



Criticos & another v Third Engineering Bureau of China City Construction Group Company Limited; Masamo (Third party) (Environment & Land Case 141 of 2014) [2024] KEELC 704 (KLR) (6 February 2024) (Ruling)

Neutral citation: [2024] KEELC 704 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 141 OF 2014
LL NAIKUNI, J
FEBRUARY 6, 2024**

BETWEEN

BASIL CRITICOS PLAINTIFF

AND

KENYA TRADE AND DEVELOPMENT COMPANY LIMITED INTENDED PLAINTIFF

AND

THIRD ENGINEERING BUREAU OF CHINA CITY CONSTRUCTION GROUP COMPANY LIMITED DEFENDANT

AND

ANDREW JUMAMOSI MASAMO THIRD PARTY

RULING

I. Introduction

1. The Plaintiff and the Intended 2nd Plaintiff/ Applicants herein, Hon. Basil Criticos and Kenya Trade and Development Company Limited moved this Honorable Court for the hearing and determination of their Chamber Summons application dated 27th April, 2023. It was brought under a Certificate of urgency and the dint of the provisions of Order 1 Rules 1, 10, 14 and 25, Order 8 Rule 3, 5, of the Civil Procedure Rules 2010, Section 1A, 1B, 3A, 63(e) and 100 of the *Civil Procedure Act*.
2. Upon service, it will be noted that the Defendant opposed the application through a Replying Affidavit of Rose Ndururi sworn on 30th May, 2023. However, the 3rd Party never opposed. The Honourable Court will be dealing with issues from the replies later on.



II. The Applicants' Case

3. The Applicants sought for the following orders: -
 - a. That leave be and is hereby granted to the Plaintiff/Applicant to join Kenya Trade and Development Company Limited to this suit as 2nd Plaintiff.
 - b. That leave be and is hereby granted to the Plaintiff/Applicant to amend the Plaintiff in terms of the hereto-annexed draft Amended Plaintiff.
 - c. That the costs of this application be provided for.
4. The application by the Plaintiff and the intended 2nd Plaintiff herein was premised on the grounds, testimonial facts and averments made out under the 11th Paragraphed Supporting Affidavit of BASIL CRITICOS sworn and dated 27th April, 2023. The 1st Plaintiff/Applicant averred that:
 - i. The Plaintiff/Applicant filed this suit through Plaintiff dated 28th May, 2014 seeking general damages against the Defendant/Respondent, amongst other reliefs, on account of Defendant/Respondent's trespass into a portion of the suit property known as L.R. No. 10287/4 measuring approximately 410.6 Ha and situated within Taita Taveta County.
 - ii. The Plaintiff/ Applicant however omitted a digit in the description of the suit property by describing the property as L.R. No. 10287 instead of L.R. No. 10287/4 and seeks to correct the description of the suit property to read L.R. No.10287/4.
 - iii. Further, at the time of filing this suit, the Plaintiff/ Applicant was the registered proprietor of the suit property but had since transferred the suit property to the intended 2nd Plaintiff Kenya Trade and Development Company Limited, of whom the Plaintiff/ Applicant is a shareholder and director. The transfer was effected on 13th October, 2020.
 - iv. Being the successor in title over the suit property, the intended 2nd Plaintiff is the current registered owner of the suit property having an ownership interest in the property and ought to be joined to these proceedings as 2nd Plaintiff being the ultimate beneficiary of any orders that the Court may grant in this suit.
 - v. The Plaintiff/Applicant therefore wishes to amend the Plaintiff to specifically plead special damages which it seeks from the Defendant/Respondent.
 - vi. The presence of the intended 2nd Plaintiff in these proceedings and the amendments to the Plaintiff that the Plaintiff/Applicant seeks will enable the Honourable Court to determine the real issues in controversy amongst the parties concerned and will assist the court to make effective appropriate orders.
 - vii. The intended amendments have been proposed in good faith and will not in any way prejudice the Defendant/Respondent or even the third party. It is therefore only fair, just and equitable that the application is allowed as prayed.

III. Submissions

5. On 16th May, 2023 while all the parties were present in Court, they were directed to have the Chamber summons application dated 27th April, 2023 be disposed of by way of written submissions and all the parties complied. Pursuant to that on 16th October, 2023 a ruling date was reserved on Notice by Court accordingly.



A. The Written submissions of the Plaintiff/Applicant

6. The Plaintiff/ Applicant through the firm of Messrs. Prof. Albert Mumma & Company Advocates filed his written submissions dated 23rd June, 2023 where the Learned Counsel commenced the submissions by stating that before the court is the Plaintiff/Applicant's chamber summons application dated 27th April, 2023 seeking the following orders:-
 - a. That leave be and is hereby granted to the plaintiff/applicant to join Kenya Trade and Development Company Limited to this suit as 2nd Plaintiff.
 - b. That leave be and is hereby granted to the plaintiff/applicant to amend the Plaintiff in terms of the hereto-annexed draft Amended Plaintiff.
 - c. That the costs of this application be provided for.
7. The Learned Counsel submitted that the application was supported by the supporting affidavit of Basil Criticos, the Plaintiff/Applicant herein who is also a director of the proposed 2nd Plaintiff. The Third Party did not oppose the application but the Defendant has through a replying affidavit of Rose Ndururi sworn on 30th May, 2023. These were the Plaintiff/ Applicant's submissions in support of the application.
8. On the background, the Learned Counsel averred that the Plaintiff/ Applicant filed this suit through Plaintiff dated 28th May, 2014 praying for judgment against the Defendant as follows, amongst others:
 1. A permanent injunction restraining the Defendant from occupying, mining or otherwise interfering with the property with the property known as Land Reference Number 10287.
 2. A permanent injunction do issue restraining the Defendant from blocking, fettering, or interfering with the free and unconditional access by the Plaintiff to his property known as Land Reference Number 10297.
 3. A declaration that the Defendant has trespassed on the Plaintiff's property land Reference Number 10287.
 4. An order that the defendant should hand over vacant possession of Land Reference Number 10287 to the plaintiff with immediate effect.
 5. General damages for trespass.
9. The Learned Counsel submitted that the suit was originally filed by Plaintiff's previous advocates. The plaintiff has since then changed his representation and is now represented by the firm of Prof. Albert Mumma and Company Advocates. While undertaking pre-trial in this matter with Plaintiff/Applicant's said new advocates, the Plaintiff/Applicant discovered that the suit property has been incorrectly described in the plaintiff as LR No. 10287 instead of LR No. 10287/4. The Plaintiff/Applicant therefore seeks to correct this descriptive error through the sought amendments. Further, as at the time of filing of the suit, the Plaintiff/Applicant was the registered proprietor of the suit property LR No. 10287/4 but has subsequently transferred the property to the proposed 2nd Plaintiff, Kenya Trade and Development Company Limited. See Entry of Transfer at page 17 of the Valuation report annexed to the supporting affidavit to the application. The Plaintiff/Applicant therefore seeks to join the said proposed 2nd Plaintiff to this suit also so that any orders issued by the court are binding on the latter.



