



REPUBLIC OF KENYA



KENYA LAW
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**Patel & another v Limuru Hills Limited & another (Environment & Land
Case E027 of 2021) [2025] KEELC 3009 (KLR) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEELC 3009 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E027 OF 2021**

JA MOGENI, J

APRIL 2, 2025

BETWEEN

KIRITKUMAR RAMBHAI PATEL 1ST PLAINTIFF

ARUNABEN KIRITKUMAR RAMBHAI 2ND PLAINTIFF

AND

LIMURU HILLS LIMITED 1ST DEFENDANT

EQUITY BANK (KENYA) LIMITED 2ND DEFENDANT

RULING

1. The Application before me is the Notice of Motion dated 15/02/2024, brought under Section 19(1) and (2) and Sections 19 and 26(3) of the Environment and Land Court Act, Section 1A and 3B of the Civil Procedure Act, Order 1 Rule 10 and Order 8 Rule 3 of the Civil Procedure Rules, 2010 and all other enabling provisions of law. The Application seeks the following orders:-
 1. That, this Honourable Court be pleased to certify this Application as urgent and do dispense with service of the same and proceed to hear the Application ex-parte in the first instance.
 2. That, this Honourable Court be pleased to hear the instant Application before the hearing of the substantive suit scheduled for 19th February 2024.
 3. That, the hearing date of 19th February 2024 be vacated to allow for the inter partes hearing and determination of this Application.
 4. That, the Honourable Court be pleased to strike out the name of the 2nd Plaintiff from the suit.
 5. That, leave be granted to the 1st Plaintiff to amend the Plaint dated 25th February 2021 in terms of the draft amended Plaint.



6. That, this Honourable Court does order that the 2nd Defendant furnish the 1st Plaintiff with the following documents forthwith:
 - i. Charge dated 17th April 2015 over L.R. No. 4967/37 and L.R. No. 4967/38;
 - ii. Valuation Reports over L.R. No. 4967/37 and L.R. No. 4967/38;
 - iii. Ninety (90) days' statutory notice to the 1st Defendant under Section 90 of the Land Act;
 - iv. Fourty (40) days' notice to sell to the 1st Defendant under Section 96(2) of the Land Act;
 - v. Fourty Five (45) days' Redemption Notice to the 1st Defendant by the Auctioneers;
 - vi. Copies of advertisements by the Auctioneers for the auction;
 - vii. Letter by auctioneer confirming aborted auction;
 - viii. Copy of the Court order authorizing sale of L.R. Nos. 4967/37 and L.R. No. 4967/38 by way of private treaty;
 - ix. Sale agreement by way of private treaty over L.R. Nos. 4967/37 and L.R. 4967/38 between the 2nd Defendant and Superior Hotels Limited; and
 - x. Transfer by Chargee over L.R. Nos. 4967/37 and L.R. No. 4967/38 to Superior Hotels Limited.
 7. That, leave be granted to the 1st Plaintiff to file a further witness statement and supplementary list of documents upon receipt of the documents sought in prayer 6 hereinabove.
 8. That, costs of the Application be in the cause.
2. The Application is premised on the annexed Affidavit of Kiritkumar Rambhai Patel and is made in the following grounds:
- i. That, the Plaintiffs filed suit by way of Plaint dated 25th February 2021 seeking for inter alia orders for a permanent injunction restraining the Defendants, whether by themselves, their agents, successors or assigns from selling, transferring, disposing or in any other way offering Log House No. 19 located on Land Reference Numbers 4967/37 (Original Number 4967/14/7) and 4967/38 (Original Number 4967/14/8) (hereinafter the "developed parcels") to any other person except by way of transfer to the Plaintiffs and an order compelling the 2nd Defendant to issue a partial discharge of Log House No.19 on the developed parcels upon payment of the balance of the purchase price by the Plaintiff.
 - ii. That, despite service of Summons on the 1st Defendant Company, it never entered appearance.
 - iii. That, the 2nd Plaintiff passed away on 2nd June 2022.
 - iv. That, the suit had previously been scheduled for hearing on 13th October 2022, 23rd February 2023 and 5th June 2023 when the same did not proceed. During the appearance on 5th June 2023, the Court granted a last adjournment in the matter and scheduled the same for hearing on 17th October 2023.
 - v. That, when the matter came up for hearing on 17th October 2023, although we were ready to proceed with the hearing, the 2nd Defendant Bank's Advocates informed the Court that



