



**Sunrise Orthopaedic & Trauma Hospital Ltd & another v Lelei & another (Environment & Land Case 56A of 2013) [2022] KEELC 15039 (KLR) (23 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 15039 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 56A OF 2013  
JM ONYANGO, J  
NOVEMBER 23, 2022**

**BETWEEN**

**SUNRISE ORTHOPAEDIC & TRAUMA HOSPITAL LTD ..... 1<sup>ST</sup> PLAINTIFF**

**DAVID LANGAT ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**LECTARY KIBOR KEIYO LELEI ..... 1<sup>ST</sup> DEFENDANT**

**ST. LUKES ORTHOPAEDIC & TRAUMA HOSPITAL ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. What is before me for determination is the plaintiffs' application dated August 30, 2022 seeking leave to amend the further amended plaint as well as leave to file a further list of documents. The application is premised on the affidavit of David Langat sworn on the August 30, 2022 and the further affidavit of Joshua Kazungu Kenga, sworn on the September 29, 2022.
2. The application is strenuously opposed by the defendants and interested party through their 3 replying affidavits. The first one is sworn by Dr Lectary Kibor Keiyo Lelei (1<sup>st</sup> defendant) on the September 9, 2022, the second one is sworn by Professor Simeon Mining (the director of the 2<sup>nd</sup> defendant) on September 30, 2022 while the third one is sworn by Mary Chenmai (interested party) on the September 14, 2022.
3. The gist of the plaintiffs' application is that it is necessary to amend the plaint to address the question as to whether the plaintiffs are entitled to half or such other share of the piece of land known as LR No Eldoret Municipality/ Block 8/90 on account of having contributed to its purchase and development as this is one of the issues in controversy that the court must determine. It is therefore contended that in order for the court to effectually and completely adjudicate upon and settle all questions in controversy between the parties, it is necessary for the plaintiffs to amend their prayers in the plaint and file an additional List and bundle of documents.



4. On the other hand, the defendants argue that the application is made in bad faith it is made too late in the day and it will occasion serious prejudice to the defendants and 3<sup>rd</sup> party. This is because the case is part heard, as the plaintiffs' two witnesses have already testified.
5. The application was canvassed by way of written submissions and the parties filed their submissions which I have considered.

### **Issues for determination**

6. The singular issue for determination is whether the application for amendment of the plaint and leave to file an additional list of documents is merited.

### **Analysis and determination**

7. Order 8, rule 3 of the *Civil Procedure Rules* provides as follows:

Amendment of pleadings with leave

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.
8. The principles that should guide the court in dealing with applications for amendment are elaborated in *Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed*, vol 2 pages 1751-1752 which has been cited in various authorities including the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* (2014) eKLR where it is stated as follows:
  - i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
  - ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
  - iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
  - iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
  - v. Amendments of a claim or relief barred by time should not be allowed;
  - vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time
  - vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties
  - viii. The delay in filing the petitions for amendment should be properly compensated by costs
  - ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”



9. In the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR, the court observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

10. In *Suleiman v Karasha* [1989]eKLR the Court of Appeal held that:

“Under the Civil Procedure Rules, the parties can amend their pleading with the leave of the court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just. “

11. Additionally, in the case of *Kassam v Bank of Baroda (Kenya) Ltd* (2002) KLR the court held as follows:

“Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice, for all amendments ought to be allowed which (a) do not work injustice to the other side and (b) are necessary for the purpose of determining the real question in controversy between the parties, and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”

12. Regarding the timing of the amendment and whether additional evidence ought to be allowed, the Court of Appeal had this to say in the case of *Wadhwa (as Legal Representative of the estate of Deshpal Omprakash Wadhwa v Mohamed and 4 others)* ( Civil Appeal No 33 and 148 of 2019 (consolidated) (2022 KECA 25 KLR:

“It is clear that courts have power to allow adduction of additional evidence even at appeal stage. The *Evidence Act* stipulates that the court may in all cases permit recalling of witnesses. It is therefore not too late for the High Court and courts of equal status to allow such an application, if in exercise of its discretion it is judicious to do so, even where the case has been concluded but before judgment”

13. What can be gleaned from the above authorities is that the court has a wide discretion to amend pleadings at any stage of the proceedings so as to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.



14. In the instant case, the application has been made after the plaintiffs' two witnesses have testified. The proposed amendments are at the centre of the dispute between the parties and the applicants have explained that previous amendments did not capture the issues now being raised in the proposed Further, Further Amended plaint as the documents in support of the proposed prayers could not be traced after exercise of due diligence.
15. Although I appreciate the defendant's frustration in what appears to be a back and forth exercise by the plaintiffs in the manner in which they have prosecuted their case, I must not lose sight of the essence of the provisions relating to amendment of pleadings as elaborated in the excerpt from *Mulla, the Code of Civil Procedure*, cited above.
16. At the end of the day, the parties must be allowed to present the best available evidence to allow the court to arrive at a just decision in order to resolve the real questions in controversy between the parties. That for me, is the whole essence of amendments. as is evident from the wording of order 8 rule 3 of the *Civil Procedure Rules*, such amendments can be made at any stage of the proceedings on such terms as are just.
17. Granted that the plaintiffs have previously been allowed to amend the pleadings, it would be unjust to deny them an opportunity to fully present their claim against the defendants as the defendants will be granted an opportunity to respond to the new issues that will be raised in the further, further amended plaint.
18. That being the position, I am inclined to allow the application as I hereby do. However, I am mindful of the fact that justice cuts both ways and the respondents must be compensated by way of costs for the inconvenience occasioned to them.
19. The upshot is that the application dated August 30, 2022 has merit and the same is granted in terms of prayers 2 and 3 of the notice of motion. I therefore, make the following orders;
  - a. The draft further, further amended plaint shall be deemed as filed and served upon payment of the requisite court fees.
  - b. The plaintiffs are granted leave to file a further list of documents within 7 days.
  - c. The respondents shall file and serve their further, further amended defences within 14 after they have been served with the plaintiffs' further list of documents.
  - d. The plaintiffs shall pay the respondents costs assessed at Kshs 60,000, payable before the next hearing date.
  - e. Time is of essence and if the timelines herein mentioned are not adhered to, these orders shall automatically lapse and the suit shall proceed on the basis of the pleadings filed earlier.

**DATED, SIGNED AND DELIVERED AT ELDORET THIS 23<sup>RD</sup> DAY OF NOVEMBER, 2022.**

**J.M ONYANGO**

**JUDGE**