10. The Learned Counsel asserted that thirdly, the Plaintiff/ Applicant has undertaken a valuation report on the injury occasioned to the suit property by the Defendant/Respondent's illegal trespass and excavation of road construction materials therefrom and wished to plead the special damages in the plaint as by law required. The proposed amendments are necessary and will enable the court to determine the real issues in controversy amongst the parties concerned.
11. On the issues for determination, the Learned Counsel submitted that the Plaintiff/ Applicant would rely on the following issue for the Honourable Court's determination:-

“Whether the Plaintiff/Applicant has proffered valid reasons for the court to exercise its discretion allow joinder and amendment as sought.”
12. The Learned Counsel submitted that the Plaintiff/ Applicant in the affirmative will submit first on the issue of joinder of the proposed 2nd Plaintiff to the suit. Order 1 Rule 10(1) and (2) of the Civil Procedure Rules, 2010 provides for substitution and addition of parties as follows:-
 - (1) Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit.
 - (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”[Underlining ours]
13. Further, Order 1 Rule 1 of the Civil Procedure Rules, 2010 stipulates who may be joined to a suit as Plaintiffs that:

“ All persons may be joined in one suit as Plaintiffs in whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if such persons brought separate suits, any common question of law or fact would arise.”
14. Further, in the persuasive decision of the High Court in “Joseph Njau Kingori – Versus - Robert Maina Chege & 3 Others [2002] eKLR”, the High Court at [Eldoret Nambuye, J as she then was] stated the relevant tests for joinder of a party as follows:
 1. He must be a necessary party.
 2. He must be a proper party.
 3. In the case of a Defendant there must be a relief flowing from that Defendant to the Plaintiff.
 4. The ultimate order or decree cannot be enforced without his presence in the matter.



5. His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.
15. The Learned Judge [in the above case] proceeded to define a necessary party as one who is necessary to the constitution of the suit without whom no decree at all can be passed and a proper party as a person who though no relief may be claimed against him, his presence is necessary for a complete and final decision of the question involved in the suit. The proposed 2nd Plaintiff is the current registered and valid owner of the suit property LR. No. 10287/4 and as such would be the one who would ultimately enjoy the fruits of the judgment should the suit be allowed as prayed. Therefore, the statements of the Defendant/Respondent contained at paragraphs 4 and 5 of the Defendant/Respondent's replying affidavit that the suit property was sold and amalgamated with another to form an alleged Lake Jipe Settlement Scheme are untrue and, in any case, ought to form the Defendant's defence to the amended plaint and not a reply to an application seeking amendment of the plaint. See Entry of Transfer at page 17 of the Valuation report annexed to the supporting affidavit to the application.
16. The Learned Counsel submitted that further that the presence and participation of the proposed 2nd Plaintiff in this suit, as the current owner of the suit property, can only aid in and not hinder the enforcement of any ultimate order or decree that may be issued in these proceedings. Further, while it is true that both the Plaintiff/Applicant and the proposed 2nd Plaintiff herein have a pending suit being ELC No.125 of 2018 seeking to cancel purported illegal titles alleged to exist on the location of the Plaintiff's suit property, it is however not true that the Plaintiff/Applicant or the proposed 2nd Plaintiff have made any admission in the said suit that LR No.10287/4 was transferred to the Settlement Fund Trustees and does not exist. The Defendant has not tendered any evidence of its false statements at paragraph 5 of its replying affidavit.
17. In opposition to the joinder of the 2nd proposed Plaintiff, the Defendant has further alleged at paragraph 6 of its replying affidavit that the transfer of the suit property to the 2nd proposed Plaintiff violates the doctrine of lis pendens for the alleged reason that the transfer was effected with the knowledge of the existence of this suit as well as ELC No. 125 of 2018.
18. To address this point, the Learned Counsel placed reliance on the rationale behind lis pendens as captured in "Shivji Naran Virji – Versus - Ogla Jemeli Barng'etuny [2021] eKLR", where the Environment and Land Court at Eldoret [S.M. Kibunja] held at paragraph 5(b) of its ruling that:
- “The lis pendens doctrine was originally a doctrine of common application to both the courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of, and the claimant forced to bring a new suit against the new owner only for the latter to dispose of the new suit and the claimant to start all over again: see Turner LJ in Bellamy v Sabine [1857]1 De J566.”
19. Adopting the above rationale behind the doctrine of lis pendens, the Learned Counsel submitted that his application herein would in fact preserve and give effect to rather than violate the rationale behind the doctrine of lis pendens since the current owner of the suit property [the proposed 2nd Plaintiff would be made a party in these proceedings and would be bound by any order or decree issued in the suit should the application be allowed.
20. Moreover, there is a connection between the Plaintiff/Applicant and the proposed 2nd Plaintiff in that the former is a director and shareholder of the latter. It is therefore hard to see how the Defendant or even the third party would be prejudiced by the joinder of the proposed 2nd Plaintiff to this suit as they would still be able to exercise their respective rights to mount a robust defence to the amended suit.



21. The Learned Counsel submitted that therefore that the proposed 2nd Plaintiff, as the current owner of the suit property, is a necessary, right and proper party whose addition, presence and participation in these proceedings will assist the court to effectively and completely adjudicate upon and settle all questions involved in the suit and issue binding orders. Secondly, by the amendments sought to the plaint, the Plaintiff/Applicant seeks to correct the misdescription of the suit property as LR No. 10287 instead of LR No. 10287/4. This would in no way prejudice the Defendant nor the third party. However, the Defendant.
22. However, the Defendant/ Respondent has opposed the application and in doing so has stated, incredibly, at paragraphs 16 and 17 its Replying Affidavit that:-

“ 16.The amendment sought to introduce LR 10287/4 would now refer to a portion of land which was admittedly surrendered by the plaintiff to the Settlement Fund Trustees and now forms part of Lake Jipe Settlement scheme, leased from the aforementioned Josephat Mwaka Kithokoi, John Wambua Matheka and Mary Wanza Makulu.

17I can confirm that the aforementioned Josephat Mwaka Kithokoi, John Wambua Matheka and Mary Wanza Makulu successfully urged their rights during the adjudication process were issued with title deeds for the parcels previously leased to the Defendant/ Respondent through a lawful land adjudication process.”

[See paragraphs 16 and 17 of the Defendant’s replying affidavit].

23. The Learned Counsel submitted that the Defendant was therefore alleging that LR 10287/4 is wholly separate and distinct portion from the location of the quarry site and secondly that the quarry site was leased to it by Josephat Mwaka Kithokoi, John Wambua Matheka and Mary Wanza Makulu. The above averments at paragraphs 16 and 17 of the Defendant’s replying affidavit go to the merits of the suit and ought to form the Defendant’s defence to the amended suit and not a reply to an application to amend suit. The same goes for paragraphs 4-14 of the Replying Affidavit. Further at paragraph 18 of its replying affidavit to the application, the Defendant stated that:

“ That I am informed by our advocates on record, which I believe to be true, that allowing the proposed amendment would leave this Honourable Court with little choice but to strike out this suit in its entirety for misjoinder of the defendant/respondent, as the land claimed by the plaintiff is wholly distinct and separate from the land actually leased by the defendant/ respondent.”

24. Therefore, according to the Defendant/Respondent, it was the Plaintiff/Applicant and the proposed 2nd Plaintiff who would be prejudiced by an amendment to the Plaint to correctly describe the suit property. Accordingly, the court should deem Paragraph 18 of the Defendant’s said Replying Affidavit to the application as an admission by the Defendant that it would not be prejudiced by the amendment application. The same should therefore be allowed. Further, at Paragraph 7 of its defence dated 11th December, 2019, the Defendant stated that:

“ In further response to paragraph 5 [of the Plaint], the Defendant avers that pursuant to a lease agreement between the Defendant and Andrew Jumamosi Masamo dated 15th February, 2014, the said Andrew Jumamosi Masamo offered and the Defendant accepted,



to lease all that parcel of land known as Title Number Taveta/Lake Jipe/780 for a period of 5 years.”

