



**Mwakulagizwa & others v Mwinganzu & another (Environment & Land
Case 35 of 2018) [2022] KEELC 13814 (KLR) (29 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13814 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 35 OF 2018**

**M SILA, J
SEPTEMBER 29, 2022**

BETWEEN

KHAMIS MOHAMED MWAKULAGIZWA & OTHERS PLAINTIFF

AND

ALI MOHAMED MWINGANZU 1ST DEFENDANT

WAKF COMMISSIONERS 2ND DEFENDANT

RULING

1. The application before me is that dated 17 February 2022 filed by the plaintiffs. It is an application seeking leave to amend the plaint.
2. I have gone through the record. The suit was commenced through a plaint filed on 14 February 2018. That plaint sues two defendants, respectively being, Ali Mohamed Mwinganzu and Wakf Commissioners. In that plaint, it is averred that the plaintiffs purchased some plots in the land parcel 428/I/MN from one David Karisa Tui. It is pleaded that the 1st defendant later sued David Karisa Tui for vacant possession and obtained judgment in his favour through the case Mombasa HCCC No. 168 of 2008. He thereafter threatened to evict the plaintiffs which resulted in the parties entering into some form of agreement that would enable them purchase the property from the 1st defendant. It is pleaded that despite receiving some money, as deposit, the 1st defendant has reneged on the agreement and refused to perform his part of the contract. There is pleading that the property is Wakf property under the 2nd defendant. In the suit, the plaintiffs *inter alia* seek orders to compel the 1st defendant refund the money paid to him, an order to compel the 2nd defendant to take over administration of the suit property, and a permanent injunction to stop the defendants from interfering with their possession of the suit property.



3. The 1st defendant entered appearance and filed a defence and counterclaim. The alleged sale agreement is denied, and in the counterclaim the 1st defendant has sought for orders of eviction and damages for trespass.
4. No appearance has been entered on behalf of the 2nd defendant.
5. I have mentioned that through this application, the plaintiffs seek to amend the plaint. There is a draft amended plaint which is annexed. From it, I can see that among the proposed amendments is the removal of the 2nd defendant from the case. There is also proposed amendment to the prayers so that the orders now sought include the order to compel the 1st defendant to complete the sale agreement.
6. Nothing has been filed to oppose the motion.
7. The application is brought *inter alia* pursuant to the provisions of Order 8 Rule 3 which permits the court to allow a party to amend his pleadings at any stage of the proceedings. Courts are generally liberal when it comes to amendments which is well exemplified by the dictum of O'Connor J, in the case of *Eastern Bakery v Castelino* (1958) EA 461, where the judge stated as follows at p462 :-

“It will be sufficient for 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: *Tildesley v Harper* (10 [1878], 10 Ch. D. 393; *Clarapede v Commercial Union Association* (2) [1883], 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v Murdoch* (3) [1875], 1 Ch. D. 42. 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: *Ma Shwe Mya v Maung Po Hnaung* (4) [1921], 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v Neal* (6) [1887], 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

8. So far, this suit is yet to be heard. I do not see any prejudice that the defendants stand to suffer if I allow the amendments. Certainly no prejudice will be occasioned to the 2nd defendant who is proposed to be removed from the suit. The 1st defendant will be the sole remaining defendant and if he has any issue with the amended plaint, he will have liberty to amend his defence and counterclaim if found necessary.
9. For the above reasons, I allow the application. The plaintiffs may proceed to file and serve the amended plaint within 14 days from today. The plaintiffs will however shoulder the costs of the application as they had opportunity to properly plead their case when they first filed the plaint. There is nothing to suggest that the amendments have been occasioned by any new developments while the suit was proceeding.
10. Orders accordingly.

DATED AND DELIVERED THIS 29TH DAY OF SEPTEMBER 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT



AT MOMBASA

