



**Amollo v Nyandiga & 3 others (Environment & Land Petition
1 of 2022) [2022] KEELC 15142 (KLR) (6 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIRONMENT & LAND PETITION 1 OF 2022
GMA ONGONDO, J
DECEMBER 6, 2022**

BETWEEN

SILAS ABONG'O AMOLLO APPLICANT

AND

JANE ATIENO NYANDIGA 1ST RESPONDENT

ASEGO DIVISIONAL LAND DISPUTE TRIBUNAL 2ND RESPONDENT

SENIOR RESIDENT MAGISTRATE, HOMA BAY LAW

COURTS 3RD RESPONDENT

ATTORNEY GENERAL 4TH RESPONDENT

RULING

1. By a notice of motion application dated September 20, 2022 and filed on even date brought under, *inter alia*, articles 48 and 159 of the [Constitution of Kenya, 2010](#), rule 18 of the [Constitution of Kenya \(Protection of Rights and Fundamental Freedoms\) Practice and Procedure Rules, 2013](#), sections 3A, 63(e) and 100 of the [Civil Procedure Act](#) chapter 21 laws of Kenya, order 10 rule 2 and order 8 rule 3 of the [Civil Procedure Rules, 2010](#) (the application herein), the applicant, Silas Abong'o Amollo through OM Otieno and Company Advocates is seeking the following orders;
 - a. Spent.
 - b. The honourable court be pleased to stay proceedings in this matter pending hearing and determination of the instant application.
 - c. The honourable court be pleased to grant leave to the petitioner/applicant to amend his petition dated the 21st day of July 2010 to bring the same in consonance with the provisions of the [Constitution of Kenya, 2010](#) for proper adjudication and determination by the court.



- d. Consequent to prayer (3) hereinabove, the court be pleased to have the annexed draft amended petition hereto be deemed as duly filed and served upon payment of the requisite court filing fee.
 - e. Costs of this application do abide the cause.
 - f. Such further and/or other orders be made as the court may deem fit and expedient.
2. The application is founded upon grounds (a) to (g) stated on the face of the same. It is further anchored on the applicant's supporting affidavit of twelve paragraphs sworn on September 20, 2022 and a copy of the draft amended constitutional petition of even date as well as the affidavit in support of the amended petition sworn on September 5, 2022 together with the annexures thereto.
 3. Briefly, the applicant contends that there is need to amend the instant petition which was filed before promulgation of the current Constitution in order to align it to the same. That the petitioner has not testified in the matter hence, none of the parties will suffer prejudice which cannot be compensated by way of costs.
 4. The 1st respondent, Jane Atieno Nyandiga, through the firm of M/s Oguttu Mboya, Ochwal and Partners, opposed the application by way of a statement of grounds of opposition dated September 23, 2022 and duly filed in court on September 26, 2022. The 1st respondent laments that the application is an abuse of court process as it seeks to set aside and/or appeal against the ruling and/or orders of the honourable court dated September 16, 2011 on the preliminary objection dated September 24, 2010 through the back door. That the application is *res judicata* as the issues raised herein and in the draft amended petition were the subject of that said ruling.
 5. Further, that the intended amendment intends to introduce new facts and claims to the suit. That further, due to the inordinate delay in lodging the instant application, the same offends the provisions of sections 1A and 1B of the Civil Procedure Act, 2010. That therefore, this application is devoid of merits.
 6. The application was heard by way of written submissions further to this court's directions of September 26, 2022; see order 51 rule 16 of the Civil Procedure Rules, 2010 and practice direction number 33 of the Environment and Land Court (ELC) Practice Directions, 2014.
 7. Accordingly, learned counsel for the applicant filed submissions dated September 29, 2022 on September 30, 2022. In brief, counsel gave the facts of the matter and identified three issues for determination thus: whether the instant application is *res judicata*, whether the court should allow the amendments sought by the applicant and whether the respondent shall suffer any injury if amendment is granted. In discussing the issues, learned counsel submitted that the court's ruling dated September 16, 2011 did not touch on amendment of the petition. Thus, the instant application is not *res judicata*. That order 8 rule 5(1) of the Civil Procedure Rules (*supra*) gives the court discretion to allow the amendment of pleadings, which discretion may be exercised at any stage of the proceedings.
 8. To reinforce the submissions, reliance was made on article 159(2) (d) of the Constitution of Kenya, 2010. Counsel also cited various authorities including the case of Bosire Ogero -vs- Royal Media Services (2015) eKLR as regards the wide discretion of the court concerning amendment of pleadings.
 9. By the submissions dated October 4, 2022 and filed herein on October 5, 2022, learned counsel for the 1st respondent gave a background of the matter and identified four issues for determination, to wit, whether the application herein is *res judicata*, whether the application herein is an abuse of the court process, whether the application herein contravenes the provisions of sections 1A and 1B of the Civil



