



REPUBLIC OF KENYA



KENYA LAW
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**Ali & 5 others v Kimani & 8 others (Environment & Land Case
356 of 2019) [2025] KEELC 1208 (KLR) (12 March 2025) (Ruling)**

Neutral citation: [2025] KEELC 1208 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 356 OF 2019**

**JA MOGENI, J
MARCH 12, 2025**

BETWEEN

**FATUMA ALI 1ST PLAINTIFF
ABDALLA ALI FERUZ 2ND PLAINTIFF
SERIFA ALI 3RD PLAINTIFF
ZAMIDA ALI 4TH PLAINTIFF
JARA KHALIL 5TH PLAINTIFF
SALIMA ALI 6TH PLAINTIFF**

AND

**NELSON WARUINGE KIMANI 1ST DEFENDANT
MICHEAL NDWEGWA KINGORI 2ND DEFENDANT
REUBEN KIPKEMOI YEGON 3RD DEFENDANT
CONCORDIA BUILDING AND CIVIL ENGINEERING LIMITED 4TH
DEFENDANT
JAMES MURIMI WANJOHI 5TH DEFENDANT
JAMES KAHUGI MWANGI 6TH DEFENDANT
THE PUBLIC TRUSTEE 7TH DEFENDANT
THE CHIEF LAND REGISTRAR, NAIROBI REGISTRY 8TH DEFENDANT
THE HON ATTORNEY GENERAL 9TH DEFENDANT**



RULING

1. This case is a part-heard and came up for hearing on 11/03/2025. The Plaintiffs have testified and closed their respective cases and so has the 1st, 3rd, 4th, 5th and 6th Defendants. The trial is set to continue on 12/03/2025 for the defence hearing of the 7th, 8th and 9th Defendants. Before the Court adjourned for the day the Counsel of the 1st Defendant made an oral Application to have the Amended Defence for the 7th Defendant to be struck out for the reason that the amended document had not been served upon him and that the 1st Defendant will be greatly prejudiced since he had already testified.
2. This position was supported by Counsels for the 3rd, 4th, 5th and 6th Defendants whereas the Counsels for the Plaintiffs opposed the Application. The Court allowed each party to submit on the position and each put up spirited arguments.
3. This being an oral Application allowed by law it was also canvassed orally by the parties.
4. The Respondents/Applicants contend that the Amended Defence does not meet the mandate of Order 8 rule 5 of the Civil Procedure Rules. Further the Respondents argue that the proposed amendments are so extensive that they change the nature and tenor of the original Defence. The Respondents state that the 7th Defendant is seeking to rewrite the original Defence and improve their case as the matter progresses.
5. The Respondents further contend that the 7th Defendant amendments go beyond the amendment that was allowed by this Court on 31/10/2023.
6. I have considered the Application and the parties' respective submissions. I have also considered the relevant legal framework and jurisprudence on the key issues in this Application. There are three issues for determination namely:
 - i. Whether the 1st Defendant's objection is merited.
 - ii. Whether the objection has been overtaken by events.
 - iii. Whether allowing the Amended Defence by 7th Defendant will cause injustice to the 1st Defendant.

Whether the objection is merited

7. The thrust of the objection is that leave should not be granted to the filed Amended Defence to be allowed.
8. Now, Order 8 Rule 5 (1) of the Civil Procedure Rules gives the Court a wide discretion as far as amendment of pleadings is concerned. This Section provides that for the purpose of determining the real question in controversy between the parties or 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 a manner as it directs as to costs or otherwise as are just. This discretion may be exercised at any stage of the proceedings, that is to say, before or at the trial, after the trial, after Judgment or on appeal. This position has been restated in various cases notably; *Bosire Ongero Vs Royal Media Services 2015 KLR*. In my considered view, the objection therefore to have the Amended Defence on record as filed is unmerited since the Amended Defence meets the required standard.



Whether the Objection by the 1st Defendant has been overtaken by events.

9. The event referred to here is that both the Plaintiffs and the 1st Defendant have testified and closed their case although there was an Application to allow the 3rd Defendant to come on record and file their Defence which was allowed. The 3rd Defendant applied to recall the Plaintiffs' witnesses and this was also allowed. The other event is that the 6th Plaintiff was allowed to file a response to the 3rd Defendant's Statement of Defence.
10. As stated earlier, Order 8 rule 5 gives the Courts a very wide discretion to allow parties to amend their pleadings at any stage of the proceedings.
11. In an attempt to narrow this discretion the High Court in Nairobi HCCC No 159 of 1981 Patel Vs Amin held that an Application for amendment should be made at the earliest possible moment. The Counsel for the 7th Defendant gave a satisfactory explanation for the need for amendment when this Court allowed the 1st Defendant to introduce other documents on 31/10/2023. That the Counsel who was handling the matter had been transferred and that he had come to the matter much later.
12. Further the Counsel also informed the Court that the cause of action in this matter arose in 1973 and the office has had to painstakingly put a lot of effort in tracing documents and information that is useful in advancing its cause in this matter. It is therefore clear to the Court that the incorporating the proposed amendments in the initial Defence was occasioned by a change of Advocates and inadvertence on the part of the predecessor Advocate.

Whether allowing the Amended Defence will cause injustice to the 1st Defendant.

