



**Mutokaa & 35 others v Kithae in trust for Jerevasion Ngari Kang'oroti & 119 others
(Environment & Land Case 254 of 2014) [2022] KEELC 15722 (KLR) (31 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 15722 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ENVIRONMENT & LAND CASE 254 OF 2014
A KANIARU, J
OCTOBER 31, 2022**

BETWEEN

PETER MURIUKI MUTOKAA & 35 OTHERS PLAINTIFF

AND

**KANG'OROTI KITHAE IN TRUST FOR JEREVASION NGARI KANG'OROTI
& 119 OTHERS DEFENDANT**

RULING

1. What is before me for determination is a notice of motion dated October 19, 2021 filed in court on July 26, 2021. The Application is expressed to be brought under Order 8 rule 3 and 5, Order 51 rule 1 of the *Civil Procedure Rules*, Article 159 (2) (d) of the *Constitution* of Kenya, Sections 3, 13 and 19 of the *Environment & Land Court Act* and all other enabling provisions of the law.

Application

2. The application came with five prayers but prayer one (1) is now moot. The prayers for consideration are therefore as follows;

Prayer 2: That the Honourable court be pleased to grant the plaintiff leave to amend the plaint dated December 30, 2014.

Prayer 3: That the annexed draft of the amended plaint be deemed as duly filed upon payment of the requisite fees.

Prayer 4: That this honourable court be pleased to issue any other order that the court will deem expedient in the circumstances.

Prayer 5: That costs be in the cause.



3. The application is premised on the grounds that the plaint is tainted with inadvertent defects and erroneous description of the suit property, which errors need to be corrected for clarity purposes and for just determination of the dispute. It was averred that the purpose of the amendment was to determine the real questions in controversy between the parties. It was also deposed that it was important to amend the plaint and join Jeremiah Josiah Nyaga, Ngigeri Technical Secondary School, John Muturi Nyaga, Albert Muriuki Mbithi, Wycliffe Njagi Munyi and David Njiru Ireri as the 121st, 122nd, 123rd, 124th, 125th and 126 defendants. It was stated too that the plaint had failed to capture specific sub-divisions of the land claimed by the plaintiff and it was in the interest of justice that the said sub-divisions be brought before the court for purposes of a just and fair determination. The application was said to have been filed on bonafide grounds and that no prejudice would be occasioned to the defendants if the application is allowed. The amendments were termed as technical in nature and it was said that no new facts were being introduced.
4. Only the 88th Defendant opposed the suit by filing grounds of opposition. He raised three grounds of opposition. He deposed that no valid grounds had been disclosed either in the application or the supporting affidavit to justify grant of the orders. He also alleged that the grounds set in the application were an abuse of the court process on grounds that there was inordinate delay in seeking the amendments; that the amendments are introducing a new cause of action; and finally that the amendments were statute barred for having occurred 13 years after the action. It was also deposed that no valid reasons were set out for the delay to warrant a grant of the orders sought. The application was termed as misconceived, unmeritorious and vexatious and the court was urged to dismiss it with costs.
5. The plaintiffs, in response to the grounds of opposition, filed a supplementary affidavit sworn by Peter Muriuki and filed on March 8, 2022. The supplementary affidavit is generally a re-emphasis of the averments set out in the grounds set out in the application and the supporting affidavit filed by the plaintiffs. The plaintiffs averred they had appointed new advocates who had come on record on March 17, 2021 and who had filed the present application without delay. The application was said to have been filed on bonafide grounds and that no prejudice would be occasioned to the defendants. The plaintiffs instead averred that they would be occasioned substantial loss and hardship and would suffer grave injustice as their rights would be violated. They termed the grounds of opposition as unmerited, litigious and aimed at wasting the courts' time.
6. The suit was canvassed by way of written submissions. The plaintiffs filed their submissions on May 10, 2022. They identified two issues for determination by the court. The first was whether their application for leave to amend the plaint is inordinately delayed and an abuse of the court process. They relied on the provisions of Order 8 Rule 3 and Order 5(1) of the Civil Procedure Rules. It was stated that the grounds of opposition raised were without merit, fatally defective, and an abuse of the court process. The plaintiffs reiterated that the plaint was tainted with inadvertent defects and erroneous description of property, which errors needed to be corrected for clarity purposes. They relied on the case of *Ochieng & Others Vs First National Bank of Chicago Civil appeal No 147/1991* which cited with approval the Court of Appeal Case of *St Patrick's Hill School Ltd Vs Bank of Africa Kenya Ltd [2018] eKLR* which set out the principles governing the amendments of pleadings.
7. It was argued that the general rule is that, amendments to pleadings sought before the hearing should be allowed if they can be made without injustice to the other side and/or if the other party can be compensated by costs. To buttress this, they relied on the case of *Harrison C Kariuki v Blueshield Insurance Company Ltd [2006]eKLR* which cited with approval the Court of Appeal decision in *Central Kenya Ltd V Trust Bank Ltd [2000] EALR 365* where it was stated that the guiding principles in applications to amend pleadings should be liberally and freely permitted unless prejudice and injustice will be occasioned to the opposite party.