[See paragraph 7 of the Defendant’s defence]

25. The Defendant’s averments at Paragraphs 16 and 17 of its Replying Affidavit and its averments at paragraph 7 of its defence dated 11th December, 2019 are contradictory in that in the former the Defendant purported that the quarry site is both separate from the suit property and was leased to it by Josephat Mwaka Kithokoi, John Wambua Matheka and Mary Wanza Makulu while in the defence of the Defendant purported that the quarry site was leased to it by Andrew Jummosi Masamo whom it had joined to these proceedings as third party. Be that as it may, the Plaintiff maintained that the quarry site was located on the suit property.
26. The Learned Counsel further argued that the rival arguments between the Plaintiff/Applicant and the Defendant/Respondent referred to above are the more reason why the amendment sought to correctly describe the suit property ought to be allowed. In so submitting, the Plaintiff relied on the decision of this very court in “Pakaja Limited – Versus - Trustees of Mombasa Simba Sports Club & 3 Others; Singh Sabha Community (Interested Party) [2022] eKLR”, where this court held:

“It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs....”
27. Adopting the above decision, the Learned Counsel posited that this amendment application had been brought in good faith and will cause no injury to the defendant or third party that cannot be compensated in damages. Further, the application was necessary for the purpose of determining the real questions in controversy between the parties and would not alter the character of the suit. Thirdly and lastly, the Plaintiff/Applicant had undertaken a valuation report dated 21st March, 2023 on the injury occasioned to the suit property by the Defendant/Respondent’s illegal trespass and excavation of road construction materials therefrom and wishes to plead the special damages in the Plaint as was by law required. The Valuation report was annexed to the supporting affidavit to the application. See “Hahn – Versus - Singh, Civil Appeal No. 42 of 1983 [185] KLR 716”, [cited in “China WU YI Limited & Another – Versus - Irene Leah Musau [2022] eKLR”, where the Court of Appeal stated:-

“Special damages must not only be specifically claimed (pleaded) but also strictly proved...”
28. In conclusion, the Learned Counsel therefore submitted that the joinder and amendments sought to the Plaint was necessary to determine the real questions in controversy between Defendant/Respondent nor has the application been brought in bad faith. Further, the application had been brought in a timely manner before the suit had been set down for hearing. For the foregoing reasons, the Learned Counsel submitted that it had proffered valid and sufficient reasons for the court to exercise its discretion to allow the chamber summons application dated 27th April, 2023 as prayed.

B. The written submissions by the Defendant/Respondent

29. The Defendant/Respondent through the Law firm of Messrs. Omusolo Mungai & Co. Advocates filed his written submissions dated 18th September, 2023 where the Learned Counsel commenced the submissions by stating that the Defendant/Respondent’s submissions were in opposition to the Plaintiff/Application’s Chamber Summons application dated 27th April, 2023, seeking leave to amend the Plaint.



30. The Learned Counsel provided the background of the case to the effect that the Plaintiff/Applicant herein filed suit via the Plaint dated 23rd May 2014, a whopping Nine (9) years and 1 month from the date of the instant application, alleging trespass by the Defendant/Respondent on property L.R. No. 10287. The Plaintiff thereafter failed to take action in the prosecution of his claim with the matter being listed for hearing of a Notice to Show Cause on 27th October 2017 when the suit was dismissed. The Plaintiff/Applicant thereafter filed an application dated 18th December, 2017, seeking to reinstate the suit. The said application was then served upon the Defendant on 29th March 2018 almost 4 years from the date of filing suit, bringing to light the existence of the suit.
31. The Counsel asserted that upon service, the Defendant/Respondent entered appearance via a Notice of Appointment of Advocates dated 10th May, 2018, there having been no summons to enter appearance served. Following the conditional reinstatement of the suit, the Defendant/Respondent filed its Defence on 11th December, 2019, denying the allegations of trespass and advising on the property so occupied being Title No. Taveta/Lake Jipe/780, under the authorization of the Third Party who is the registered owner, who in his Defence, confirms the Defendant/Respondent's averments. The Defendant/Respondent further pleaded and produced evidence to prove that the property Title No. Taveta/Lake Jipe/780, was initially part of L.R. No. 10287/4 which property previously belonged to the Plaintiff/Applicant but was sold off to the Settlement Fund Trustee in the year 1990.
32. It was further not in dispute that as a result of the transfer of property L.R. No. 10287/4 to the Settlement Fund Trustee, the property had since been sub - divided and Title Deeds issued to 3rd parties. Consequently, and admittedly, the Plaintiff/Applicant filed High Court ELC Case No.125 of 2018 wherein he seeks cancellation of the Title Deeds resultant from the subdivision of property L.R. No. 10287/4, including the Title Issued to the Third party herein. Paragraph 44 of the Plaint in ELC 125 of 2018, the Plaintiff/Applicant herein pleads as follows:-
- “The Plaintiff's specific claim against the 40th Defendant the Attorney General is for it through Registrar of Titles to immediately cease forthwith issuance of title deeds to portions of L.R. No. 10287/4 and to cancel all title deeds issued by Director of Settlement Taita Taveta to portions of L.R. No. 10287/4.”
33. He held that the said suit was yet to be determined. The Defendant/Respondent further assertively submitted that the Plaintiff/Applicant categorically admitted that the property L.R. No. 10287/4 even as at 28th May 2018 when ELC 125 of 2018 was filed, no longer existed. This position held true to date. The Plaintiff/Applicant's Chamber Summons application now sought leave to amend the Plaint filed in the year 2014 in terms highlighted therein and reproduced summarily hereunder:
- a. Amend the description of the suit property from property described as Land Reference No. 10287 to Land Reference No. 10287/4 measuring approximately 410.6Ha, situated within Taita Taveta County.
 - b. Join Kenya Trade and Development Company Limited as the 2nd Plaintiff, on grounds that it has since become the registered owner of the suit property L.R. No.10287/4, by virtue of a transfer allegedly effected on 13th October 2020.
 - c. Amend the acreage of the portion of land allegedly trespassed upon by the Defendant from Forty (40) acres to approximately Twenty (20) acres.
 - d. Introduce a claim for special damages in the sum of Kshs. 19,320,000/=.