there had been a change of circumstances as the Bank had disposed of the developed parcels on which the suit property is situate in exercise of its statutory power of sale, thereby significantly changing the substratum of the suit. As the Bank had not notified the 1st Plaintiff about the said sale prior to the Court attendance, the 1st Plaintiff's Advocate sought and the Court reluctantly granted an adjournment on the said ground.

- vi. That, the 2nd Defendant Bank sold the developed parcels via private treaty to Superior Hotels Limited.
 - vii. That, the suit was rescheduled for hearing 19th February 2024 and the Court marked this as the final adjournment and ordered that if the 1st Plaintiff does not proceed with the hearing on the said date the suit would be dismissed.
 - viii. That, the 1st Plaintiff seeks to amend the Plaint dated 25th February 2021 to seek inter alia, for refund of the deposit paid to the 1st Defendant in the sum of Kshs. 2,600,000.00 together with interest and to strike out the name of the 2nd Plaintiff from the suit before the next hearing date on 19th February 2024.
 - ix. That, unless this Honourable Court grants leave to the 1st Plaintiff to amend his Plaint dated 25th February 2021 the Plaintiffs claim will be defeated due to the change of circumstances.
 - x. That, it is in the interests of justice that the 2nd Defendant is compelled to produce the documents sought in order for this Honourable Court to justly determine the dispute between the parties and for the instant Application to be heard and determined before the hearing date of 19th February 2024.
 - xi. That, the Defendants will not be prejudiced by the proposed amendments in the Plaint.
 - xii. That, it will therefore be just, mete and in the interest of justice of the case for the orders sought to be granted.
3. The said Application is opposed by the 2nd Defendant/Respondent who filed Grounds of Opposition dated 2/10/2024 brought under Order 51 Rule 14.
 4. Curiously, the 1st Defendant who had entered into the sale agreement with the Plaintiff did not participate in the Application.
 5. The 2nd Defendant through the Grounds of Opposition contended that the Motion is misconceived, scandalous, frivolous, vexatious, mala fides and an abuse of this Court's process aimed at wasting judicial time and resources and at the expense of the 2nd Defendant/Respondent contrary to the Overriding Objectives under the provisions of Sections 1A, 1B and 3A of the Civil Procedure Act, Cap 21.
 6. The 2nd Defendant/Respondent stated that there is in existence a valid charge duly executed by the 1st Defendant on its own free will in favour of the 2nd Defendant/Respondent the right to exercise the statutory power of sale over the charged securities in order to settle the accrued arrears in the event that the 1st Defendant/Respondent failed to honor their loan repayment obligations.
 7. It was their contention that there was no Court Order barring the exercise of the 2nd Defendant/Respondent's statutory power of sale and the chargee's interest supersedes the doctrine of lis pendens (see *Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna, Edward Njuguna Kangethe, George James Kangethe, Nguru Auctioneers, Leakey Auctioneers & Joserick Merchants Auctioneers* [2017] KECA 79 (KLR)).



