



Ernestine (Suing as Co-administrator of the Estate of Richard Mutunga Mailu) v Malombe & another (Environment & Land Case E003 of 2023) [2025] KEELC 3165 (KLR) (3 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3165 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E003 OF 2023**

**A KANIARU, J
APRIL 3, 2025**

BETWEEN

JENNIFER CINDY ERNESTINE (SUING AS CO-ADMINISTRATOR OF THE ESTATE OF RICHARD MUTUNGA MAILU) PLAINTIFF

AND

BEATRICE NZAMBI MALOMBE 1ST DEFENDANT

JEMIMA SYOVINYA MALOMBE 2ND DEFENDANT

RULING

- The plaintiff in this suit – Jennifer C. Ernestine – is the applicant in the motion on notice dated 8.7.2024 filed in court on even date. The motion is expressed to be brought under Articles 50 (1) and 159 of *the Constitution* of Kenya, Sections 1A, 1B, and 3A of the *Civil Procedure Act* and Orders 8 Rules 1, 37, and 51 Rule 1 of the Civil Procedure Rules, 2010, and all other enabling provisions of law. The motion came with four (4) prayers as follows:

Prayer 1: That this honourable court be pleased to grant leave to the plaintiff to amend the plaint filed herein.

Prayer 2: That upon granting prayer 1 above, the annexed amended plaint and supporting documents be deemed to be properly on record.

Prayer 3: That this honourable court grants any other order it deems appropriate in the circumstances.

Prayer 4: That the costs of the application be provided for.

Just for clarity, reference to the plaintiff is reference to the applicant. The two names are herein interchangeably used. Equally, reference to the defendant is also reference to respondents.



2. The motion is premised on the grounds, inter alia, that 2nd defendant – Jemima Syovinya Malombi – took out letters of administration intestate with respect to the estate of Juliana Matani Malombe on or about 9.8.2022; that plaintiff only learnt of this in the year 2024; that the 2nd defendant, despite taking out letters of administration still refuses or rejects to transfer the disputed portion of land to the plaintiff; that the 2nd defendant still persists in issuing threats to the plaintiff and interfering with peaceful and quiet enjoyment of the disputed portion by the plaintiff; that the intended amendment shall not prejudice the defendants; and finally that it is in the interests of justice that the amendment be allowed.
3. There is a supporting affidavit accompanying the motion and it amplifies the grounds on which the application is anchored. It also provides the background and antecedents surrounding the matter.
4. The respondents responded to the application vide grounds of opposition dated 19.7.2024 and a replying affidavit of even date. According to the respondents, the application or motion is res judicata as the subject matter was fully and finally determined via the ruling of this court dated 28.7.2023. They also deposed that the suit itself is ill-advised and frivolous; that the suit is based on land belonging to an estate of a deceased person and the estate has not yet undergone succession; that the intended amendment serves no purpose; that the plaintiff has never assumed actual possession of the disputed portion even after the purported purchase; that the sale agreement is null and void; and that the 2nd defendant is not the administrator of the estate of Malombe Mwanga, the registered owner of the land, but the administrator of the estate of the late Julia Matani Malombe.
5. The motion was canvassed by way of written submissions. The applicant’s submissions are dated 5.8.2024. The applicant submitted, inter alia, that the general position is that amendment should be allowed at any stage of proceedings; that the applicable law, in this case Section 100 of [Civil Procedure Act](#) (Cap 21) and Order 8 Rule 5 (1) of Civil Procedure Rules, clothes the court with jurisdiction to allow amendment and to use its discretion to allow such amendment if it is helpful in determining the real question in controversy. The cases of *Bosire Ongero –vs- Royal Media Services* [2015] eKLR and *Central Bank of Kenya Ltd. -vs- Trust Bank Ltd.* [2002] EA 365 were cited and quoted for tenor and effect. The point was further emphasized by citing and quoting also the cases of *City Clock Limited -vs- County Clock Kenya Limited & Another* [2020] eKLR and *Institute for Social Accountability & Another –vs- Parliament of Kenya & 3 Others* [2014] eKLR.
6. The broad consensus that emerges from the cases cited and quoted is that amendment serves the purposes of ensuring that the substantive merits of a case are considered and determined; that the amendments should be timeously applied for and that amendment can be allowed at any stage of proceedings; that prejudice to the other side is a relevant consideration but amendment can still be allowed if such prejudice can be redressed by way of costs; and that the purpose served by amendment is to ensure, inter alia, that litigation between the parties is conducted not on the false hypothesis of the facts already pleaded or the reliefs sought, but on the basis of facts which the parties really and finally intend to rely on.
7. The applicant submitted in this matter that no prejudice will be suffered by the other side and it is in the interest of justice that the application be allowed.
8. The respondents on the other hand reiterated what they stated in their responses. According to them, the proposed amendment is an abuse of the court process. It would, they submitted, be a waste of court’s time as the applicant seeks to sue the 2nd defendant who represents the estate of the late Julia Matani while the said Julia was not the personal representative of the person, meaning Mwanga Malombe, in whose name the disputed land is registered. It was further submitted that there has been



inordinate delay of some fifteen (15) months by the applicant in filing the application for amendment. That delay is said not to have been sufficiently explained by the applicant.

