interrogate is the lack of explanation as to why the proposed Interested Parties were never included at the earlier stages, if the Defendants'/Applicants', honestly thought that their presence was necessary and/or imperative.
48. Suffice it to point out, that a Party seeking exercise of discretion of the court must tender explanation as to why the omission arose and/or occurred and thereafter justify, the reason why there has been (sic) some delay in taking the appropriate remedial action.
49. Having not tendered and/or availed any explanation as to why the proposed Parties, which were well known to the Defendants/Applicants, were not joined, the Defendants/Applicants herein cannot partake of and/or benefit from the discretion of the court.
50. To vindicate the foregoing position, it is appropriate to invoke and re-state the holding in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, where the Court of Appeal stated as hereunder;

‘The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's *Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said 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 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.” (underline supplied)

51. In respect of the subject matter, the suit was filed and/or commenced in the year 2013 and the issues, including the proposed Parties, were known to the Defendants/Applicants, but same did not mount the application for amendment immediately or within reasonable time.
52. To my mind, the filing of the subject application 9 years after the suit was commenced and 3 years after the close of the Plaintiffs' case, reeks of and speaks to inordinate delay, which is inexcusable.
53. Consequently, the Court finds and holds that the Defendants'/Applicants' application for Leave to amend and implead the proposed Interested Parties is defeated by the doctrine of Laches.



ISSUE NUMBER 3 Whether the proposed Amendment shall alter and/or change the character of the proceedings and if so, whether the Plaintiffs' shall suffer grave Injustice.

54. Whereas an amendment of pleadings can be allowed and/or granted at any stage of the proceedings, it is nevertheless imperative to take cognizance of the stage at which the application is being made and/or mounted.
55. Secondly, it is also important to consider whether the issues that are sought to be brought on board vide the intended amendment were known to and within the knowledge of the Applicants.
56. Thirdly, it is also imperative to discern the conduct of the Applicant in the course of the proceedings and ascertain whether the application for amendment is driven by good faith and/or otherwise.
57. Other than the foregoing, it is also imperative to appreciate, whether the intended amendments will alter and change the character of the suit and thereby negate the entire proceedings, if any, that has hitherto been taken in the matter.
58. As pertains to the subject suit, I must point out that the conduct of the Defendants'/Applicants,' as well as that of their counsel, does not show any good faith and/or desire to have the matter heard and concluded.
59. In fact, even after filing the subject application, the Defendants'/Applicants' were not keen to have same prosecuted and the application had to be mentioned more than three times to persuade Counsel for the Defendants'/Applicants' to serve his written submissions on the adverse Parties and thereby enable same to respond to the Application and facilitate hearing and disposal of same.
60. Notwithstanding the foregoing, it is also appropriate to underscore that the grant of the subject application, which has been made after the close of the Plaintiffs' case, shall not only alter the character of the suit, but shall negate all the previous proceedings and roll back time to the pre-trial stage.
61. Essentially, the entire proceedings that have hitherto been undertaken and the time therein shall go down the drain.
62. Quite clearly, such kind of a situation shall not amount to appropriate and proportionate utilization of the courts time. In this regard, it is imperative to underscore the import and tenor of Article 159 2(b) of the Constitution of Kenya 2010.
63. In any event, the importance of expeditious hearing and disposal of court proceedings, has since attracted judicial pronouncement and in this regard, it suffices to reproduce the observation of the Court Of Appeal in the case of Said Sweilem Gheithan Saanum v Commissioner Of Lands (being sued through Attorney General) & 5 others [2015] eKLR, where the Court stated as hereunder;

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge's conclusion that the suit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise it cannot be



fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

64. Finally, the legal position as pertains to late amendments, whose purport and tenor is to introduce a new factor into the matter was considered and dealt with by the Court of Appeal in the case of *Catherine Koriko & 3 others v Evaline Rosa* [2020] eKLR, where the court of appeal underscored the position as hereunder;

Comparatively, in the South African case of *Robinson –v- Randfontein Estates Gold Mining Company Limited, 1925 AD 173* Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court’s refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.

65. In my humble view, the situation obtaining in respect of the subject matter replicates, corresponds with and falls on all fours, with what was dealt with by the Court of appeal in the preceding decision.
66. In the premises, the intended amendment, shall be disposed to occasion and/or inflict grave Injustice upon the Plaintiffs/Respondents, in a manner, not compensable in monetary terms.

FINAL DISPOSITION:

67. Having reviewed the issues that were outlined for determination and having considered same, it must have become evident and/or apparent that the subject Application has been mounted with undue and inordinate delay and hence same shall cause undue prejudice and injustice.
68. In the premises and taking into account the provisions of Section 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya, as read together with Article 159 (2) (b) of the *Constitution*, 2010, the Application dated November 1, 2021, be and is hereby Dismissed with costs to the Plaintiffs/ Respondents.
69. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JUNE 2022.

OGUTTU MBOYA,

JUDGE.

In the Presence of;

Kevin Court Assistant

Mr E M Obonyo for the 1st Plaintiff/Respondent

Mr Odera Were for the 2nd Plaintiff/Respondent

Mr Moasa for the Defendants/Applicants

