



REPUBLIC OF KENYA



**Ethuru v Thikanyi & 2 others (Environment & Land Case
2 of 2019) [2022] KEELC 15318 (KLR) (7 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15318 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 2 OF 2019
CK NZILI, J
DECEMBER 7, 2022**

BETWEEN

ANDREW KOBIA ETHURU PLAINTIFF

AND

JOSHUA THIANE THIKANYI 1ST DEFENDANT

ANDREW KIUGU THIKANYI 2ND DEFENDANT

**DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER 3RD
DEFENDANT**

RULING

1. The court by an application dated November 1, 2022 is asked by the plaintiff to grant leave to amend the plaint dated May 27, 2010, so as to correct some alleged inadvertent errors for the court to determine the real issues in question. The application is based on the grounds on its face and a supporting affidavit of Andrew Kobia Ethuru dated November 1, 2022.
2. The application is opposed by the 1st & 2nd respondents by grounds dated November 8, 2022. The 3rd respondent has not filed any response. The 1st & 2nd respondents take the view that the application is in bad faith, brought too late in the day so as to defeat the surveyors report; it is academic in nature under the pretext of breathing life to a defective claim and is an abuse of the court process.
3. With leave of court, parties filed written submissions dated November 11, 2022 and November 16, 2022 respectively.
4. The plaintiff submitted that the application has merits based the wider powers the court has under sections 1A, 1B, 3A, 63(e) and 100 of the *Civil Procedure Act* as read together with order 8 rule 3 & 5 *Civil Procedure Rules* and sections 13 and 19 of the *Environment and Land Court Act*. The plaintiff averred that the suit parcel of land became a registered land from land under adjudication during the



lifetime of the suit; that the application has been brought at the earliest opportunity before the hearing has commenced and that there will be no prejudice or injustice to the defendants.

5. Reliance was placed on *John Gakuo and another v County Government of Nairobi & another (2017) eKLR*, *Robert Ombaso Nyareru & another v Beldina Mokaya (2012) eKLR* and *Peter Obwogo O & 2 others v HO Suing as next friend of PO (Minor) and another (2017) eKLR* on the proposition that an amendment is aimed at facilitating the determination of the real question in controversy between the parties and can be brought and freely allowed up at any stage it is brought so long as it was necessary for the court to make a fair decision and where the other party can be properly compensated by way of costs.
6. On the part of 1st & 2nd defendants it is submitted that the discretion to allow for amendments of pleadings should be exercised judiciously in line with set principles but not where it will occasion injustice and prejudice to the opposite party.
7. In this case, the 1st & 2nd defendants/respondents have submitted that the application has been brought 12 years from the filing of the suit and that pretrial directions were taken together with a hearing date. Therefore the same is not only brought in bad faith, late, mischievously but it is calculated to defeat the surveyors report, out to interfere with the manner of hearing the case, is an afterthought, a delaying tactic, a belated but also a malevolent move which this court should not entertain at all.
8. The general rule is that an application for both the amendment of a pleading and a joinder of parties will be freely allowed at any stage of the proceedings so long as the same will not result in prejudice or injustice to the other party which is incapable of being compensated by way of costs.
9. In *Beldina Mokaya v Robert Ombaso Nyareru & another [2009] eKLR*, the court held that the overriding consideration in such an application should be whether the amendments are necessary for the just determination of the controversy between the parties and if a party is out to bring on board all the relevant materials in order to aid the court to reach a fair decision and if so, then such a party or material should not be shut out from the seat of judgement.
10. In Peter Obwogo O & 2 others (*supra*) the issue before the trial court was the failure to file a supplementary record of appeal on time containing the decree. The issue was not based on an application for an amendment hence the case is irrelevant to the matter before court.
11. In *James Ochieng Oduol t/a Ochieng Oduol & Co Advocates v Richard Kuloba (2008) eKLR*, the court noted that leave to amend was filed after a defence of no cause of action was filed and the facts introduced in the claim were not new since the claimant knew about them but failed to plead them.
12. In *Trust Bank Ltd v Shab & 3 others (civil appeal) application 16 of 2015 (2022) KECA 75 (KLB (4th February 2022) (Ruling)*, the case before the Court of Appeal addressed the issues of afterthought, malafides, deliberate intention to frustrate the respondent, introduction of new issues, delay and prejudice based on accrued legal rights by the opposite party.
13. The court stated that under sections 3A and 3B of the *Appellate Jurisdiction Act*, it was in favour of facilitating the just, expeditious, proportionate and affordable resolution of disputes. The court cited with approval John Gakuo (*supra*), where it was held that before allowing the application, a court must be satisfied that the same is brought in good faith, whether the same is material for the proper determination of the issues before court or if it will clarify, cloud or confuse the issues or if allowed, it will prejudice the respondents.



