



**Bombo v Kitumbo & another (Environment & Land Case
307 of 2021) [2024] KEELC 4993 (KLR) (13 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 4993 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KWALE
ENVIRONMENT & LAND CASE 307 OF 2021**

AE DENA, J

FEBRUARY 13, 2024

BETWEEN

HAMADI BAKARI BOMBO PLAINTIFF

AND

NASSIR MOHAMMED KITUMBO 1ST DEFENDANT

DISTRICT LAND REGISTRAR KWALE 2ND DEFENDANT

RULING

1. The application subject of this ruling is dated 14/6/2023 and is brought before court by the Plaintiff. The same is premised upon the provisions of Order 8 Rule 3&5, Order 52 Rule 1 of the [Civil Procedure Rules](#) 2010, sections 1A,1B and 3A of the [Civil Procedure Act](#), Article 159[2] [d] of [the Constitution](#) and all other enabling provisions of the law. The Plaintiff/Applicant seeks for the following orders;
 1. That this application be certified urgent and the court be pleased to grant order 2 below exparte at the first instance
 2. That the hearing and further proceedings in the main case be stayed pending the hearing and determination of this application interpartes
 3. That leave be granted to the Plaintiff to further amend his amended plaint dated 19/3/2013 and the accompanying pleadings [where necessary] in terms of the draft amended pleadings annexed to the affidavit in support of this application
 4. That leave be granted to the Plaintiff to file a further list of witnesses[further] witness, statements, a further list of documents and a reply to defence and defence to counterclaim within fifteen [15] days from the date of this order.



5. That witness summons be issued to the District Land Adjudication Officer, Kwale and the Land Registrar Kwale to attend court and present their respective records for the suit property at the hearing of the main suit
 6. That in view of the above orders, the hearing of the main suit to start de novo
 7. That the costs of this application be provided for.
- 2 The application is premised upon grounds on its face and the supporting affidavit of Hamisi Kityeke Mgandi an Advocate of the High Court of Kenya practicing as such at HM Lugogo & Company Advocates. He avers that at the time of filing this suit, the firm of Hezron Gekonde had conduct of the matter and which was vide a plaint dated 21/9/2012 and amended on 19/3/2023. The suit was struck out against the 2nd Defendant vide a ruling dated 18/9/2015. The 1st Defendant filed his defence and counterclaim on 14/7/2021. That upon the demise of Hezron Gekonde advocate the Plaintiff proceeded with the matter in person.
- 3 The deponent states that in early 2023 the Plaintiff requested him to take over the matter. Counsel states that he sought for information at the lands office over the status of the suit property and came across the information that the green card for the suit property Kwale/Mwananyamala/321 was closed and 2 new title deeds issued upon subdivision. There were however no records for the alleged subdivision, the 2 new titles and 2 new green cards at the lands registry. That the Plaintiff had informed the deponent that the Land Registrar had declined to effect the partition and the Plaintiff was still holding the original title.
- 4 It is averred that the 1st Defendant has in his counterclaim challenged the validity of the title deed of the suit property on grounds of fraud and it is therefore necessary for the Plaintiff to explain the root of the same. That the Plaintiff has further come into possession of extremely important documents that will aid in determination of the matter. The Plaintiff acknowledges that the window for filing of the pleadings has been closed and hence the application herein. That the Defendants will suffer no prejudice in the event that the application is allowed as prayed.

Response

- 5 In opposing the application, the 1st Defendant filed a replying affidavit sworn by Nassir Kiitumbo on 14/7/2023. The deponent states that the Plaintiff was aware of the demise of his Advocate and even informed the court of the same. That the Plaintiff was further aware of the closure of title No. Kwale/Mwananyamala/321 and can therefore not state that the same is new information. That the annexed defence has no substantive information to alter the current plaint and that the intended amendments are to only delay the determination of the matter. The application is termed as devoid of merit and the court is urged to dismiss the same.

Submissions

- 6 Vide directions of the court issued on 27/6/2023, the parties were asked to file written submissions. The 1st Defendants written submissions were filed before court on 13/9/2023 and the Plaintiffs on 14/8/2023. The court has taken note of the contents thereof.