- e. Introduce an averment that the portion of the suit property allegedly trespassed upon by the Defendant differs from that purported to belong to the Third Party.
 - f. Assert the existence of a pending suit being Mombasa ELC No.125 of 2018: Basil Criticos & Another – Versus - AIC Makutano & 66 others, wherein the Plaintiff seeks cancellation of Titles issued to among others, the Third Party by the Settlement Fund Trustees, touching on the same subject matter being L.R. No. 10287/4.
34. The application was vehemently opposed by the Defendant/Respondent. This Honorable Court was invited, upon retiring to write its ruling, consider the Defendant/Respondent's Replying Affidavit dated 30th May 2018 and deponed by one Rose Ndururi together with these submissions.
35. On the analysis, the Learned Counsel submitted that by virtue of the admitted existence of ELC 125 of 2018 as filed by the Plaintiff/Applicant, challenging the issuance of Titles to third parties (Defendants in the referenced suit) by the Director of Settlement Taita Taveta, this court should rightly so draw inference to the fact that property L.R. No 10287/4 ceased to exist. This was buttressed further by the fact that the Third Party herein-Andrew Masamo-was issued with his Title in the year 1996 as attached to the Defendant/Respondent's documents. The Third Party was further sued as the 39th Defendant in ELC 125 of 2018. It therefore behooved the Plaintiff/Applicant to substantiate the Title purportedly issued on 21st September 2017, allegedly transferred to the intended 2nd Plaintiff/Applicant and attached to the summons.
36. The Defendant/Respondent had adduced before the Honorable court, uncontroverted evidence in support of the historical transition of the property L.R. No. 10287/4, in the nature of correspondence from the relevant Ministerial departments, the relevant local administration offices and documents from the National Survey Office, none of which had been rebutted. Of interest to note was the Applicant's glaring silence on the documents. Indeed, the Defendant/Respondent's submitted that silence meant consent. Converse to the Applicant's submissions at paragraph 35, there was absolutely no contradiction in the Defendant/Respondent's averments. An elaborate perusal of the Defendant/Respondent's Defence would confirm that at no point did the Defendant/Respondent aver to having undertaken excavation activities on the Third party's property- Title Number Taveta/Lake Jipe/780 or that the quarry site was on the said property. Indeed, the Defendant/Respondent, as was confirmed by the Third Party, did lease out property Title Number Taveta/Lake Jipe/780 for use. Nothing in the Lease Agreement submitted before the court, avers to the property being used as a quarry site.
37. The Learned Counsel further proceeded to produce uncontroverted evidence to prove that the quarry site was located on what was formerly unadjudicated trust land- Challa Njukini Adjudication Section- which property has never belonged to the Plaintiff and whose lawful occupants as confirmed by the Deputy County Commissioner, Taveta Sub-County were Josephat Mwaka Kithokoi, John Wambua Matheka and Mary Wanza Makulu. The Defendant has further provided evidence to prove that the said owners executed lease agreements authorizing the excavation on exercise. Of greater importance to this court, was to note that the adjudication, process was concluded, and Title Deeds issued. Of further importance was to note that what was the unadjudicated Challa- Njukini Section, was not part of what was property L.R. No. 10287/4. Indeed, the beneficiaries of the adjudication of the Challa- Njukini scheme was not party to the proceedings by the Plaintiff in ELC 125/2018.
38. What then was the fate of the Applicant's Summons seeking to amend the Plaint in terms of Paragraph 7 hereinabove? The Defendant/Respondent submitted that the application ought to be dismissed with costs. The reasons thereof were submitted hereunder:



39. The Learned Counsel held that the law on amendment of pleadings was anchored on the provision of Section 100 of the Civil Procedure Act, Cap. 21 as read with Order 8 Rule 3(1) and (2) of the Civil Procedure Rules, 2010 provide that:-

- “(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.
- (2) Where an application to the court for leave to make an amendment, such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.”

40. Further Order 8 Rule 5 as follows:-

- “(1) For purposes 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.’(emphasis added).”

41. In the case of:- “Lewar Ventures Limited – Versus - Equity Bank(Kenya) Limited [2022] eKLR” the court endeavored to set out the parameters for amending pleadings by stating as follows:

“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 F:ading-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.”

42. His view was that the purpose of an amendment was to determine the real question in controversy between the parties i.e. the substantive merits of the case or to correct a defect or error in the proceedings. Merits was defined as the inherent rights and wrongs of a legal case, absent of any emotional or technical bias.
43. The Learned Counsel submitted that the Applicant herein was on a forum shopping venture. The suit herein was filed over 9 years ago wherein the Plaintiff's claim was based on the property described as L.R. No 10287. Service of Summons was effected upon the Defendant/Respondent 4 years after filing of the suit. The Defendant/Respondent entered appearance denying the Applicant's claim and enjoined the Third party from whom it had leased out property Title No. Taveta/Lake Jipe/780. The Third Party filed his Defence confirming the lease between himself and the Respondent. At the same time, the Applicant filed ELC No. 125 of 2018 wherein it seeks a cancellation of Titles among them, the title issued to the Third party. That suit was pending before this Honorable Court.
44. The Learned Court implored upon this Honorable court to find that by filing ELC No. 125 of 2018, the Applicant impliedly admits that property L.R. 10287/4 was no longer in existence, following its subdivision by the Settlement Land Trustee and issuance of consequent Titles to third parties (Defendants in ELC No. 125 of 2018). This Honorable court to note that the transfer of property L.R. 10287/4 to Kenya Trade and Development Company (the intended 2nd Plaintiff) was purportedly effected on 13th October 2020, by which date ELC No. 125 of 2018 had already been filed, challenging the acquisition of the property by the Settlement Fund Trustee, the subsequent subdivision of the property and issuance of titles to third parties.
45. The Learned Counsel stated that the intended amendments aimed at introducing property L.R. 10287/4 are devoid of merit, raised with the sole aim of misleading this Honorable court into perpetrating an illegality with the Applicant seeking to unjustly benefit from the Respondent, whose access, use and occupation of what was formerly property L.R. 10287/4, was authorized by the rightful owners. The Respondent submitted that the sought amendments never in any way, aid in determining the real question in controversy between the parties but was geared at unjust enrichment. The application herein are an affront to the provisions of Order 2 Rule 6(1) of the Civil Procedure Rules, 2010 which provides that no party may in any pleading make an allegation of fact, or raise any new ground of claim, Inconsistent with a previous pleading of his in the same suit. This rule discouraged parties from adopting a shifting and opportunistic approach to their claims, where they could introduce new issues as and when they see fit, irrespective of the existing pleadings.
46. It was crucial to note that the Plaintiff/Applicant, from the inception of this suit, had relied on the claim that the Defendant/Respondent trespassed onto Land Reference Number 10287, measuring approximately 40 acres. However, as demonstrated through irrefutable evidence, the said parcel of Land Reference Number 10287 never existed as claimed by the Plaintiff/Applicant. The Defendant/Respondent had diligently provided documentation from the Ministry of Lands, which confirmed that the property initially referred to as Land Reference Number 10287 was sold to the Settlement Fund Trustee and ceased to exist since its subdivision and allocation to other beneficiaries in the year 1996. By introducing a different parcel of land Nine (9) years after instituting the suit, the Plaintiff/Applicant was effectively changing the subject matter of the dispute. This not only went against the permissible scope of amendments but also raised questions about the credibility and integrity of the Plaintiff/Applicant's claims.