13. The Courts would normally not grant a request for amendment of pleadings where the proposed amendment would have the effect of creating a new cause of action which is time-barred. This was stated in Nzirane Vs. Lukwago 1971 EA 328.
14. Furthermore an amendment should ordinarily not be disallowed on the ground that it introduces a new case. However, the Court has no power to substitute a cause for another cause or change the subject matter of the suit as per Sir Kenneth O'Conner J in Eastern Bakery Vs. Castelino 1958 EA 461.
15. The main principle is that amendment should not be allowed if it will cause injustice to the other side. In Institute for Social Accountability & Another V Parliament of Kenya and 3 Others 2014 KLR a three Judge bench of Lenaola, Mumbi and Majanja J stated 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 state of facts which the parties really and finally intend to rely on. The power to amend 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 and proceedings.”



16. Lastly, amendments should be freely allowed provided they are not done in bad faith and they do not occasion injustice to the other party which cannot be compensated by way of costs. Justice J.B Havelock in the case of Daniel Ngetich & Another Vs. K-Rep Bank Limited [2013] KLR stated that:-

“Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave 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.”

17. Amendments ought to be allowed when:-

- a. They do not work injustice to the other side.
- b. They are necessary for the purpose of determining the real questions in controversy between the parties.

18. All the authorities lay down precisely the same doctrine that amendments 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 really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the Court or unnecessarily delay justice or work an injustice.

19. Notably, on 31/10/2023 the 1st Defendant through Senior Counsel Mbuthi Gathenji after the start of the hearing of this case made an oral Application seeking leave to enable the 1st Defendant to place on record documents that had just come to their attention. The Plaintiffs' Counsels strongly opposed the oral Application, the Defendants' Counsels supported the Application. On his part Mr Motari submitted that this being a land matter the Court was being asked to have a chance to examine all evidence at our disposal. The Court granted the Application as prayed and directed that all parties having been served they were granted leave to file any supplementary document within 5 days and any documents filed after 15/11/2023 shall be automatically expunged from the Court record.

20. The Amended Defence is dated 7/11/2023 and was filed on 14/11/2023 a day before the deadline of the date set for expunging of all documents filed after the cutoff date. It is common ground that hearing of the Plaintiffs' case commenced and ended on 24/06/2024. With the 3rd Defendant coming on board late the Plaintiffs' witnesses were recalled and cross-examined and the Plaintiff's case closed on 11/03/2025. The 1st, 3rd, 4th, 5th and 6th Defendants have also closed their cases. What is pending is the hearing of the 7th, 8th and 9th Defendants' case. The present oral Application was brought before hearing of the 7th, 8th and 9th Defendant's case.

21. As already pointed out above all parties were granted leave on 31/10/2023 to file any supplementary documents before 15/11/2023. I note that the 7th Defendant's Amended Defence was filed within the days provided and filed before the expiry of the deadline. All parties filed their supplementary documents including the 1st Defendant.

22. As already stated Order 8 rule 5 of the Civil Procedure Rules gives the Court wide discretion and power to grant amendments. Furthermore, in the 12th Edition of "Precedents of Pleadings" by Bullen & Leake & Jacob, the learned authors say at page 124 –

“The guiding principle of cardinal importance on the question of amendments is that, generally speaking, all such amendments ought to be made for the purpose of determining



the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings. The rule of conduct of the Court is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”

23. In addition, under Order 8 of the Civil Procedure Rules, amendments may be allowed even if the effect would be to introduce a new cause of action and they may be allowed at any time before Judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs.
24. It is the 7th Defendant’s case that the amendments proposed were done within the timeframe granted by this Honorable Court and that the 7th Defendant’s witness has not yet testified and she can be cross-examined on the proposed amendments. He further submitted that this being an old matter whose cause of action arose in 1973 it took time for the 7th Defendant to trace some of the documents that have led to the amendments since the information was not available when the original Defence was filed.
25. I note that besides the Amended Defence, all the Defendants have closed their cases, the last two Defendants are yet to give their evidence. In that case, the parties herein still have an opportunity to sufficiently argue their case.
26. I have perused the 7th Defendant’s Amended Defence. A look at the same indicates that the amendments were substantially aimed at bringing out clearly and precisely the issues in the instant suit. Indeed the purpose of amendments is to, inter alia, determine the real questions in controversy to the parties.
27. In summary there is no comprehensible prejudice to be suffered by the Plaintiffs or other Defendants as a result of the proposed amendments by the 7th Defendant. Besides the Public Trustee is the sole custodian of the documents that this instant suit is hinged on and it would be prejudicial to fail to allow the 7th Defendant to produce in Court all documents in its custody so that the Court can have all the information that will enable it make a just decision.
28. The other parties have occasion to cross-examine the 7th Defendant’s witness.
29. In light of the above findings, the order that commends itself to this Court is to allow the 7th Defendant’s Amended Defence as filed. The hearing of the trial at hand to continue.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT MILIMANI NAIROBI IN OPEN COURT THIS 12TH DAY OF MARCH, 2025.

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MOGENI J

JUDGE

Ruling read in open Court in the presence of:

..... For the 1st Plaintiff

..... For the 2nd Plaintiff

..... For the 3rd Plaintiff

..... For the 4th Plaintiff



..... For the 5th Plaintiff
..... For the 6th Plaintiff
..... For the 1st Defendant
..... For the 2nd Defendant
..... For the 3rd Defendant
..... For the 4th Defendant
..... For the 5th Defendant
..... For the 6th Defendant
..... For the 7th Defendant
..... For the 8th Defendant
..... For the 9th Defendant
Brandy.....Court Assistant.

.....

MOGENI J

JUDGE