Determination

- 7 The criteria for amendment of pleadings with the leave of court is outlined under Order 8 Rule 3 of the [*Civil Procedure Rules*](#) which provides 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.
- 8 Further, Order 8, rule 5 gives the court the general power to amend as follows; -
- 5.
- (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.
- 9 The court of appeal in *Ochieng and 2 others v First National Bank of Chicago* (1995) eKLR, set out the principles upon which Courts may grant leave to amend pleadings. The same is 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; and
 - 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 an amendment notwithstanding the expiry of current period of limitation.
- 10 I have perused the draft Further Amended Plaint attached to the application herein. The Plaintiff states that he and the 1st Defendant's father who is deceased are the owners of the suit property. That the suit property has formally been divided into two at all times and with the two owners occupying their respective portions. Further that his portion is fully developed. The Plaintiff's case is that the 1st Defendant and his family have forcefully moved into his portion and caused him immeasurable loss.
- 11 It is stated that the above said actions are supported by the 2nd Defendant by failing to make an order for partition of the suit property as per section 94[5] of the *Land Registration Act* 2012. The Plaintiff seeks that the suit property be declared as being held as tenants in common by the Plaintiff and Juma Kitumbo each holding half a share and further for partitioning orders. The Plaintiff further seeks for eviction of the 1st Defendant from his portion and for general damages. The Plaintiff states that according to the green card of the suit property, the title Kwale/mwananyamala/321 was closed and 2 new title deeds issued upon subdivision. That from the records however, the title deeds and the green cards are not traced at the lands registry.
- 12 The power to grant leave for amendment is on the discretion of the court and which should be exercised judiciously based on the circumstance of each case. Section 100 of the *Civil Procedure Act* also empowers the court to grant orders for amendment. Many issues are in controversy in the instant suit the first being the issue of ownership which is highly contested. The allegations of the property being jointly owned can only be unravelled upon investigation at a full trial. For me to attain a just determination of this matter, the parties herein ought to be allowed to furnish the court with all the documentation they deem necessary in illuminating more light on the true ownership and nature of



occupation of the suit property. Amendments can be made at any stage of the proceedings, and as stated above, the main purpose is for the court to make a determination of the real issues in controversy. This position was reiterated by the Court of Appeal in the case of *Central Kenya Limited -v- Trust Bank Limited* (2000)2 EA 365 where the court held that:

that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

13 I find that the amendment to the plaint is necessary based on the facts put across by the Applicant herein.

14 On the issue of filing a further list of documents and statements as stated under prayer 4 of the application. Having allowed the prayer for amendment of the plaint, it is imperative that the same be accompanied by the necessary documents for reinforcement of whatever new facts have been outlined in the plaint. For that reason am inclined towards allowing the said application for filing of further documents. I am guided by the holding in *Esther Wambui Njenga v Harrison Mwangi Nyota & 2 others* [2018] eKLR where the court held that it is fair to allow each party to fully ventilate their case if for no other reason but so that the whole truth is revealed.

15 The Applicant has further sought for the Land Registrar and the District Land Adjudication Officer to be summoned as witnesses in the matter. That the records to be presented before court as evidence are to be found in their respective offices and they are therefore the custodians of the same. The court has the authority to issue summons of witnesses to court on application by either party. This was stated by the court in *Dahir Sadik AUSAAD Vs Modogashe Construction Ltd. & 3 Others* [2016] eKLR where it was held as follows;

This Court has powers to issue summons to witnesses to attend a trial. That is done on the application of any party. It is also done after the case has been certified as ready for hearing.”

16 I have noted that PW1 testified on 13/3/2023 and is the only witness who has testified in the matter. I do not think that any prejudice will be occasioned to the Defendants should the hearing start de novo. I however caution the parties against any tactics that are aimed at further delaying the hearing of this matter whether by further amendments to the pleadings or applications. The suit was filed in the year 2012 and the same has clearly been in court for a long time. The court is mandated to ensure delivery of justice in a timely manner and within a reasonable period of time, that is what this court endeavours to do.

17 The prayer for stay of proceedings pending determination of this application has been overtaken by events. The court hereby re-opens the pre-trial proceedings and the following orders shall issue;

- a. Leave be and is hereby granted to the Plaintiff to further amend his amended plaint dated 19/3/2013 and the accompanying pleadings in terms of the draft amended pleadings annexed to the affidavit in support of this application
- b. That leave be and is hereby granted to the Plaintiff to file a further list of witnesses, further witness statements, a further list of documents and a reply to defence and defence to counterclaim within fifteen [15] days from the date of this order.



- c. The Defendant in view of prayer 1 and 2 above is granted corresponding leave to respond and file further documents within 14 days of service.
- d. The hearing of the main suit to start de novo
- e. Witness summons be and are hereby issued to the District Land Adjudication Officer, Kwale and the Land Registrar Kwale to attend court and present their respective records for the suit property at the hearing of the main suit.
- f. Each party to bear its own cost.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED THIS 13TH DAY OF FEBRUARY 2024.

A.E DENA

JUDGE

Mr. Khamis for the Plaintiff /Applicant

No appearance for the Defendant/Respondent

Mr. Daniel Disii – Court Assistant