8. From their viewpoint, the 1st Defendant/Respondent has neither contested the validity of the subject charge in favour of the 2nd Defendant/Respondent nor the exercise of the Statutory Power of Sale by 2nd Defendant/Respondent.
9. He further stated that the exercise of the Power of Sale by the Defendants/Respondents is statutory, contractual and legal and this Honourable Court cannot therefore interfere with the same as it would be tantamount to rewriting the Contract between the parties, which this Honourable Court has no jurisdiction to do.
10. They contend that all the requisite Statutory Notices by the 2nd Defendant/Respondent were duly served and received by the 1st Defendant/Respondent and the sale by private treaty conducted on 6th September 2023 is therefore regular and in accordance with the law.
11. That the Plaintiffs'/Applicants' suit is utterly hopeless as it plainly and obviously discloses no reasonable cause of action and/or a prima facie case against the 2nd Defendant/Respondent, and is so weak as to be beyond redemption and incurable by amendment of the Plaint as sought. The instant Motion does not meet the time-honoured principles to warrant a grant of an order for amendment as sought. (See *Kassam vs. Bank of Baroda (Kenya) Ltd* (2002) 1 KLR 294 as quoted with approval in the case of *Nguruman Limited vs. Jan Bonde Nielson* [2014] KEHC 1718 (KLR). And that the 2nd Defendant/Respondent will be greatly prejudiced should this Court grant the Orders as sought in the instant Motion as the suit property was sold over a year ago.
12. It is their contention that the intended amendment of the Plaint will alter the character of the subject suit and thus the sought amendment is in essence the Plaintiff/Applicant filing a new suit disguised as an Application for amendment of the Plaint. Further that the sought amendment will remove this suit from the jurisdiction of this Honourable Court as it lacks jurisdiction to determine the issues raised in the draft amended Plaint. Thus any orders granted will be in vain as this Court can neither hear nor determine the amended suit nor can it transfer the amended suit to a Court of competent jurisdiction (See *Phoenix of E.A. Assurance Company Limited vs. S. M. Thiga T/A Newspaper Service* [2019] KECA 767 (KLR).
13. It is their Ground of Opposition that the Court owes the 2nd Defendant/Respondent a fiduciary duty under Article 159 of the *Constitution of Kenya, 2010* to facilitate the fulfilment of contractual obligations as a matter of good policy that when a property is given as security for a loan it becomes a commodity for sale and is subject to sale in case of default.
14. Thus the 2nd Defendant seeks dismissal *limine* of the Plaintiffs'/Applicants' Notice of Motion dated 15th February 2024.
15. A brief history of the Plaintiffs' case would be useful at this point. The Plaintiffs filed the instant suit by way of a Plaint dated 25th February 2021. The suit had previously been scheduled for hearing on 13th October 2022, then 23rd of February 2023, then 5th June 2023 and then 17th October 2023. On this last date of 17th October although the 1st Plaintiff was ready to proceed with the hearing, the 2nd Defendant Bank's Advocates informed the Court that there had been a change of circumstances as the Bank had disposed of the developed parcels on which the suit property is situate in exercise of its Statutory Power of Sale, thereby significantly changing the substratum of the suit.
16. The Plaintiffs' case is that the 1st Defendant breached the terms of the agreement of sale by failing to furnish them with a notification of the issuance of the certificate of practical completion despite the development of Log 19 which is the suit property which they had purchased and that it had