8. Further, it was submitted that an amendment should not be permitted if it is inconsistent with original pleadings to the extent of altering the nature of the pleadings. It was submitted that in the instant case, no injustice will be caused to the other side and especially to the 88th defendant who is already part of the proceedings from inception. The plaintiffs also cited a number of authorities to support their application. They also submitted that leave to amend pleadings is a discretion to be exercised by the court within the ambit of the principles of natural justice. It was stated that the instant application has never proceeded for hearing from the time it was filed and that allowing the applicant to amend the plaint would not occasion injustice or prejudice to the respondents as they would have a right to file an amended response.
9. The amendments were said to have been done in good faith and it was deposed that no new facts or cause of action was being introduced. The plaintiffs were further of the view that amending the plaint was necessary in order to determine the real question in controversy between parties.
10. The second issue was whether the proposed amendments were statute barred. The plaintiffs relied on the provisions of section 26 of the *Limitations of Actions Act* which provides that a period of limitation does not run until the plaintiff has discovered the fraud or mistake or could with reasonable diligence have discovered it. According to the plaintiffs, the discovery of the fraudulent and illegal transfers in this case was shortly before commencement of the suit and the cause of action was therefore not statute barred. It was argued that the issue of statute could only be raised by the proposed defendants and not the 88th defendant who was already a party to the suit. In conclusion, the plaintiffs submitted that the application was merited and would help the court determine the instant suit justly. As at the time of writing this ruling, the 88th defendant who is the only party who had opposed the application, had not filed his submissions despite being directed by the court to do so. I shall however proceed to deliver the ruling, lack of the said submissions notwithstanding.

Analysis And Determination

11. I have looked at the application, the response by the 88th defendant, and the submissions filed by the plaintiff. The plaintiffs have filed this application seeking leave to amend the pleadings. They aver that there is need to introduce new parties to the suit against whom the plaintiffs are claiming ownership of parcels of land registered in their names. They are also seeking to introduce the specific subdivisions of the claimed land. They have equally deposed that there are inadvertent defects and erroneous description of the properties which needed to be corrected for clarity purposes. They are of the view that the amendments would serve to bring clarity to the suit and to ensure that the court determines the matter effectively. The said amendments are also said to be brought in good faith and that no prejudice would be occasioned to the defendants.
12. The 88th defendant opposed the application. According to him, the application is affected by inordinate delay. It allegedly introduces a new cause of action and further that the cause of action is time barred. Having considered the application, I find that there is only one issue for determination, which is whether the application for amendment of pleadings ought to be allowed.
13. The plaintiffs have correctly traced the legal provisions on amendment of pleadings to the provisions of Order 8 Rule 3 and Order 8 rule 5 of the Civil Procedure Rules. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court and states as follows:

' 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'.

14. Further Order 8 Rule 5 of the Civil Procedure Rules provides for the general power to amend pleadings

' For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just'.

15. The principles of amending pleadings were well espoused by the Court of Appeal in its decision in the case of [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited \[2013\] eKLR](#) where the court stated that:

' 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.'

16. The purpose for seeking an amendment is also well stated in [Halsbury's Laws of England, 4th Ed \(re-issue\), Vol 36\(1\)](#) at paragraph 68, that: -

' 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 on such terms as to costs or otherwise as may be just and in such manner, if any, as the court may direct.'

17. As well laid out in above, a party who seeks to move the court for leave to amend pleadings ought to do so timeously. In case of delay, the amendment should be allowed if made in good faith, so long as costs can compensate the opposing party. It ought not introduce a new cause of action. But if a new cause of action is introduced, it should not be one of a substantially different character which could be made subject of a fresh action.