14. As to delay, the court cited with approval [*Central Bank of Kenya Ltd v Trust Bank Ltd \(2000\) eKLR*](#) that a mere delay is not a ground for declining to grant leave unless the said delay was likely to prejudice the opposite party beyond monetary compensation in costs.
15. In [*Mohamed v Mariakani Holdings Ltd and another \(Civil Appeal\) Application 76 of 2019 \(2022\) KECA 122 \(KLR\) 18th February 2022 \(ruling\)*](#) the issue was the failure to get proper brief from the previous lawyers as opposed to current lawyers on an unpleaded issues. The court found the explanation satisfactory and the amendments necessary to enable the court to determine the dispute fairly and correctly.
16. In [*Institute for Social Accountability and another v Parliament of Kenya & 3 others \(2014\) eKLR*](#), the court held that the object of amendments was to enable parties to conduct litigation not on the false hypothesis of fact already pleaded or relief or remedy already claimed but rather on the basis of the true state of the facts which the parties rely and finally intend to rely on, so as to make the function on the court more effective in determining the matter substantively and on merits without being held captive to form of the action or proceedings, provided that there is no undue delay, no vested interest or an accrued right is affected and or injustice to the opposite party.
17. Similarly, in [*Elijah K Arap Bii v KCB \(2013\) eKLR*](#) the court held that amendments can even be allowed at appeal stage if made in good faith as long as the amendments were not immaterial, useless, merely technical or introducing a new case or a new ground or changing the character of the suit or aimed at reframing the case so as to deprive a defendant his right to rely on limitation acts.
18. Applying the foregoing binding caselaw and principles, the applicant seeks to amend the plaint before the hearing has commenced on the ground that the suit property is no longer governed by the [*Land Adjudication Act*](#) but the [*Land Registration Act*](#) hence the need to align the suit with the correct facts.
19. The 1st & 2nd defendants are of the contrary view that the same is done too late, after a delay of 12 years, it is in bad taste, an abuse of the court process, aimed at breathing fresh life to a collapsing suit, prejudicial and out to cause an injustice to them.
20. The court has looked at the proposed amendments. All what has been brought forward is the correct description of the suitland as registered land as opposed to land under adjudication. It only relates to the descriptive features, any developments thereon and the previous litigation over the subject land.
21. There is no change on the parties, new cause of action and or a substantial re-adjustment of the claim. There are no new prayers or facts which are substantially or materially different so as to be said to deny the defendants any accrued legal rights or defence to the claim.
22. The respondents have not denied that the suit property is currently falling under registered land as opposed to land under adjudication. The defendants alleged injustice, malafides, mischievous behavior to circumvent the surveyors report and delaying tactic have not been substituted. The defendants still retain a right to respond to the amendment if allowed by way of an amended defence if need be.
23. As held in the various caselaw afore cited, the purpose of an amendment is to bring all issues and facts before the court so as to fully and conclusively reach on a fair decision.
24. The hearing of the suit, is yet to commence. Therefore, I find no inordinate delay and or mischief. After all, if the previous lawyers failed to find the missing facts relevant a party should not suffer out of inaction or mistakes of previous lawyers. There is nothing wrong with a new set of lawyers bringing more impetus to the case. After all, that is why a party has a right to legal representation and for that matter, quality and relevant legal representation. Under sections 1A, 1B & 3A [*Civil Procedure Act*](#), an



advocate has a duty to help the court attain its overriding objective in dispensing justice in a just, fair, proportionate and costs effective manner.

25. Consequently, I find the proposed amendment relevant, necessary and crucial for this court to reach a fair decision.
26. The application is allowed. The amended plaint shall be filed and served within 7 days from the date hereof. The defendants shall file and serve the amended defence within 15 days upon service.

Costs to the defendants.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 7TH DAY OF DECEMBER, 2022

In presence of:

C/A: Kananu

Koech for C P Mbabu for plaintiff

Ndubi holding brief for Miss Waswani

Mwiti for 2nd respondent

HON C K NZILI

ELC JUDGE

