



REPUBLIC OF KENYA



**KENYA LAW**  
THE NATIONAL COUNCIL FOR LAW REPORTING  
Where Legal Information is Public Knowledge

**Kabaya v Ngure & 2 others (Environment & Land Case 1136 of 2013)  
[2022] KEELC 15497 (KLR) (24 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15497 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 1136 OF 2013  
LC KOMINGOI, J  
NOVEMBER 24, 2022**

**BETWEEN**

**CLEMENT V. GACHUHI KABAYA ..... APPLICANT**

**AND**

**DAVID KIBUIKA NGURE ..... 1<sup>ST</sup> RESPONDENT**

**EMBAKASI RANCHING COMPANY LIMITED ..... 2<sup>ND</sup> RESPONDENT**

**LAND REGISTRAR NAIROBI ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. This is the notice of motion dated March 30, 2022 brought under order 8 rule 3 and 5 of the [Civil Procedure Rules, 2010](#), section 5 of the [Judicature Act](#) cap 8 and all other enabling provisions of law.
2. It seeks orders:-
  1. Spent.
  2. An order be and is hereby granting leave to the plaintiff/applicant to file an amended plaint after close of pleadings.
  3. An order be and is hereby issued holding the 1<sup>st</sup> defendant/respondent in contempt of the orders of this honourable court issued on December 9, 2014.
  4. An order be and is hereby issued ordering the 1<sup>st</sup> defendant/respondent to deposit to this honourable court t original certificates of lease dated the March 27, 2019 and the original leases dated the March 4, 2019 with respect to title Nos Nairobi/Block 105/1274 and 1275.
  5. Cost of this applicant.



3. The grounds are on the face of the application and are set out in paragraph 1 and to 13.
4. The application is support by the affidavit of Clement V Gachuhi Kabaya, the plaintiff/applicant herein sworn on the March 30, 2022.
5. The application is opposed. There is a replying affidavit sworn by the 1<sup>st</sup> defendant/respondent on the June 7, 2022.
6. The notice of motion was canvassed by oral submissions on the July 26, 2022.
7. It is the plaintiff's/applicant's case that there is need to amend the plaint. This has been necessitated by the filing of the 1<sup>st</sup> defendant's further list of documents. That the 1<sup>st</sup> defendant/respondent now has original certificate of leases issued in the year 2020.
8. That this was against the consent orders dated November 9, 2014. That by submitting documents for verification by the 2<sup>nd</sup> defendant and the subsequent issuance of titles by the 3<sup>rd</sup> defendant, the 1<sup>st</sup> defendant was in contempt of the orders of December 9, 2014. He prays that the application be allowed.
9. The 1<sup>st</sup> defendant/respondent on the other hand, states that he was not in control of the process of issuance of title deeds. That the process was taken over by the government of Kenya and the 2<sup>nd</sup> defendant. It is his case that he did not disobey the orders of December 9, 2014. He prays that the application be disallowed.
10. I have considered the notice of motion, the affidavit in support and the annexures. I have also considered the affidavit in response, the oral submissions and the authorities cited. The issues for determination are:-
  - (i) Whether the plaintiff/applicant ought to be allowed to amend his plaint.
  - (ii) Is the 1<sup>st</sup> defendant/respondent in contempt of the court orders?
  - (iii) Who should bear costs of this application?
11. On the November 15, 2021 the court granted leave to the 1<sup>st</sup> defendant/respondent to file additional documents with corresponding leave to the plaintiff to file additional documents if any.
12. When the 1<sup>st</sup> defendant filed the additional documents, the plaintiff realized that he (1<sup>st</sup> defendant) is in possession of certificates of lease issued in 2020. It is the plaintiff's case that this necessitated this application.
13. Order 8 rule 3 of the *Civil Procedure Rules* provides that:-
  - 1) 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.
  - 2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.



- 3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- 4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- 5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

rule 5 provides that:-

- “(1) 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.
- (2) This rule shall not have effect in relation to a judgment or order.”

14. I note that the plaintiff has testified but has not closed his case.
15. Order 8 rule 5 of the [Civil Procedure Rules](#) allows for amendment of pleadings notwithstanding that the effect of such amendment is to add or substitute a new cause of action if the new cause arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment. I find that the plaintiff/applicant has made out a good case for the amendment of the plaint so that the issues herein can be resolved once and for all.
16. On the December 9, 2014 honourable J Onguto (as he then was) granted the following orders:-
  - “1. That there is to be no transfer or registration of suit property Nairobi/Block105/1274 and Nairobi/Block 105/1275 either in favour of the plaintiff, the 1<sup>st</sup> defendant or the interested party or any other party for that matter pending the hearing and determination of this suit and or further order of the court.
  2. That there shall be no further developments whatsoever pending the hearing and determination of the suit and or further orders by court.
  - .....”

It is against this background that the plaintiff/applicant seeks that the 1<sup>st</sup> defendant/respondent be found to be in contempt of the said orders.



17. The 1<sup>st</sup> defendant/respondent, went ahead and procured registration of the two titles in his favour. This was against order No 1 of the consent orders.
18. The 1<sup>st</sup> defendant/respondent justification is that the 3<sup>rd</sup> defendant took over the registration process and that he was not in control of the same. This may be true but the 1<sup>st</sup> defendant/respondent was under an obligation to inform the 2<sup>nd</sup> and 3<sup>rd</sup> defendants of the existence of the said orders.
19. Had the 2<sup>nd</sup> and 3<sup>rd</sup> defendants been made aware of the pendency of the suit and the existence of the orders they would have halted the process.
20. I am of the view that the 1<sup>st</sup> defendant/respondent may not have willfully and deliberately disobeyed the court orders but he neglected to bring it to the attention of the 2<sup>nd</sup> and 3<sup>rd</sup> defendants.
21. This will not go without consequences. I decline to find the 1<sup>st</sup> defendant/respondent guilty of disobeying the court orders of December 9, 2014. However, he is in possession of certificate of leases for the suit properties.
22. I agree with the plaintiff/applicant that they are now two sets of title documents in respect of the suit properties. I agree with the plaintiff/applicant's submissions that there is a danger of the 1<sup>st</sup> defendant/respondent disposing the suit properties to the third parties to the detriment of the plaintiff/applicant.
23. The 1<sup>st</sup> defendant/respondent ought to deposit the certificates of lease issued to him in the year 2020 in court pending the hearing and determination of this suit.
24. In conclusion, I find merit in this application and I grant the orders sought namely:-
  - (a) That the plaintiff/applicant is hereby granted leave to amend the plaint within twenty-one (21) days from the date of this ruling with corresponding leave to the defendants to file amended defence if any.
  - (b) That an order is hereby issued compelling the 1<sup>st</sup> defendant/respondent to deposit with this honourable court the original certificates of lease dated March 27, 2019 and the original certificates of lease dated March 4, 2019 with respect to title numbers Nairobi/Block 105/1274 and Nairobi/Block 105/1275 within fourteen (14) days from the date of this ruling.
  - (c) That the costs of this application be borne by the 1<sup>st</sup> defendant/respondent.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 24<sup>TH</sup> DAY OF NOVEMBER 2022.**

.....

**L. KOMINGOI**

**JUDGE**

**In the presence of:-**

**No appearance for the Plaintiff/Applicant**

**Mr. Chege Njoroge for the 1<sup>st</sup> Defendant and 1<sup>st</sup> Interested Party present**

**No appearance for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Mutisya – Court Assistant**