9. The respondents also submitted that the amendment sought; if allowed, will inevitably introduce a new cause of action as parcel No. Kyangwithya/misewani/1888 may be brought into the equation yet it is distinct from the parcel of land the applicant is claiming.
10. In the submissions, the following authorities were cited and quoted as deemed necessary: City Clock Limited –vs County Clock Kenya Limited & Another [2020] eKLR, Central Kenya Limited –vs- Trust Bank Limited [2000] 2EA 365, Eastern Bakery –vs- Castellino [1958] EA 462 (CAU), Kassam –vs- Bank of Baroda [2002] eKLR and Elija Kipng’eno Arap Bii –vs- Kenya Commercial Bank Limited [2013] eKLR. The cases simply articulate the applicable law with City Clock’s case (supra) for instance emphasizing that amendments are usually allowed in order to determine the substantive merits of a suit and also that the amendment should be timeously applied for. The Central of Kenya case (Supra) emphasized the need to allow amendment in order to determine the real issue in controversy or to avoid multiplicity of suits. In the Eastern Bakery case (supra) the court pointed out that amendment may be refused if it might result into changing the suit into one of an entirely different character. This is also a position espoused in Elijah Kipng’eno’s case (supra).
11. Ultimately the applicant’s application was said to have failed to meet the requisite threshold for allowing an amendment. The court was urged to dismiss the application with costs.
12. I have considered the application as filed, the responses made, rival submissions, and the entire suit as filed generally. Both sides have expostulated the applicable law well though both are aiming for different results. In Halsbury’s Laws of England, 4th Edition (re-issue) Vol. 36 (1) at paragraph 76, the purpose of amendment is captured thus:

“... The purpose of 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.”
13. From a statutory perspective, the power to amend is to be found in Section 100 of [Civil Procedure Act](#) (Cap 21, Laws of Kenya), which states as follows:

“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 proceedings in a suit; and all necessary amendments shall be made for the purpose for determining the real question or issue raised by or depending on the proceedings.”
14. My appreciation of the submissions filed by the respondents is that they view the amendment sought as one that is coming rather late in the day. It is also one that is likely to change the character of the suit. But my reading of the suit generally does not seem to support this position. It seems clear to me that the 2nd defendant is intended to be the sole defendant in the suit because she is the one who is the legal representative of the estate of the person that the plaintiff, or her late spouse, transacted with in the alleged purchase of the disputed land. The discovery that she is such legal representative came late and this fact is well brought out by the applicant.
15. It is also not true to say, as alleged in the respondents’ grounds of opposition, that res judicata applies as the subject matter was allegedly fully and finally determined in a ruling delivered by the court on 28.7.2023. The ruling mentioned related to an application for restraining orders and the law is clear



that at that stage, nothing requiring trial is ever conclusively determined. The role of the court at that stage is usually to weigh up the comparative strengths of each side without an in-depth analysis that may amount to a trial. It would therefore be wrong to hold the view that there were conclusive findings on the subject matter. The amendment sought by the applicant is about effective and conclusive trial of the entire suit. My considered view is that a comment or averment made in an interlocutory process should not be allowed to stand in the way of a proper or effective trial.

16. The right of a party to articulate his case as he pleases is crucial in our court processes. It can only be curtailed in cases of absolute necessity. Such necessity has not been demonstrated by the respondent. There is for instance no prejudice that will be occasioned to the respondents which is not remediable by way of costs or damages. When all circumstances are considered, the scales tilt in favour of allowing the amendment sought. I therefore hold without equivocating that the merits of the application herein have been demonstrated. I hereby allow the application in terms of prayers 1 and 2. Costs, which is prayer 4, to be in the cause.

JUDGEMENT DATED, SIGNED AND DELIVERED IN OPEN COURT AT KITUI THIS 3RD APRIL, 2025.

In the presence of,

1st defendant present

2nd defendant present

Plaintiff absent

Mwinzi for defendants

Wanyonyi absent for plaintiff

Court Assistant - Musyoki

A. KANIARU

JUDGE- ENVIRONMENT & LAND COURT, KITUI

3/4/2025