47. It was evident that the Plaintiff/Applicant's intention was to introduce entirely new issues aimed at altering the cause of action in the matter. This was not a case of a minor modification to clarify or enhance the original claim; instead, it amounted to an attempt to introduce a different and inconsistent ground of claim that was fundamentally at odds with the Plaintiffs previous pleadings. The Court of Appeal had had occasion to consider this aspect in the case of:- "James Ochieng Oduol – Versus - Richard Kuloba)(2008) eKLR" where the Honourable Judges of Appeal stated as follows in the relevant passage:-

"It was not until a defence was filed alleging that no action lies and further denying publication, that the Respondent moved the trial court for leave to amend the Plaintiff. The facts which were introduced in the Amended Plaintiff were not new. The Respondent was all along aware of them but failed to plead them in the Plaintiff. The amendment appears to have been allowed in effect to aid a negligent pleader. The provisions of Order VIA rule 5(1) of the Civil Procedure Rules are not intended to aid a negligent pleader, more so where its effect will be to defeat an accrued defence. A careful reading of Order VIA rule 3 of the Civil Procedure Rules clearly shows that amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view are lacking here. We appreciate that particulars were requested for and furnished; and that by dint of the provisions of Order VI rule 8(b), the particulars now form part of the pleadings. However, in a case as this one where a Plaintiff is reacting to a defence raised, the court should be slow in allowing amendments to the Plaintiff which prima facie have the effect of defeating that defence. In exercising his discretion in this matter, Visram, J. failed to appreciate this fact and for that reason we think that he erred. Consequently we allow the appeal, set aside the order allowing the amendment of the Plaintiff and substitute therefor an order dismissing the Respondent's application for leave to amend the plaintiff, dated 4 January, 2000 with costs both of this appeal and the application to abide the outcome of the Respondent's suit in the High Court."

48. The Learned Counsel averred that the Plaintiff/Applicant from inception knew that the suit property referenced in their Plaintiff no longer existed. They willingly transferred it to the Settlement Fund Trustee 32 years ago and lack locus to bring any action on this land. The nature of such action would only be a suit for recovery of the Land from the Settlement Fund Trustees and not from the Defendant. This was essentially what the Plaintiff/Applicant claimed in ELC No. 125 of 2018. Such action would in any event be estopped by operation of law, specifically, the provision of Section 7 of the [Limitation of Actions Act](#) which states as follows:-

"7. Actions to recover land

An action may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued to him or, if it first accrued to some person through whom he claims, to that person."

49. The Learned Counsel further submitted that the Plaintiff/Applicant's title to LR 10287 was extinguished by operation of law i.e., Section 7 as read together with the provision of Section 17 of the [Limitation of Actions Act](#) which further provides as follows:-

17. Title extinguished at end of limitation period Subject to section 18 of this Act, at the expiration of the period prescribed by this Act for a person to bring an action to recover land (including a redemption action), the title of that person to the land is extinguished.



50. Therefore, the Learned Counsel asserted that any application to amend the Plaint could not be viewed as anything other than an attempt to introduce an entirely new and substantially different cause of action which is specifically geared to circumvent the *Limitation of Actions Act*. By introducing a different parcel of land several years after instituting the suit, the Plaintiff/Applicant was effectively changing both the subject matter of the dispute and statutory timelines that would otherwise operate to extinguish its claims. This was especially relevant considering the fact that the Plaintiff/Applicant had filed ELC No. 125 of 2018 against the Settlement Fund Trustee seeking to revoke the very titles emanating from the sub - division of LR 10287/4 thereby creating Lake Jipe Settlement Scheme. The proposed amendment was therefore judicial sophistry by the Plaintiff/Applicant where they sought to secure in one suit what they had failed to secure in another suit based on the same subject matter.
51. On the issue of whether the proposed amendments had been made timeously, the Learned Counsel submitted that the same was of significant importance in the present case. As it stood, the suit was originally filed in the year 2014, and the proposed amendments had emerged a whopping 9 years later, only after the matter had been fixed for hearing. The Applicant had since Inception of the suit, been privy to what was formerly property L.R. No 10287/4, which fact was buttressed by the Applicant's List and Bundle of Documents attached to the Plaint. The Applicant had not offered any satisfactory explanation for the delay in seeking amendments. While it was true that there had been a change in legal representation, this alone cannot justify the years of delay in seeking amendments. The delay further suggested a lack of diligence on the part of the Applicant. In any event, the Respondent reiterated that the amendments sought was devoid of merit ab initio.
52. It was therefore crystal clear that the proposed amendments was coming much too late in the day and evince an ulterior motive, which was to defeat the Defendant/Respondent's accrued Defence while allowing the Plaintiff/Applicant to approbate and reprobate on the same matter in two different suits over the same subject matter. To this extent, the proposed amendments was highly prejudicial to the Defendant. Sergon J, observed as much in Civil Appeal No. 632 of 2012 "Evans Njenga Muritu – Versus - Continental Developers Ltd (2019) (eKLR)" when he stated as follows:

“The suit was filed way back in 2001 whereas the amendment was sought close to 11 years later. In my view, there has certainly been an inordinate delay in bringing the application which leads me to the conclusion that the application amounted to an abuse of the court process. In so finding, I am guided by the rendition in *Kyalo v Bayusuf Brothers Limited* [1983] KLR 229 which I have laid out under paragraph 14 of this judgment.

Going by the record, it is also clear that at the time of filing the application, the parties had closed their respective cases and filed written submissions, which means that the suit was in its last leg. No viable explanation has been given to indicate why the appellant or his advocate had to wait until the last minute.

I have re-examined the amendments being sought and I have observed that the same include particulars of fraud and a prayer for refund of the purchase price. To my mind, these do not constitute issues which will necessarily facilitate the determination of the real issues in controversy of the parties at this point in time since the relevant facts were all along within the knowledge of the appellant and his advocate.

From where I stand, the appellant appears not to be acting in good faith and as I have already pointed out, the explanation given for the inordinate delay is not satisfactory. I associate myself with the High Court's following analysis in *St. Patrick's Hill School Limited v Bank*



of Africa Kenya Limited [2018] eKLR with reference to Bramwell, LJ in *Tildesley v Harper* (1878), 10 Ch.D. at p.296:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide...”

I am therefore Inclined to conclude that the application for amendment of the plaint was not only a mere afterthought but would have had the impact of causing prejudice to the respondent who was equally awaiting the conclusion of the suit, which prejudice I am doubtful would be adequately compensated by way of costs.”

53. It was equally not sufficient for the Plaintiff/Applicant to claim that a change in representation could or should explain the delay in bringing the proposed amendment. To buttress the above the Learned Counsel relied on the findings in “*Harrison C. Kariuki – Versus - Blue Shield Insurance Co. Ltd.* [2006] eKLR” where the court in dismissing an application for amendment stated as follows:

“In this application he has sought to blame his previous Counsel. Assuming that that blame is merited, is it a sufficient reason to allow the amendments sought at this late stage? The Court of Appeal had this to say in the case of *Municipal Council of Thika And Another – Versus - Local Government Workers Union (Thika Branch)*, Court of Appeal, Civil Appeal No. Nal. 41 Of 2001:-

“We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings.”

I hold that to allow the extensive amendments sought by the Applicant at this late stage will occasion great prejudice to the Respondent that cannot be made good by costs. It will occasion injustice to the Respondent who will have to extensively amend its defence”.

