



REPUBLIC OF KENYA



**Abdallah & 5 others v Ali & 2 others (Environment & Land Case  
8 of 2020) [2022] KEELC 13733 (KLR) (26 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13733 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 8 OF 2020  
NA MATHEKA, J  
OCTOBER 26, 2022**

**BETWEEN**

**MOHAMED KHANIS ABDALLAH ..... 1<sup>ST</sup> PLAINTIFF  
KHAMIS HAMAD ..... 2<sup>ND</sup> PLAINTIFF  
HAJI ALI HAJI (DECEASED) ..... 3<sup>RD</sup> PLAINTIFF  
NASSIR ALI SUDI ..... 4<sup>TH</sup> PLAINTIFF  
SWALEH AHMED MWINYI ..... 5<sup>TH</sup> PLAINTIFF  
MOHAMED ABDALLAH SHEKUE ..... 6<sup>TH</sup> PLAINTIFF**

**AND**

**MWINYIHAJI KHAMIS ALI ..... 1<sup>ST</sup> DEFENDANT  
ALI KHAMIS ALI ..... 2<sup>ND</sup> DEFENDANT  
REGISTRAR OF LANDS MOMBASA COUNTY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The application is dated June 9, 2022 and is brought under order 51 rules 1, 3, order 1 rule 10 (2) and order 8 rule 3 of the *Civil Procedure Rules*, section 3A of the *Civil Procedure Act*, and article 159 (2) of the *Constitution* of Kenya 2010 seeking the following orders;
  1. That the plaintiffs/ applicants be granted leave to amend their plaint in terms of the draft amended plaint annexed hereto.
  2. That the proposed amended plaint be adopted as properly filed amended plaint in this suit.
  3. That the defendants do file their defence, if any, within 14 days from the date of the court order granting the plaintiffs leave to amend their plaint.



4. That the costs of this application be provided for.
2. It is based on the grounds that the plaintiffs need to amend this plaint to remove extraneous issues and bring the determination before this honourable court so that he can expediently dispose the same. That it is imperative that the plaintiffs be granted leave to amend so that the issues in contention herein can be properly canvassed.
3. The respondent stated that the plaintiffs' application is mischievous, misleading, misconceived and craftily designed to delay and defeat the determination of the real issues in dispute on merit. That the issues raised by the plaintiffs in their application and supporting affidavit are matters best handled by a family court as the same relates to who are rightful heirs late Ali Bin Hamadi and distribution of the estate of the late Ali Bin Hamadi. That the plaintiffs/ applicants' application offends section 13 of the *Environment and Land Court Act*. That an individual cannot be used to set aside or vary the decision of a court. (Annexed and marked as "SMK—I" is a copy of the order issued on February 21, 2013). That as per the court order issued on September 21, 2013, the suit property does not form any part of the estate of Ali Bin Hamadi. Further to the court order of February 21, 2013, then court pronounced itself in Succession cause No 37 of 2014 and provided that the legal heirs to the suit property were Mwinyi Khamis Ali & Ali Khamis Ali. (Annexed and marked as "SMK-2" is a copy of the court order issued by the Chief Kadhi Sheikh Almuhdhar AS. Hussein on August 7, 2014). That the distribution provided by the plaintiffs and marked as A, has no bearing in law as the same is the opinion of one Mr Hammad M Kassim, the Director of Sharefa Center. That it was the plaintiffs who took the defendants to court and as such, it was upon them to research and disclose the number of wives that the late Ali Bin Hamadi had at the time of filing the suit.
4. This court has considered the application and the submissions therein. Order 1 rule (10) (2) of the *Civil Procedure Rules* empowers the court, at any stage of the proceedings, upon application by either party or suo moto, to order the name of a person who ought to have been joined or whose presence before the court is necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, to be added as a party. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others*, CA No 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

"All amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."
5. It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party and that the that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings in the case of *AAT Holdings Limited v Diamond Shields International Ltd (2014) eKLR*, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No 222 OF 1998 as shown below:-
  - (i) That are necessary for determining the real question in controversy.
  - (ii) To avoid multiplicity of suits provided there has been no undue delay.



- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
  - (iv) That no vested interest or accrued legal rights is affected; and
  - (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.
6. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a plaint is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

In *Moi University v Visba Builders Limited Civil Appeal No 296 of 2004* (unreported) this court said:-

The law is now settled that if the defence raises even one bona fide triable issue, then the defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *H D Hasmani v Banque Du Congo Belge (1938) 5 EACA 89*. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at P 76* Duffus P said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as sheridan ,J put it “a triable issue” that is an issue which raises a *prima facie* defence and which should go to trial for adjudication.”

7. I have perused the proposed amended plaint and I see that no prejudice will be suffered by the parties should the amendment be allowed. I take note that this matter was filed in 2020, be that as it may, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated June 9, 2022 is merited and I grant it. Costs of this application to be in the cause.

It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26<sup>TH</sup> DAY OF OCTOBER 2022.**

**N A MATHEKA**

**JUDGE**