- been completed. They argue that the completion of the construction was to be 31/1/2018. That the notification was necessary to allow the Plaintiffs to pay the balance of the purchase price.
17. It is the Plaintiffs' contention that they have acquired a beneficial interest on the suit property that ought to be protected by this Court by way of an interim injunction. There is a confirmation by the 1st Defendant of receipt of the deposit of Kshs 2.6 million. The agreement at Clause 4.2 provided that the Plaintiffs shall pay the deposit to the vendors Advocates who shall immediately and unconditionally release the same to the vendor.
 18. Given the above development, the hearing of the suit was rescheduled to 19th February 2024. However, the same did not proceed on the said date as the 1st Plaintiff sought leave to amend the Plaint to seek inter alia, for refund of the deposit paid to the 1st Defendant in the sum of Kshs. 2,600,000.00 together with interest and to strike out the name of the 2nd Plaintiff from the suit who has since passed on.
 19. That pending the hearing and determination of the 1st Plaintiff's Application seeking leave to amend the Plaint, the 2nd Defendant through a Notice of Preliminary Objection dated 3rd June 2024 challenged this Court's jurisdiction which matter was heard and determined. The 2nd Defendant had argued that the Court's jurisdiction to hear the matter has been ousted as the suit was lost on 6th September 2023 when the 2nd Defendant has sold in exercise of its statutory power the parcel of land upon which the suit property has been constructed.
 20. As intimated, the Court dismissed the 2nd Defendant's Notice of Preliminary Objection and held that it had jurisdiction to hear the suit.
 21. So this Application is brought in order to enable the 1st Plaintiff to pursue his claim against the Defendants as the prayers sought in the Plaint dated 25th February 2021 are no longer tenable against the Defendants and to have the name of the 2nd Plaintiff who is deceased having passed on 2nd June 2022 to be struck off the suit.
 22. Parties were directed to file submissions and the Plaintiff filed submissions dated 18/11/2024 and argues that under Order 1 Rule 10 the Court has power at any stage of the case to order striking out to any name that has been improperly joined. Thus that since the 2nd Plaintiff has passed on her name ought to be struck out of the suit.
 23. He further submitted that under Order 8 Rule 3(1) and (5) of the Civil Procedure Rules, the Court has discretion to allow amendments to pleadings at any stage of the proceedings before Judgement is pronounced.
 24. Counsel for the 1st Plaintiff also made reference to Order 8 Rule 5(1) and submitted that amendments may be allowed for purposes of assisting the Court determine the real issue in dispute and also for purposes of correcting an error on the records. The amendment can be done if a party moves the Court or even suo motto.
 25. It is his submission that whereas he was ready to proceed on 17/10/2023 it was the 2nd Defendant's Counsel who alerted the Court that the substratum of the suit had changed. As such this change necessitates an amendment taking into cognizance the new circumstances that have arisen.
 26. In further submission, Counsel for the 1st Plaintiff averred that the amendments sought by the Plaintiff would not prejudice the Defendants in any way and further, that any prejudice suffered by the introduction of the amendments can be compensated by an order for costs. It is the 1st Plaintiff's submission that the proposed amendments are not inconsistent with the claim before the Court since



they arise from the same chain of transaction that forms the basis of the claim and was engineered by the 2nd Defendant's action of selling the suit property while the case was in pendency.

27. The 1st Plaintiff relied on the cases of Joseph Ochieng' & 2 Others vs. First National Bank of Chicago (1995)eKLR, Eastern Bakery vs. Castelino (1958)EA 461, Court of Appeal decision in Elijah Kipng'eno Arap Bii vs. Kenya Commercial Bank [2013]eKLR, The Court of Appeal decision in Central Kenya Ltd vs. Trust Bank Ltd [2000] EALR, where the Court quoted with approval the learned authors of AM Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, Vol 26th Edn at P 2245 where they stated as follows regarding the overriding consideration in Application seeking leave to amend pleadings:

“That a party is allowed to make such amendments as maybe necessary [or determining the real question in controversy or to avoid multiplicity of suits ... ”

The others cases relied on by the Plaintiff were St Patrick's Hill School Limited vs Bank of Africa, St. Patrick's Hill School Limited vs. Bank of Africa Kenya Limited [2018]eKLR, Everest Limited vs Katherine Wambui Kuria, Court of Appeal decision in Marete vs Ndegwa & 2 Others [2024]KECA where the Court of Appeal upheld the applicability of the doctrine of lis pendens. There was also the Amalo Co. Limited vs. Investments & Mortgages Bank Limited [2005]KEHC and Nvanza Management Limited & Another vs. National Bank of Kenya Limited & 3 Others[2023]KEHC.

28. The 2nd Defendant filed their submissions dated 9/12/2024. Their bottom-line submission was that this Court lacks jurisdiction to hear and determine the suit as proposed to be amended. That the 1st Plaintiff cannot challenge the power of sale by the 2nd Defendant since they were not privy to the contract. That in any case the Plaintiff's case ended on 6/09/2023 when the 2nd Defendant exercised its power of sale and therefore there is no suit in existence and that the Plaintiff needs to file a new suit.
29. The 2nd Defendant has relied on the cases of Kassam vs Bank of Baroda (Kenya) Ltd (2002)1 KLR 294 as quoted with approval in the case Nguruman Limited v Jan Bonde Nielson [2014]KEHC 1718 (KLR) in which the Court held as follows:

“Firstly, that the amendments should be allowed if the Court is satisfied that the party applying is not acting mala fide; it will not cause some injury to the other side which cannot be compensated by costs; is not a device to abuse the Court process; is necessary for the purpose of determining the real questions in controversy; the amendment will not alter the character of the suit. Secondly, that in case of late amendments, the Applicants must show that the delay is not deliberate and Court exercises such discretion for or against the Applicant. Thirdly, in exercising discretion, the Court ought to consider whether the amendment embodies a legally valid claim; the reasons why the proposed amendment was not included in the original pleading and justification for the delay if any.”

