



Mwangi & 4 others (Suing as Administrator Ad Litem and Children of the Estate of George Kungu Wainaina - Deceased) v Kungu & 3 others (Environment & Land Case 83 of 2018) [2024] KEELC 1785 (KLR) (9 April 2024) (Ruling)

Neutral citation: [2024] KEELC 1785 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 83 OF 2018**

**JG KEMEL, J
APRIL 9, 2024**

BETWEEN

**ROSEMARY WANGARI MWANGI 1ST PLAINTIFF
SERAH NJOKI KUNGU 2ND PLAINTIFF
JOSEPH WAINAINA KUNGU 3RD PLAINTIFF
LILIAN WAMUCHI 4TH PLAINTIFF
RUTH WAITHERA 5TH PLAINTIFF
SUING AS ADMINISTRATOR AD LITEM AND CHILDREN OF THE ESTATE
OF GEORGE KUNGU WAINAINA - DECEASED**

AND

**JOYCE WAMBUI KUNGU 1ST DEFENDANT
COUNTY LAND REGISTRAR, KIAMBU 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
THE HON. ATTORNEY GENERAL 4TH DEFENDANT**

RULING

1. On the 24/4/2023 the Plaintiffs/Applicants moved the Court vide a Notice of Motion dated 18/4/2023 seeking in the main leave to amend the Plaint as per the attached proposed amended Plaint marked “RWM1”.
2. The Application is premised on the grounds annexed thereto and the Supporting Affidavit of Rosemary Wangari Mwangi deponed on 18/4/2023. She stated that the proposed amendments will



not prejudice the Defendants/Respondents as they will be accorded the opportunity to amend their defence. That amending the Plaintiff is intended to bring on board all issues for determination and that justice shall be served if the Application is so allowed.

3. Opposing the Application, the 1st Defendant/Respondent through the Replying Affidavit of Joyce W. Kungu sworn on 1/5/2023 and 20/6/2023 stated that the Application is an abuse of the process of the Court. That the Applicant has a history of abusing the process of the Court by circumventing justice, for example in filing Nairobi ELC No 22 of 2013 marked “JWK1”. That while that matter was pending the Applicant filed this suit in Thika on 9/3/2018. That to defeat her Preliminary Objection the Applicant withdrew the suit in Nairobi and proceeded to take out a Citation in Kiambu E112 of 2022 seeking the 1st Defendant to take out Letters of Grant of Administration in the estate of George Kungu Wainaina. That she raised a Preliminary Objection in the said Succession Cause and sensing a possible defeat, she has now brought this Application to short circuit justice. That the Applicant has come to Court with unclean hands and urged the Court to dismiss the Application.
4. On 25/4/2023 parties elected to file written submissions. It is only the Applicant who complied with the directions with respect to filing written submissions.
5. Relying on Section 100 of the Civil Procedure Act read together with Order 8 Rule 3 & 5 of the Civil Procedure Rules, the Court was urged to allow the amendments for the purpose of determining the real question in the controversy. Further that the amendment will aid in the provision of access to justice and a fair hearing. That the amendment does not introduce a new cause of action or issues and that no prejudice or injustice will be visited on the Respondents. The Applicant further submitted and denied any abuse of the process of Court as the suit HCC No 22 of 2013 was transferred to Environment and Land Court and assigned a new number ELC No 1025 of 2013 which suit was withdrawn on 9/4/2013.
6. The Applicant further argued that this Court has no jurisdiction to issue orders directing that parties obtain Letters of Administration which orders fall under the High Court hence the Application.
7. The key issue is whether the Application is merited.
8. Section 100 of the Civil Procedure Act states as follows:-

“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.”
9. Order 8 Rule 5 of the Civil Procedure Rules states as follows:-
 - “(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.
 - “(2) This rule shall not have effect in relation to a judgment or order.”
10. The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that litigation between the parties is conducted not on a hypothetical basis but rather on the true state of facts which the parties really and finally intend to rely on. The power of amendment makes the



function of the Court more effective in determining the substantive merits of the case. See *Institute for Social Accountability and another v Parliament of Kenya & 3 others* (2014)eKLR.

11. In this case the suit was filed on 30/11/2018 and as early as 2019, parties for one reason or another failed to comply with pretrial conference. Finally the matter was fixed for hearing on 13/10/2018 when the hearing failed to take off because the 7th Defendant had filed a Preliminary Objection. The same was heard and determined on merits on 28/3/2022.
12. When the matter came for hearing on 25/4/2023 the Plaintiffs intimated to the Court that they had filed the instant motion. The hearing was therefore halted for the 2nd time to allow the Court to hear and determine the instant Notice of Motion.
13. Although it is trite that amendments to pleadings sought before hearing should be freely allowed, in this case the Applicants waited until the matter had been fixed for hearing to file the Application.
14. Is there prejudice? As a matter of fact, the prejudice lies in the delay in hearing the suit. That said, I have reflected on the proposed amendments which are intended to remove a prayer that directed the 1st Defendant to commence Succession proceedings with respect to the estate of George Kungu Wainaina. In as much as the Court agrees with the Applicant that the jurisdiction of this Court does not include hearing and determining Succession matters however the Applicant need not have waited upto the eleventh hour to move the Court. Such dilatory actions cause unnecessary delay and backlog and should be frowned upon.
15. In the interest of justice, I allow the Application but on terms: -
 - a. Applicants are directed to file and serve the Amended Plaint within fourteen (14) days.
 - b. Upon service of the Amended Plaint the Defendants shall have the liberty to amend their Statement of Defence (s) if any.
 - c. The costs of the Application shall be borne by the Applicants in favour of 1st Defendant.
 - d. Parties to expeditiously fix the matter for hearing.

Orders accordingly.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 9TH DAY OF APRIL, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Masinde HB Macharia for 1st, 2nd, 3rd, 4th and 5th Plaintiffs

Okello for 1st Defendant

2nd, 3rd, 4th, 5th and 6th Defendants – Absent

Masaviru for 7th Defendant

8th, 9th and 10th Defendants - Absent

Court Assistants – Phyllis/Oliver