18. I have carefully looked at the proposed amendments by the plaintiffs. They are basically seeking to correct errors relating to description of the parcels, add more parties to the suit, and to include the various subdivisions emanating from the mother title - Mbeere/Kirima/2244. The parties sought to be included in this suit, are the registered owners of the various subdivisions. The 88th defendant



has opposed the application on various grounds, among them that the plaintiffs seek to introduce a new cause of action and further that the cause of action is time bared. The court, in the case of *Eunice Chepkorir Soi v Bomet Water Company Ltd [2017] eKLR*, cautioned courts from allowing amendments that would have the effect of bring a new cause of action that is time barred. It was thus:

' The courts would normally not grant a request for amendment of pleadings where the proposed amendment would have the effect of creating a new cause of action which is time-barred. This was stated in *Nzirane V Lukwago* 1971 EA 328'.

19. In the initial suit filed against the defendants who are already parties to the suit, the plaintiffs were claiming ownership over various subdivisions of the suit parcel of land Mbeere/Kirima/2244 against the defendants who are the registered owners of the said parcels. In the proposed amendments, the plaintiffs are seeking to introduce new parties as defendants, who are said to be the registered owners of the various subdivisions of the subject parcel of land Mbeere/Kirima/2244. They have annexed copies of official searches as proof that the said parties are registered owners of said subdivisions. The plaintiffs in my view are not altering their claim in any way. They are essentially not introducing any new cause of action as alleged by the 88th defendant.
20. With regard to the issue of the cause of action being time barred as against the said defendants, I note that this issue has been raised by the 88th defendant who is already a party to the suit and in whose response has not raised the issue of his case being time barred. However even then, the plaintiffs have pleaded that the cause of action against the defendants is one based on fraud and have in that regard invoked the provisions of Section 26 of the Limitations of Actions Act, which provide that time for purposes of limitation does not run until fraud is discovered or with reasonable diligence could have been discovered. I am of the view that the proper parties who could raise the issue of limitation are the proposed defendants. Once the court allows this application if it finds it has merit, they will have an opportunity to raise the said issue if they are of the view that it is statute barred.
21. The application has further been said to have been affected by inordinate delay. I note that the initial plaint was filed on December 30, 2014 while the application herein was filed on October 19, 2021. This is a period of around 7 years, which indeed is a long period. However the proper manner to consider whether there is delay, is if such delay will occasion prejudice on the opposite party which cannot be compensated by costs. This was as stated in the case of *Central Kenya Limited vs Trust Bank Limited* (2000) EALR 365], where the learned judges stated;

' Mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs.

The 88th defendant has not stated what prejudice will be occasioned if the application is allowed and I do not see what prejudice the intended defendants will suffer either.

22. Further, I have perused the court file and I note that hearing of the suit has never taken place. It is my considered view, that the current and proposed defendants will have an opportunity to consider the amendments, respond to them, and even incorporate them or make reference to them during their hearing if need be. This principle was well settled in the case of *St Patrick's Hill School Limited v*



Bank of Africa Kenya Limited [2018] eKLR which cited with approval the case of '*Eastern Bakery v Castelino, (1958) EA 461 (U)*' at p 462: where it was stated that:

' It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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'.

23. The amendments sought are in my view made in good faith and are aimed at assisting the court to deal with all the issues before it and to prevent the parties from adjudicating on the matter in instalments. There is need for the court to identify and determine the real issues in controversy. I accordingly allow the application as prayed. But I wish to comment on the manner in which the plaintiffs have approached the court. In their application, the plaintiffs have merely sought for leave to amend their pleadings and have urged the court to consider the draft plaint as duly filed before it. Looking at the amendments sought, the parties are seeking to not only just correct errors but also to join new parties to the suit. I find that the proper approach would have been to have another prayer to join the said parties and in this way those parties would have an opportunity to be served and respond to this application. This would indeed uphold the rules of equity and natural justice. However, even in their absence, I find the application to be meritorious. I see no prejudice that the said parties will be occasioned and considering they are indeed the registered owners of the resultant subdivisions of the suit parcel then they are necessary parties to this suit.
24. In that regard the application is allowed in terms of prayers 2 and 3. However based on the aforementioned lapses in the application, I shall not make any orders as to costs.

RULING DATED, SIGNED and DELIVERED in open court at EMBU this 31ST DAY of OCTOBER, 2022.

Rose Njeru for Kioguthi for plaintiffs; Okwaro for 2nd to 14th, 16th to 21st, 23rd to 57th, 59th to 64th, 66th to 86th and 89th defendants and Omwenga for 92nd to 120th defendants.

Court assistant: Leadys

A.K. KANIARU

JUDGE