30. The other Court cases relied on were Court of Appeal case of Co-operative Bank of Kenya Limited v Patrick Kangethe Njuguna & 5 others [2017] eKLR , Court of Appeal decision in Equity Bank Limited v Bruce Mutie Mutuku t/a Diani Tour Travel (2016) eKLR, Owners of the Motor Vehicle 'Lilian S' vs Caltex Oil (Kenya) Limited [1989]eKLR, Court of Appeal case of Suleiman Said Shabhal vs Independent Electoral & Boundaries Commission & 3 Others [2014] eKLR, where the Court of Appeal quoted Macfoy vs United Africa Col Ltd (1961) 3All ER 1169. The 2nd Defendant submitted that the 1st Plaintiff has no cause of action against the 2nd Defendant and cannot bring any action against it.



31. He further submitted that the lis pendens rule does not automatically act as stay unless the suit is actively being prosecuted.

Analysis and Determination

32. The starting point is to address the issue of jurisdiction raised by the 1st Defendant in its Grounds of Opposition.

33. A Court of law cannot validly take any step without jurisdiction. The moment a party in a suit successfully challenges the jurisdiction of the Court, the said Court must down its tools. The Supreme Court in the Matter of Interim Independent Electoral Commission [2011] eKLR held as follows:

“Assumption of jurisdiction by Courts in Kenya is a subject regulated by *the Constitution*, by statute law, and by principles laid out in judicial precedent. The classic decision in this regard is the Court of Appeal decision in Owners of Motor Vessel ‘Lillian S’ v. Caltex Oil (Kenya) Limited [1989] KLR 1, which bears the following passage (Nyarangi, JA at p.14):

“I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the Court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a Court has no power to make one more step”.

(30) The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the Recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.”

34. In the instant suit the 2nd Defendant has based his Grounds of Opposition on the ground that this Court lacks jurisdiction to hear and determine the new issues that are being proposed to be introduced by the Plaintiff in the amended Plaint. The issue of jurisdiction is a pure point of law which can determine the matter without having to consider the merits of the case.

35. I have perused the Amended Plaint in light of the prayers sought therein. The Plaintiff proposes to introduce the phrase “..... and the late Arunaben Kiritkumar Rambhai” at paragraph 7, 8, 10, 12 and 16. He also seeks to introduce paragraphs 20 A to 20 G addressing the issue of sale by private treaty of the suit property. Which in sodoing is to show that the 2nd Plaintiff is deceased and therefore the contention that the 2nd Plaintiff’s name be struck out of the suit.

36. As a result to the proposed amendment the Plaintiff seeks the following:

- a. A declaration that the sale by private treaty by the 2nd Defendant of Land Reference Nos. 4967/37 and 4967/38 was in breach of the doctrine of lis pendens and is therefore null and void.
- b. A declaration that the Plaintiff is entitled to a refund of the deposit in the sum of Kesh 2,600,000.00 paid to the 1st Defendant for the purchase of Log House No. 19 situate in Land Reference Nos. 4967/37 and 4967/38.



