



**M’Mwithiga & 4 others v M’Rugongo (Originating Summons
28 of 2019) [2022] KEELC 13466 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13466 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ORIGINATING SUMMONS 28 OF 2019**

CK NZILI, J

OCTOBER 12, 2022

**IN THE MATTER OF SECTION 37 AND 38 OF THE LIMITATION
OF ACTIONS ACT (CAP 22 OF THE LAWS OF KENYA)**

BETWEEN

**SABERA KARANYAMA M’MWITHIGA 1ST PLAINTIFF
JOSEPH KANGOROTO MWITHIGA 2ND PLAINTIFF
EDWARD GIKUYU 3RD PLAINTIFF
SAMSON KAIGERA MWITHIGA 4TH PLAINTIFF
FREDRICK MURURU MWITHIGA 5TH PLAINTIFF**

AND

GEOFFREY MUTUMA M’RUGONGO DEFENDANT

RULING

1. The applicant by an application dated 24.6.2022 seeks leave to amend his defence and include a counterclaim. The reasons given are that there is need to include a claim for eviction and mesne profits against the plaintiffs so that the court can determine all the issues in controversy effectually.
2. The application is opposed through the replying affidavit by Joseph Kangoroto Mithiga on 18.7.2022. The grounds are that the application is brought three years since the suit was filed; it is contrary to pretrial directions given on 14.12.2021 and 24.2.2022; it is an afterthought; brought in bad faith is an abuse of the court process and lacks merits.
3. The basis of the plaintiffs’ claim is the originating summons dated 17.6.2019 which was supported by plaintiffs’ affidavits, witness statements and annexures of the even date.



4. The defendant herein filed a replying affidavit sworn on 19.8.2019 in which he mentioned that he was seeking for their eviction from the suit land.
5. The plaintiffs filed their issues for determination on 4.3.2020 and a paginated bundle on 25.1.2022, while the defendant despite various orders made failed to file any compliance documents.
6. Order 8 Rules 3 & 5 of the Civil Procedure Rules allows a party to apply to amend his pleadings at any stage of the proceedings, including an originating summons, petition and an originating notice of motion. The court has the ultimate discretion to allow the application on such terms as are just.
7. The principles to apply in Central Bank of Kenya vs Trust Bank Ltd & others (2000) eKLR, that a party would be allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no inordinate delay; that no new or inconsistent cause of action is introduced; that no vested interest or accrued – legal rights is affected and that the amendment can be allowed without injustice to the other side.
8. In Joseph Ochieng & 2 others vs First National Bank of Chicago Civil Appeal No. 149 of 1991, the court held that are the amendments are intended to determine the substantive merits of the case; should be timeously applied for; the power to amend can be exercised by the court at any stage of the proceedings; the general rule is that however late the amendment is sought, if made in good faith provided costs can compensate the other side; 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 the Limitations of Actions Act subject however to the powers of the court and that the court will still allow for an amendment notwithstanding the expiry of current period of limitation.
9. Applying the above principles, the applicant has not explained or the justified the inordinate delay given that in the replying affidavit he had mentioned the issue of eviction.
10. The substratum of the suit is adverse possession. The defendant opted to file a replying affidavit and not of a statement of a defence.
11. It appears he now wants to change tune by filing a defence and counterclaim.
12. In the replying affidavit filed herein, the defendant denied that he was the legal representative of the estate of the late Perista Kigetu and made it clear that he had not taken out any letters of grant over it despite the possession of a title deed over L.R No. Abuthoguchi/Ruiga/456.
13. In the draft counter claim he now describes himself as the legal representative of the estate of Perista Kigetu.
14. In Catherine Koriko & 3 others vs Evaline Rosa (2020) eKLR the Court of Appeal held that a claim for adverse possession proposed was inconsistent with a claim for being a beneficiary of the estate of a deceased person, and since in the original suit the appellants had not conceded that indeed the respondent was the true owner of the property, a subsequent application to amend the statement of defence and counterclaim was nothing but an indirect attempt to re-open litigation over the suit property with a view of circumventing the substantive effect of and the rights of the opposite parties.
15. In Njoki Wainaina vs Josephat Thuo Githachuri & 3 others; National Land Commission & another (interested parties) (2021) eKLR, the court was faced with a situation where the intended amendment sought to introduce a counterclaim not made in the alternative and without prejudice to the claim of ownership. The court took the view that the proposed amendment was calculated to introduce a new case which would have changed the nature and or character and was at variance with the position hitherto ventilated or pleaded and therefore, inconsistent with the statement of defence



pleaded coming four years later. The court found that the proposed pleadings were running contrary to the general principles governing the amendment of pleadings.

16. In this application, the delay of 3 years has not been explained at all. This court should not be seen to condone and or sanitize dilatoriness and ineptitudes. See *Eastern Bakery vs Castelino* (1958) E.A 361, *Abdul Karim Khan vs Mohamed Roshan* (1965) E.A 289, [*Aaron Tafari Ouko & another vs Solomon Boit* \(2021\) eKLR](#).
17. In view of the foregoing reasons, I find the application dated 24.6.2022 lacking merits. The same is dismissed with costs.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 12TH DAY OF OCTOBER, 2022

In presence of:

Muchiri h/b for Kaimenyi for plaintiff

C/A: Kananu

HON. C.K. NZILI

ELC JUDGE