54. The Counsel stated that the Defendant/Respondent had a legitimate interest in the timely resolution of the dispute herein. The proposed amendments, being introduced after significant time has elapsed since the original filing, shall lead to considerable prejudice for the Defendant. The Defendant had already proffered a complete defence through the issuance of Third-Party Notice which brought the Third Party into the suit as a necessary party. The Defence was essentially that the land occupied by the Defendant in fact belonged to the Third Party, a fact the Third Party readily admitted and corroborated. It was therefore obviously prejudicial to the Defendant/Respondent for the Plaintiff/Applicant to now seek to introduce yet another parcel of Land and a new cause of action including additional claims for special damages. The Defendant would now be called upon to gather additional evidence, introduce new witnesses, and generally treat this as a fresh suit on the basis of a different set of facts. The said witnesses and evidence may also not be available to the Defendant/Respondent at this late stage noting that the original suit was filed 9 years ago.
55. The Learned Counsel therefore humbly submitted and prayed that this Honourable Court rejects the application for amendment on the grounds of inordinate delay in bringing the application which delay shall obviously prejudice the Defendant.
56. On the proposed amendments proving to occasion prejudice to the Respondent, the Learned Counsel asserted that the Applicant’s action in this regard was prejudicial and unjust. By allowing such



amendments, the Court would be endorsing a situation where a party could manipulate the claims and subject matter of a suit, disregarding the principle of justice and fairness. The proposed amendments went beyond correcting a mere descriptive error. The Applicant sought to Introduce new causes of action, including the claim for special damages in the colossal sum of Kenya Shillings Nineteen Million Three Hundred and Twenty Thousand (Kshs. 19,320,000/-), which was not part of the original claim. The said claim was anchored on a valuation report dated March 2023, which period dates Eight (8) years after the handover of the project to KeNHA by the Defendant/Respondent. The Defendant/Respondent submitted that it has provided irrevocable proof of:

- a. Confirmation of ownership of property L.R. No 10287/4 by the Settlement Fund Trustee.
- b. The transition of property L.R. No.10287/4 (a fact that was asserted by the Applicant via filing of ELC No. 125 of 2018, challenging the sub - division of the property and the resultant Titles.
- c. Its written authorization to occupy and use the excavated portion of land, whose original status was unadjudicated land under the Challa - Njukini scheme.

57. Further, the Learned Counsel acquiesced that should the unmerited amendments sought by the Applicant be allowed, the Defendant/Respondent would be greatly prejudiced by being unlawfully condemned to defend baseless claims of trespass whereas having been duly authorized to occupy and use the excavated parcel. This Honorable court would further be deceitfully called upon to determine the question of ownership of what was formerly property L.R. No. 10287/4, which issue was pending before a different forum. The proposed amendments were a pre-emptive measure to influence the determination of issues currently pending before another court in Mombasa ELC No.125 of 2018: Basil Criticos & Another vs. AIC Makutano & 66 others, wherein the Applicant sought the cancellation of titles issued to third parties resultant from property L.R. No. 10287/4, issued by the Settlement Fund Trustees. Granting the amendments sought would set a dangerous precedent and encourage forum shopping, where litigants attempt to gain an advantage by simultaneously pursuing similar claims in different courts.
58. In light of the above, it was the Learned Counsel's fervent submission that the proposed amendments should not be allowed. Therefore, it was respectfully prayed that this Honorable court exercises its discretion judiciously and dismiss the application.
59. On whether, this Honorable court should grant the joinder of Kenya Trade and Development Company Limited as a 2nd Plaintiff to the suit. The Learned Counsel submitted that the amendment seeking to enjoin the intended 2nd Plaintiff - Kenya Trade and Development Company Limited, equally ought to be denied. The Respondent had produced numerous uncontroverted evidence as to the ownership of property L.R. 10287/4 by the Settlement Fund Trustee and the subsequent subdivision and issuance of Titles to third parties, which fact is expressly acknowledged by the Applicant as pleaded in ELC 125 of 2018.
60. Further the Learned Counsel averred that the joinder of the proposed Applicant went against the doctrine of Lis Pendens. It was trite law that property that was subject matter in a suit shall not be transferred during pendency of the suit. The doctrine of Lis pendens ensured that there was orderly and efficacious disposal of justice as the property was transferred upon the final adjudication of the matters before the court. The doctrine of Lis Pendens was elaborated in the case of "Naftali Ruthi Kinyua – Versus - Patrick Thuita Gachure & another [2015] eKLR" where the court relied on the case of "Mawji – Versus - US International University & another [1976]KLR 185", as follows:-

“The doctrine of lis pendens under section 52 of TPA is a substantive law of general application. Apart from being in the statute, it is a doctrine equally recognized by common



law. It is based on expedience of the court. The doctrine of lis pendens is necessary for final adjudication of the matters before the court and in the general interests of public policy and good effective administration of justice. It therefore overrides, section 23 of the RTA and prohibits a party from giving to others pending the litigation rights to the property in dispute so as to prejudice the other...”

61. The Learned Counsel submitted that the purported transfer of property L.R. 10287/4 to the intended 2nd Plaintiff insinuates fraud by the Applicant, a question whose determination was best suited under the proceedings in ELC No. 125 of 2018, where the ownership of the subject property as sub - divided and titles issued to 66 persons was challenged. The intended joinder of a 2nd Plaintiff was therefore unwarranted. It should further not be lost to this court, that none of the documents produced by the Respondent and attached to its Replying Affidavit to the summons, had been denied by the Applicant.
62. In conclusion, on the issue as to who should bear the costs of the application, the Learned Counsel opined that it is trite law that costs follow the event and the Defendant/Respondent's costs of the application be borne by the Plaintiff/Applicant herein.

IV. Analysis & Determination.

63. I have carefully read and considered the pleadings herein being the Chamber Summons application dated 27th April, 2023 by the Plaintiff/Applicant and the replies by 1st Defendant/Respondent, the written submissions, the myriad of cases cited herein by the parties, the relevant provisions of the Constitution of Kenya, 2010 and statutes.
64. In order to arrive at an informed, Just, equitable and reasonable decision, the Honorable Court has three (3) framed issues for its determination. These are:-
 - a. Whether the intended 2nd Plaintiff ought to be enjoined as a party in this instant suit
 - b. Whether the Plaintiff/Applicant's Chamber summons application dated 27th April, 2023 seeking orders for amendment has merit and ought to be entertained?
 - c. Who will bear the Costs of Notice of Motion application 27th April, 2023.

Issue No. a). Whether the intended 2nd Plaintiff ought to be enjoined as a party in this instant suit

65. The Legal position that governs joinder of parties is founded under the provision of Order 1 Rule 10 (2) of the Civil Procedure Rules, 2010. It states as follows: -

“The court may at any stage of the proceedings, either upon, or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon or settle all questions involved in the suit, be added.”
66. In the case of:- “Pravin Bowry – Versus - John Ward and Another [2015] eKLR” the Court of Appeal considered the principles to be considered in an application for joinder of parties to a suit. The court



referred to the Ugandan case of “Deported Asians Custodian Board – Versus - Jaffer Brothers Limited [1999] 1 E.A. 55 (SCU)” where the court stated as follows:-

“ A clear distinction is called for between joining a party who ought to `have been joined as a defendant and one whose presence before the court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit because the party’s presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the cause or matter...

For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders which the Plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such person joined so that he is bound by the decision of the court in that suit. Alternatively, a person qualifies (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the Defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.” (Emphasis by underline)

67. The Court of Appeal in the case of “JMK – Versus - MWM & another [2015] eKLR” while speaking to the principle of joinder of a party in a proceeding noted as follows:

“ This Court adopted the same approach in CENTRAL KENYA LTD - VERSUS - TRUST BANK & 4 OTHERS, CA NO. 222 OF 1998, when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the Court...”