Procedure Act, chapter 21 laws of Kenya and whether the honourable court is bound by the provisions of the Civil Procedure Act and Rules, 2010.

10. Counsel submitted that the instant application is *res judicata* as it seeks to amend the petition whose competency had been the subject of a preliminary objection. That the honourable court through a ruling delivered on September 16, 2011 directed that the issues raised in the said preliminary objection be handled during the hearing of the petition. That thus, the instant application is *res judicata* and an appeal in disguise against the said orders as the orders sought are intended to cure the incompetency in regard to the manner in which the petition was presented in court.
11. Counsel also stated that if the application is allowed, the issues in the preliminary objection will be defeated and the replying affidavit which raises factual issues will be rendered nugatory contrary to the said court orders which have not been set aside and/or reviewed. Further, counsel stated that there has been inordinate delay in lodging the instant application. Thus, counsel urged the court to dismiss the instant application with costs.
12. To fortify the submissions, counsel relied on various authorities including the case of George Gikubu Mbutia -vs- Consolidated Bank of Kenya & another (2015) eKLR on some of the guiding principles for amendment of pleadings in a matter.
13. The 2nd, 3rd and 4th respondents were duly served as disclosed in an affidavit of service sworn on October 12, 2022 by the applicant's counsel. However, they did not respond to the application nor file submissions in respect of the same.
14. I have duly considered the application, the 1st respondent's grounds of opposition and the rival submissions in their entirety. The principal issues for determination are:
 - a. Whether the applicant is deserving of leave to amend the petition dated 21st day of July 2010.
 - b. Who should bear the costs of this application?
15. Order 8 rule 3 of the Civil Procedure Rules, 2010 provides for amendment of pleadings with leave of court as follows:

"(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."
16. Further, order 8 rule 5 of the of the Civil Procedure Rules (*supra*) gives the court the general power to amend pleadings thus:

"(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."
17. To allow an amendment, the court ought to examine the intent and purpose of the amendment. The court has to look at whether, any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs.



18. In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:-

“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....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Emphasis added)

19. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs First National Bank of Chicago, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; 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 Limitation Acts.”

20. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up that the amendment should:

- a. Not introduce new or inconsistent cause of actions or issues;
- b. Be made timeously;
- c. Not affect any vested interest or accrued legal right and
- d. Not prejudice or cause injustice to the other party.

21. The applicant argues that the instant petition, which was filed before the promulgation of the current Constitution, needs to be amended in order to be in compliance with the latter. That he has not testified in the case, thus no party will suffer prejudice that cannot be compensated through costs.



22. On her part, the 1st respondent laments that the instant application is *res judicata* as it seeks to amend the petition whose competency had been the subject of a preliminary objection on which the court rendered a ruling on September 16, 2011. That the applicant herein is attempting to appeal against the said ruling through a back door. Further, that there has been inordinate delay in lodging this application as twelve years have lapsed since the promulgation of the *Constitution of Kenya*, 2010.
23. It is the court's considered view that indeed there has been inordinate delay in lodging this application. Clearly, the delay has not been explained by the applicant herein.
24. In addition, this court subscribes to the Court of Appeal decision in *Ochieng and others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 where the court set out the following principles for grant of leave to amend the pleadings;
- "a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings;
 - d. that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;
 - e. 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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation." (Emphasis added)
25. To that end, I find no merit in the applicant's application dated September 20, 2022. The same is hereby dismissed.
26. Costs to be in the cause.
27. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 6TH DAY OF DECEMBER 2022.

G.M.A ONGONDO

JUDGE

Present

Mr. B. Mulisa, learned counsel for the 1st respondent

Ms. Okong'o holding brief for Mr. O.M Otieno, learned counsel for the petitioner/applicant

Okello, Court Assistant

