



Kisang & another v Cherutich (Sued as the Legal Representatives of the Late Koleta K Cherutich) & 2 others (Environment and Land Case 66 of 2022) [2025] KEELC 5481 (KLR) (8 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5481 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ITEN
ENVIRONMENT AND LAND CASE 66 OF 2022**

L WAITHAKA, J

JULY 8, 2025

BETWEEN

KWAMBAI TOROITICH KISANG 1ST PLAINTIFF

JOSEPH C KIPTUYEI 2ND PLAINTIFF

AND

ROSE J CHERUTICH (SUED AS THE LEGAL REPRESENTATIVES OF THE LATE KOLETA K CHERUTICH) 1ST DEFENDANT

DAVID MASIRE (SUED AS THE LEGAL REPRESENTATIVE OF THE LATE ELIZABETH KIBOR) 2ND DEFENDANT

LAND REGISTRAR ELGEYO MARAKWET COUNTY 3RD DEFENDANT

RULING

Introduction

1. By an application dated 30th September 2024, the applicants sought among other orders leave to amend their defence; that the amended statement of defence attached be deemed as duly filed and served.
2. The application is premised on the grounds on its face and the affidavit sworn by Rosa Cheserem Cherutich on 27th September 2024. She deposes that they filed an amended statement of defence on 3rd July 2024, in response to the amended plaint but later found it necessary to file a counterclaim following the decision in Eldoret High Court Succession Cause No.220 of 1997 in which the estate of Paulo Cherutich Kibor was distributed among his three widows; that each widow is buried in their respective parcels; that they are children of the deceased widows and they have been and are still residing where their late mothers are buried.



3. She avers that there is need to amend their defence to include a counterclaim seeking among other orders, that the 1st and 2nd defendants be found to be the rightful owners of E/ Marakwet/Kapsowar 435 and E/Marakwet/ Kapsowar /20 and that a permanent injunction to be issued against the 1st and 2nd plaintiffs in respect of land parcel E/Marakwet/Kapsowar/435 and E/Marakwet Kapsowar/20.
4. The application is opposed vide the replying affidavit of Kwambai Toroitich and Joseph C Kiptuyei sworn on 29th January 2025. In a nut shell, they aver that the respondents are not keen on proceeding with this suit and they have caused delay since the 1st and 2nd defendants passed on. It is their contention that the 1st and 2nd defendants are frustrating the hearing and finalisation of this case. They urge the court to dismiss the application with costs.
5. The 3rd defendant did not file submissions having informed the court earlier that he was not opposing the application.
6. Pursuant to directions issued on 26th February 2025, the application was disposed off by way of written submissions. As at the time of writing this ruling, the respondents/plaintiffs had not filed any submissions despite being given time to do so and if they did, the same were not placed in the court file.

Submissions

Applicant's submissions

7. The applicant filed their submissions dated 16th May, 2025 on 19th May, 2025 and identified two issues for the court's determination. These are; -
 - i. Whether or not leave should be allowed as prayed
 - ii. Who is to bear costs.
8. On whether leave to amend the defence should be given, the applicants made reference to Order 8 of the *Civil Procedure Rules* and cited the following authorities that set out the principles governing amendment of pleadings:- *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* (2014) eKLR, *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013) eKLR, *Kassam v Bank of Baroda* (2002) eKLR, *Andrew Wabuyele Biketi v Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 Others* (2015) eKLR, *Bosire Ogero v Royal Media Services* (2015) eKLR, *Daniel Ngetich & Another v K-Rep Bank Limited* (2013) eKLR, *Emerge Development Limited v Chestnut Uganda Limited & Another* (2020) eKLR.
9. In the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 as cited in *St. Patrick Hill School Ltd v Bank of Africa Kenya Ltd* (2018) eKLR, the Court of Appeal set out the principles governing amendment of pleadings as follows; -
 - 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 the amendment notwithstanding the expiry of current period of limitation.

10. The applicants submitted that this court has the discretion to grant and refuse an application for amendment and that in this case, no prejudice will be suffered by the plaintiffs if the application is allowed.
11. On costs, they submitted that they are willing to pay costs pursuant to Section 27 of the Civil procedure.

Analysis and determination

12. I have considered the application, the grounds, affidavit in support, the response in opposition and submissions by the applicants and I find the sole issue for determination to be whether the application has merit.
13. The Substantive law on amendment of pleadings is found in Section 100 of the Civil Procedure Act which provides;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

14. Order 8 rule 3 of the Civil Procedure Rules provides for amendment of pleadings with the leave of court. The power to amend pleadings can be exercised at any stage of the proceedings before judgment is entered as long as it meets certain criteria as stated in the case of John Nyagaka Osoro v Reynold Karisa Charo & 5 others [2021] eKLR quoting Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, thus -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

15. From the principles set out above captured in the decisions cited by counsel for the applicants, it is clear that amendments of pleadings should be allowed freely, unless they are bound to cause prejudice to the other party. Amendments should even be allowed in situations of delay if the other side can be compensated by award of costs. The caveat in amendments is that the person applying for amendment must be acting in good faith, the amendment should not be intended to advance a new ground of defence, should not seek to repair an omission due to negligence or carelessness and should be allowed if it can be made without injustice to the other side.
16. I have perused the record and noted that the 1st and 2nd defendants died on 4th February 2022 and 24th February 2021 respectively. The families of the 1st and 2nd defendants appear not to have any interest in the suit and were not cooperative in obtaining limited grant of letters of administration Adlitem for purpose of defending this suit. The plaintiffs had to file Citation Cause No. E 20 of 2023 in the Senior Principal Magistrates Court Iten. They were issued with Grant of Letters of Administration Ad Litem on 2nd August 2023 to Rose J Cherutich to defend the suit. Thereafter, the suit was revived and the 1st



and 2nd defendants substituted vide a ruling by this court delivered on 12th March, 2024. After being served with the amended plaint, the 1st and 2nd defendants filed their amended statement of defence and thereafter filed the instant application.

17. I have considered the application and applied the above principles to the circumstances of this case and I am of the humble view that the proposed amendments will not alter the nature or substance of the suit and will help the court determine the real question in controversy. The applicants are however guilty of inordinate delay of over 4 years in bringing the application since the claim was filed in court. That notwithstanding, there is no evidence that the application is being made mala fide. Further I do not see what injustice the respondents will suffer if the orders sought are granted that cannot be compensated by an award of costs.
18. Consequently, I order as follows: -
- i. Prayer 3 and 4 in the application are allowed on condition that payment for the amended defence and counterclaim is made in 14 days.
 - ii. Correspondingly, the respondent is given leave to file a reply, if need be, within 21 days from the date of payment of the amended defence and counterclaim.
 - iii. Costs of the application to be borne by the applicants.
19. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 8TH DAY OF JULY, 2025.

L. N. WAITHAKA

JUDGE

In the presence of:

N/A for the applicant

N/A for the 1st and 2nd respondents

Ms. Jerubet h/b for Ms. Cheruiyot for the 3rd respondent

C/A: Christine