68. The Court of Appeal in the case of “EG – Versus - Attorney General; David Kuria Mbote & 10 others (Interested Parties) [2021] eKLR” shedding more light on the application of this principle held as follows:

“(1) The core of the court’s power to join a party to any proceedings including at the appellate stage, as aptly discussed in Hamisi Yawa & 36,000 others – Versus - Tsangwa Ngala Chome & 19 others [2018] eKLR, is to bring on board a necessary party for purposes of determining the real issue(s) in dispute. Also, a joinder of a party is not an automatic right, but one which is granted upon exercise of the discretion of the court concerned. Nonetheless, the court exercises such discretion under defined parameters, that is, it must be satisfied that: -



- a. The intended party has a personal interest or stake in the matter in question; and that interest is clearly identifiable and proximate enough and not merely peripheral.
- b. The intended party's presence would enable court to resolve all the matters in the dispute.
- c. The intended party would suffer prejudice in case of non-joinder.
- d. The joinder of the intended party will not vex the parties or convolute the proceedings with unnecessary new matters and grounds not contemplated by the parties or envisaged in the pleadings."

69. Similarly, in the case of "Meme – Versus - Republic, [2004] 1 EA 124", the High Court observed that a party could be enjoined in a matter for the reasons that:

- “(i) Joinder of a person because his presence will result in the complete settlement of all the question involved in the proceedings;
- (ii) Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- (iii) Joinder to prevent a likely course of proliferated litigation.

We ask ourselves the following questions: a) what is the intended party's state and relevance in the proceedings and b) will the intended interested party suffer any prejudice if denied joinder.?"

70. Although joinder as a party is not an automatic right, a party who is desirous to have a party enjoined in the suit can do so at any time in an ongoing proceeding through an application. The Court will then consider it and in its discretion decide on the suitability of such an addition. In making this determination the Court is accordingly guided by the principles set out in the cited authorities.

71. In the instant case, the Plaintiff/Applicant through its chamber summons application seeks to have the intended 2nd Plaintiff enjoined being that as at the time of filing the suit, the Plaintiff/ Applicant was the registered proprietor of the suit property but had since transferred the suit property to the intended 2nd Plaintiff Kenya Trade and Development Company Limited, of whom the Plaintiff/ Applicant is a shareholder and director. The transfer was effected on 13th October, 2020. Being the successor in title over the suit property, the intended 2nd Plaintiff is the current registered owner of the suit property having an ownership interest in the property and ought to be joined to these proceedings as 2nd Plaintiff being the ultimate beneficiary of any orders that the Court may grant in this suit. The presence of the intended 2nd Plaintiff in these proceedings and the amendments to the Plaint that the Plaintiff/ Applicant seeks will enable the Honourable Court to determine the real issues in controversy amongst the parties concerned and will assist the court to make effective appropriate orders.

72. The principles objectives for joinder are enunciated in the case of "Joseph Njau Kingori – Versus - Robert Maina Chege & 3 others [2002] eKLR" that;

“... that the guiding principles when an intending party is to be joined are as follows:

- (1) He must be a necessary party;



- (2) He must be a proper party;
- (3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;
- (4) The ultimate order or decree cannot be enforced without his presence in the matter;
- (5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.”

73. The Honourable Court agrees with Plaintiff/ Applicant that enjoinder will assist this court in that the Intended 2nd Plaintiff being the owner of the suit property after the transfer of title from the 1st Plaintiff/Applicant. In all fairness, the Honourable Court fully concurs with the Learned Counsel for the Defendant/Respondent and rightfully so that indeed the application was made rather late in the day and according to the said Counsel’s contention that the Plaintiff/Applicant waited for nine years to enjoin the 2nd Plaintiff being that the suit was filed on 28th May, 2014. Be that as it may, in the interest of Natural Justice, Equity and Conscience, I take great cognizance that, despite of all this period, the matter had never been put down for Pre - trial conferencing as required by law. No prejudice to be suffered by the 2nd Intended Defendants has been demonstrated by neither the Defendant nor any other party whatsoever. For that very reason, I therefore find merit in the prayer to enjoin the Intended 2nd Plaintiff, Kenya Trade and Development Company Limited.

Issue No. b). Whether the Applicant’s Chamber summons dated 27th April, 2023 seeking orders for amendment has merit and ought to be entertained.

74. Under this Sub heading is primarily to do with the amendment of pleadings. Amendment of pleadings are anchored on the provisions of Order 8 rule 3 of the Civil Procedure Rules, 2010 which provides:-

- “(3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”

75. Further Order 8 Rule (1) and (5) 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 as it may direct, allow any party to amend his pleadings.
5. An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.....”



76. The principles for consideration in an application for amendment of pleadings are set out in Court of Appeal decision of the case of:- “Ochieng and Others – Versus - First National Bank of Chicago Civil Appeal Number 147 of 1991”. They are 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;(emphasis is more)
 - e. the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff 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.
77. I wish to cite the case of:- “Bramwell, LJ in Tildesley – Versus - Harper (1878), 10 Ch. D. at p. 296” stated as under:
- “My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”
78. In “Eastern Bakery – Versus - Castelino, (1958) E.A.461 (U.) at p.462” it was stated thus:
- “It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”
79. This Order gives the court the mandate to allow amendment of pleadings at any stage of the proceedings on such terms that may be just. Having set out the law relating to amendment of pleadings, it is now important to apply the said principles to the present suit. The Plaintiff prayed for the Honourable Court to add the Kenya Trade and Development Company Limited as the 2nd Plaintiff in terms of the amended plaint attached to the application. The Plaintiff averred that the suit was filed through a Plaint dated 28th May, 2014 seeking general damages against the Defendant/Respondent, amongst other reliefs, on account of Defendant/Respondent’s trespass into a portion of the suit property known as L.R. No. 10287/4 measuring approximately 410.6 Ha and situated within Taita Taveta County. The Plaintiff/ Applicant however omitted a digit in the description of the suit property by describing the property as L.R. No. 10287 instead of L.R. No. 10287/4 and seeks to correct the description of the suit property to read L.R. No.10287/4.
80. Further, at the time of filing this suit, the Plaintiff/ Applicant was the registered proprietor of the suit property but had since transferred the suit property to the intended 2nd Plaintiff Kenya Trade and Development Company Limited, of whom the Plaintiff/ Applicant is a shareholder and director. The transfer was effected on 13th October, 2020. Being the successor in title over the suit property, the intended 2nd Plaintiff is the current registered owner of the suit property having an ownership interest in the property and ought to be joined to these proceedings as 2nd Plaintiff being the ultimate beneficiary of any orders that the Court may grant in this suit.