- c. Refund by the 1st Defendant of the deposit in the Kesh 2,600,000.
 - d. Compound Interest on C above at 14% per annum with effect from 9th May 2016 until payment in full.
 - e. General damages.
 - f. Judgment against the Defendants jointly and severally in the sum of Kesh 5,000,000 being loss of bargain on the property.
 - g. Costs of the suit to be borne by the 1st Defendants.
 - h. And any other or further reliefs as this Honorable Court may deem fit to grant.
37. The 1st Defendant's view is that the above matters cannot be addressed by the ELC since the issues are the subject of the High Court mandate. That the ELC Court may not be able to transfer the suit to the High Court which has the mandate to deal with issues of charges, mortgages and commercial transaction that seem to be the focus in the amended Plaint, On his part, the Plaintiff opines that this Court has jurisdiction to determine the issues as they are within its pecuniary jurisdiction and they are a mixture of both commercial and land use.
38. The jurisdiction of the Environment and Land Court is limited by Article 162(2) and (3) of *the Constitution* of Kenya and Section 13(2) of the ELC *Act No. 19 of 2011*. Article 162(2)(b) which states that Environment and Land Court has the mandate to hear and determine disputes relating to use and occupation and title to land.
39. In particular the provisions of Article 162(2) of *the Constitution* of Kenya 2012 provide as follows: -
- “(1) The superior Courts are the Supreme Court, the Court of Appeal, the High Court and the Courts mentioned in clause
 - 2. Parliament shall establish Courts with the status of the High Court to hear and determine disputes relating
 - (a); and
 - (b) the environment and the use and occupation of, and title to, land.
 - (3) Parliament shall determine the jurisdiction and functions of the Courts contemplated in Clause (2).”

Jurisdiction of the Court

40. The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162(2) (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.
41. In exercise of its jurisdiction under Article 162(2) (b) of *the Constitution*, the Court shall have power to hear and determine disputes-
- a. relating to environmental planning and protection, climate issues, land use planning, title, tenure, boundaries, rates, rents, valuations, mining, minerals and other natural resources;
 - b. relating to compulsory acquisition of land;
 - c. relating to land administration and management;



- d. relating to public, private and community land and contracts, choses in action or other instruments granting any enforceable interests in land; and
- e. any other dispute relating to environment and land.”
42. It follows therefore that the High Court's enforcement jurisdiction does not extend to matters relating to disputes falling under Section 13(2) of the *Environment and Land Court Act*.
43. The jurisdiction of the High Court is set out under Article 163(3) which states that the High Court shall among others, have; a) Unlimited original jurisdiction in criminal and civil matters.
44. Black's Law Dictionary, 9th Edn; defines the word 'use' as being:-
 “The Application or employment of something; esp. a long continued possession and employment of a thing for the purpose for which it is adapted, as distinguished from a possession or employment that is merely temporary or occasional.’ Emphasis added.
45. The Court of Appeal stated in the case of Co-operative Bank of Kenya vs Patrick Kangethe Njuguna & 5 Others (supra) that for land use to occur, the land must be utilized for the purpose for which the surface of the land, air above it or ground below it is adapted. To the law therefore, land use entails the Application or employment of the surface of the land and/or the air above it and/ or ground below it according to the purpose for which that land is adapted.
46. In the instant suit the Plaintiff had purchased some Log Home No. 19 which was sold on an off-plan basis located on the suit land described as LR 4967/37 and 4967/38 but the 1st Defendant failed to disclose that it had charged the property and the 2nd Defendant sold off the property during the pendency of the suit. The Plaintiff thus sought to amend the Plaint seeking a refund of the deposit totaling Kesh 2,600,000 and Judgment against the Defendant jointly and severally for loss of bargain.
47. As a result the 2nd Defendant argues that the substratum of the suit has changed from use of land, possession and title to refund of monies paid and loss of bargain.
48. Now, Article 162 of *the Constitution* grants the ELC equality of status with the High Court. By dint of this equality of status, the ELC Court has unlimited original jurisdiction in Civil disputes germane to land and the environment.
49. Section 13(1) of the *Environment and Land Court Act* reads as follows
 “(1) The Court shall have original and appellate jurisdiction to hear and determine all disputes in accordance with Article 162 (b) of *the Constitution* and with the provisions of this Act or any other law applicable in Kenya relating to environment and land.”
50. I find that this Court has jurisdiction to hear and determine this suit. Where necessary, the ELC Court can transfer a suit to a Subordinate Court or withdraw a suit from a Subordinate Court and hear and determine it as allowed by Section 18 of the *Civil Procedure Act*.
51. Infact, pecuniary jurisdiction is subject to this overall jurisdiction as set out in Section 13 of the *Environment and Land Court Act* and Article 162(2)b of *the Constitution* of Kenya 2010.
52. On the other hand, Section 9 of the Magistrates Court *Act No. 26 of 2015* confers jurisdiction to the Magistrates Courts to hear and determine land disputes in exercise of jurisdiction conferred upon it



