



**Walao & 2 others v Kimani & 5 others (Environment & Land Case  
37 of 2019) [2022] KEELC 3931 (KLR) (5 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3931 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KISUMU  
ENVIRONMENT & LAND CASE 37 OF 2019  
A OMBWAYO, J  
AUGUST 5, 2022**

**BETWEEN**

**GEORGE ODERO WALAO ..... 1<sup>ST</sup> PLAINTIFF  
PAUL OCHIENG ODERO ..... 2<sup>ND</sup> PLAINTIFF  
JOSEPH MALAO ODERO ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**DOMICUS IHUTHIA KIMANI ..... 1<sup>ST</sup> DEFENDANT  
ERICK OMUODO OUNGA ..... 2<sup>ND</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT  
CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT  
DIRECTORATE OF CRIMINAL INVESTIGATIONS ..... 5<sup>TH</sup> DEFENDANT  
ATTORNEY GENERAL ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

**Brief Facts**

1. The matter for determination herein is the Plaintiffs' Application dated 1<sup>st</sup> March 2021 and filed on 3<sup>rd</sup> March 2021 under Order 51 Rule 1, Order 8 Rule 3,5 of the *Civil Procedure Rules* and section 3A of the *Civil Procedure Act* and all enabling provisions of the law seeking orders that this Honourable Court be pleased to grant the Plaintiffs leave to amend the Plaint. That the annexed draft of the Amended Plaint be deemed as duly filed upon payment of the requisite fees. That service to the 1<sup>st</sup> Respondent be dispensed with. That costs of this Application be provided for.



2. The Application was based on grounds that the 1<sup>st</sup> Plaintiff is a very old man of over 80 years and has been ailing hence the need to dispose this suit expeditiously and it is necessary to bring out all the issues which will help the court to resolve this matter. It is the Plaintiffs' case that no prejudice and no injustice will be occasioned to any party if the amendments are allowed and it is in the interest of justice that this Application be heard immediately as the Defendant had been notified of the intended amendments.
3. It is the Plaintiffs' case that the 1<sup>st</sup> Defendant failed to enter appearance nor file a Statement of Defence despite being served through substituted service via a newspaper advert and more than 12 years have passed since the 1<sup>st</sup> Plaintiff was fraudulently and through misrepresentation and deceit, dispossessed and deprived of his parcel of land by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants. The Application was supported by the Affidavit of George Odero Walao who relied on the grounds in the Application. I have perused the file and do confirm that the Defendants herein did not file a response to the Application. The Application was canvassed by way of written submissions.

### **Plaintiffs Submissions**

4. The Plaintiffs filed their submissions on 27<sup>th</sup> September 2021 where two issues were raised for determination that is whether the Plaintiffs should be allowed to file an Amended Plaint and who should bear the costs of the Application.
5. The Plaintiffs relied in the case of *Eastern Bakery v Calestino* (1958) EA 462 (CAU) and the case of *Central Bank Kenya Limited vs Trust Bank Limited* (2000) 2 EA 365 where the court set out the principles of amendments of pleadings.
6. It was submitted that the court has wide discretion to allow any party to amend its pleadings at any stage of proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct under Order 8 Rule 3 of the *Civil Procedure Rules*. That the court should consider whether the amendments sought are necessary for determination of the real question in controversy and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.
7. It was the Plaintiffs' submission that they should be granted orders as prayed for.

### **Defendants' Submissions**

8. The Defendants' failed to file their submissions as directed by the court.

### **Analysis and Determination**

9. The 1<sup>st</sup> Plaintiff in his Supporting Affidavit stated that it was necessary to amend the Plaint in order to bring out all the issues which will enable the court to resolve this matter. It should be noted that the Defendants herein did not file a response to the Application.

Order 8 rule 3 of the *civil procedure Rules*, 2010, which states: -

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.
2. Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.



3. An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
  4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
  5. An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
10. The Learned Authors of *Halsbury's Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -
- “.....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, 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...”
11. In the case of *Harrison C. Kamau v Blue Shield Insurance Co. Ltd* (2006) eKLR, the court stated that:-
- “the amendments of pleadings.....(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:
- (i) There has been no undue delay;
  - (ii) No new inconsistent cause of action (is) introduced;
  - (iii) No vested interest or accrued legal right (is) affected; and
  - (iv) The amendment (can) be allowed without injustice to the other side.....”
12. I have looked at the draft Amended Plaint and I am of the view that there is no inconsistent cause of action that is being introduced, the same has been brought without undue delay as the matter had not commenced for hearing and it is clear that no prejudice and injustice would be occasioned to any party if the amended Plaint is allowed.
13. This court finds merit in the Plaintiffs' Application dated 1<sup>st</sup> March 2021 and the Plaintiffs are hereby granted leave to amend the Plaint as per the filed draft of the Amended Plaint dated 1<sup>st</sup> March 2021 which is deemed as duly filed.



14. The Defendants herein are granted leave to file an Amended Statement of Defence in 21 days and the Plaintiffs are at liberty to file any Reply to the Amended Statement of Defence. That costs be on the cause.

**DATED AT KISUMU THIS 5TH DAY OF AUGUST, 2022**

**ANTONY OMBWAYO**

**JUDGE**