81. I hold that parties are at liberty to choose the necessary parties in a suit where they claim certain reliefs arising from a transaction or a wrong committed. A party cannot force a Petitioner to sue persons that they do not have a claim against as if the case is dismissed then the party must bear the burden of paying costs.
82. The Defendant on the other hand has stated that the Plaintiff herein filed suit via the Plaint dated 23rd May 2014, a whooping Nine (9) years and 1 month from the date of the instant application, alleging trespass by the Defendant on property L.R. No. 10287. The Plaintiff thereafter failed to take action in the prosecution of his claim with the matter being listed for hearing of a Notice to Show Cause on 27th October 2017 when the suit was dismissed. The Plaintiff thereafter filed an application dated 18th December, 2017, seeking to reinstate the suit. The said application was then served upon the Defendant on 29th March 2018 almost 4 years from the date of filing suit, bringing to light the existence of the suit.
83. The Defendant, upon service, entered appearance via a Notice of Appointment of Advocates dated 10th May, 2018, there having been no summons to enter appearance served. Following the conditional reinstatement of the suit, the Defendant filed its Defence on 11th December, 2019, denying the allegations of trespass and advising on the property so occupied being Title No. Taveta/Lake Jipe/780, under the authorization of the Third Party who is the registered owner, who in his Defence, confirms the Defendant's averments. The Defendant further pleaded and produced evidence to prove that the property Title No. Taveta/Lake Jipe/780, was initially part of L.R. No. 10287/4 which property previously belonged to the Plaintiff but was sold off to the Settlement Fund Trustee in the year 1990. The said suit is yet to be determined. The Defendant further assertively submits that the Plaintiff categorically admits that the property L.R. No. 10287/4 even as at 28th May 2018 when ELC 125 of 2018 was filed, no longer existed. This position holds true to date.
84. It is my personal view that is a reason why before a party files a suit in court, he/she must be sure of the party to have a duel with. You do not start battles on all fronts hoping to settle on one person. You must be sure of the Party you want to sue. In this case the Defendant opposed the amendment because by virtue of the admitted existence of ELC 125 of 2018 as filed by the Plaintiff, challenging the issuance of Titles to third parties (Defendants in the referenced suit) by the Director of Settlement Taita Taveta, this court should rightly so draw inference to the fact that property L.R. No 10287/4 ceased to exist. This is buttressed further by the fact that the Third Party herein-Andrew Masamo was issued with his Title in 1996 as attached to the Defendant's documents. The Third Party is further sued as the 39th Defendant in ELC 125 of 2018. It therefore behooves the Plaintiff to substantiate the Title purportedly issued on 21st September 2017, allegedly transferred to the intended 2nd Plaintiff and attached to the summons.
85. I seek refuge from the case of:- "Rubina Ahmed & 3 others – Versus - Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR" the Court of Appeal while dismissing an appeal relied on Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76, which stated the following about amendments of pleadings: -

"...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...”.
[Emphasis added].

86. According to the Defendant, they had adduced before the is Honorable court, uncontroverted evidence in support of the historical transition of the property L.R. No. 10287/4, in the nature of correspondence from the relevant Ministerial departments, the relevant local administration offices and documents from the National Survey Office, none of which has been rebutted. Of interest to note is the Applicant's glaring silence on the documents. Indeed, the Defendant submits that silence means consent. Converse to the Applicant's submissions at paragraph 35, there is absolutely no contradiction in the Defendant's averments. An elaborate perusal of the Defendant's Defence will confirm that at no point did the Defendant aver to having undertaken excavation activities on the Third party's property- Title Number Taveta/Lake Jipe/780 or that the quarry site war on the said property. Indeed, the Defendant, as is confirmed by the Third Party, did lease out property Title Number Taveta/Lake Jipe/780 for use. Nothing in the Lease Agreement submitted before the court, avers to the property being used as a quarry site.
87. In the forgoing, I am persuaded that the prayer sought on amendment by the Plaintiff/Applicant has a legal basis. Thus, I find that it will be in the interest of justice to allow the prayer on the amendment of the Plaint by the Plaintiff to incorporate the 2nd Plaintiff and the amendment to the mistaken title number.

Issue No. c). Who will bear the Costs of Notice of Motion application 27th April, 2023.

88. As it is now well established that the issue of costs is at the discretion of the Court. The Black Law Dictionary defines cost to means:-

“the expenses of litigation, prosecution or other legal transaction especially those allowed in favour of one party against the other”

89. In other words, Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the Civil Procedure Act, Cap. 21 holds that costs follow the events. It grants the High Court discretionary power in the award of costs which ordinarily follow the event unless the Court for good reasons orders otherwise. Section 27 (1) of the Civil Procedure Act provides as follows:-

“(1) Subject to such conditions and limitations as may be prescribed, and to the provisions of any law for the time being in force, the costs of and incidental to all suits shall be in the discretion of the court or Judge, and the court or Judge shall have full power to determine by whom and out of what property and to what extent such costs are to be paid, and to give all necessary directions for the purposes aforesaid; and the fact that the court or Judge has no jurisdiction to try the suit shall be no bar to the exercise of those powers: Provided that the costs of any action, cause or other matter or issue shall follow the event unless the court or Judge shall for good reason otherwise order.”

90. A careful reading of Section 27 indicates that it is considered trite law that costs follow the cause/event, as described by Sir. Dinshah Fardunji Mulla in his book “The Code of Civil Procedure, 18th Edition, 2011 reprint 2012 at 540”, is that costs must follow the event unless the court, for some good reasons, orders otherwise.



91. Additionally, the provision provides for ‘costs of and incidental to all suit or application’ which expression includes not only costs of suit but also costs of application in suit as described by Mulla (supra) at 536. Furthermore, Rtd. Justice Richard Kuloba in his book *Judicial Hints on Civil Procedure*, 2nd Edition, 2005 at 95 notes that the words ‘the event’ means the result of all the proceedings incidental to the litigation. Accordingly, the event means the result of the entire litigation. The order as to costs as provided for under section 27 remains at the discretion of the court.
92. The award of costs is therefore not cast in stone but courts have ultimate discretion. In exercising this discretion, courts must not only look at the outcome of the suit but also the circumstances of each case. In “Morgan Air Cargo Limited – Versus - Everest Enterprises Limited [2014] eKLR” the court noted that;
- “The exercise of the discretion, however, depends on the circumstances of each case. Therefore, the law in designing the legal phrase that “Cost follow the event” was driven by the fact that there could be no “one-size-fit-all” situation on the matter. That is why section 27(1) of the *Civil Procedure Act* is couched the way it appears in the statute; and even all literally works and judicial decisions on costs have recognized this fact and were guided by and decided on the facts of the case respectively. Needless to state, circumstances differ from case to case.”
93. In this case, as this Honourable Court has opined above, the Applicant has convinced this Honourable Court that the 2nd Plaintiff should be enjoined as a party and that the Plaint should be amended. Although the law provides that the costs follow the events, it is this Honourable Court’s opinion that the costs of the Chambers Summons application dated 27th April, 2023.

V. Conclusion & Disposition

94. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience.
95. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes the following order:-
- a. That the Chamber Summons application dated 27th April, 2023 be and is hereby found to have merit and hence allowed in its entirety.
 - b. That an order made to have the Kenya Trade and Development Company Limited be and is hereby enjoined as the 2nd Plaintiff.
 - c. That this Honourable Court hereby grants the Plaintiffs 14 days leave to file and serve Amended Plaint.
 - d. That this Honourable Court hereby issues an order that the annexed Amended Plaint be deemed duly filed on payment of requisite court fees.
 - e. That the Defendant and the Third Party to file their response to the Amended Plaint within seven (7) days of this ruling.
 - f. That the matter to be transferred henceforth and be mentioned on 12th March, 2024 before Voi Courts to confirm compliance, conducting of Pre - trial conference under the provision of Order 11 of the Civil Procedure Rules, 2010 and further directions.
 - g. That the cost of the Chamber Summons application dated 27th April, 2023 to abide the outcome of the main suit.



It is so ordered accordingly.

**RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT
MOMBASA THIS 6TH DAY OF FEBRUARY 2024.**

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**HON. MR. JUSTICE L. L NAIKUNI,
ENVIRONMENT AND LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumna, the Court Assistant.
- b. Mr. Ochieng Advocate holding brief for Mr. Obok Advocate for the Plaintiffs/Applicants.
- c. No appearance for the Defendant/Respondent.