- by Section 26 of the *Environment and Land Court Act* and is subject to the pecuniary limits under Section 7 of the Magistrates Court Act.
53. Section 11 of the *Civil Procedure Act* provides that every suit shall be instituted in the Court of the lowest grade competent to try it. This, in my view is administrative, and not intended to act as bar to Courts hearing disputes.
 54. The parties could by consent have a suit transferred to the Subordinate Court, a Defendant could apply to have a suit transferred for valid reasons given, the Court may or on its own Motion have a suit transferred to the Subordinate Court for speedy dispensation of justice but not due to lack or want of jurisdiction.
 55. Consequently, the 2nd Defendant's contention on jurisdiction has no legal basis.
 56. Now I turn to the key issue of the Application which is whether the Applicant's Notice of Motion Application for amendment is merited. The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other party can be compensated by costs.
 57. A wider footage on the issue was given in the case of *Ochieng and 2 Others vs. First National Bank of Chicago (1995) eKLR*, where the Court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings. The same is as follows:
 - a. the power of the Court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the Court at any stage of the proceedings;
 - d. 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; and
 - e. The Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitations Act subject however to powers of the Court to still allow an amendment notwithstanding the expiry of current period of limitation.
 58. The above mentioned parameters are not exhaustive as far as the grant of leave to amend Plaintiffs is concerned. What that means is that the Court has a very wide berth in granting leave to amend. This position was stated in the case of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018]eKLR* cited by the Plaintiff/ Applicant in his submissions.
 59. A perusal of the Draft Amended Plaintiff indicates that the proposed amendments are as stated at paragraph 36 herein above.
 60. The 2nd Defendant contends that this Application has departed from the original pleadings and introduced a new claim and this Court has no jurisdiction over the new claim. That 2nd Defendant stands to suffer prejudice.
 61. On the other hand, the Plaintiff contends that the amendment should be allowed for the purposes of determining the real questions in controversy between the parties in this case. The Application does not introduce any new claim as the amendment has been informed by the developments that have



occurred while the suit was pending. That no prejudice will be suffered by the Defendants. It is actually the Plaintiff who would be occasioned substantial injustice if the amendment is not allowed.

62. It is clear from the principles discussed above that an amendment of pleadings in general may be allowed before the final Judgement is delivered. The instant case is still at its hearing stage. No party has called any witnesses yet infact the hearing has not yet started.
63. Even perchance the Defendants had closed their respective cases, which they haven't, the provisions of Order 18, rule 10 of the Civil Procedure Rules provides that:

‘The Court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the Court thinks fit.’

64. Further Section 146 (4) of the Law of Evidence Act provides that:

“The Court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross –examination and re – examination respectively.”

65. This Court has the responsibility to ensure that litigants are given ample opportunity to ventilate and make their presentations in respect of all the issues arising in their case.
66. I do not see how the 2nd Defendant will be prejudiced by allowing the Plaintiff leave to amend his Plaintiff. The 2nd Defendant will have a chance to even further amend his own pleadings if necessary. For the purpose of determining the real questions in controversy between the parties herein, this Court will allow the Plaintiff's Application to amend the Plaintiff.
67. Accordingly, this Court makes the following orders: -
- a. The Plaintiff is granted leave to amend his Plaintiff.
 - b. The Amended Plaintiff filed is deemed as properly filed upon payment of the requisite fees and should be served within 7 days from the date of this Ruling.
 - c. The Defendants are granted corresponding leave to amend, file and serve an amended defence within 14 days from the date of service of the Amended Plaintiff.
 - d. The costs of the Application shall abide the outcome of the main suit.

It so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF APRIL, 2025
VIA MICROSOFT TEAMS.**

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MOGENI J

JUDGE

Judgement read in virtual Court in the presence of:

1st Plaintiff/Applicant – Absent

2nd Plaintiff – Absent

1st Defendant – Absent



Ms. Ngure holding brief for Mr. Njuguna for the 2nd Defendant/Respondent
Melita - Court Assistant.

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MOGENI J

JUDGE

