



Mindo (Suing as the administrator of the Estate of the Late Robert Maxwell Mburu) & another v Ndirangu & 2 others (Environment & Land Case 1543 of 2016) [2024] KEELC 5260 (KLR) (11 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5260 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1543 OF 2016**

**JA MOGENI, J
JULY 11, 2024**

BETWEEN

**ANTHONY MINDO (SUING AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE ROBERT MAXWELL MBURU) 1ST PLAINTIFF
RUTH WANJIKU MINDU 2ND PLAINTIFF**

AND

**ESTHER WARINGA NDIRANGU 1ST DEFENDANT
JOSEPH WAWERU CHEGE 2ND DEFENDANT
DANIEL KAMAU NDUNGU 3RD DEFENDANT**

RULING

1. This Ruling is in respect of a Notice of Motion Application dated 8/03/2024 filed by the Plaintiff, brought under the provisions of Section 1A, 1B of the [Civil Procedure Act](#), Order 8 Rule 3 & 5 of the [Civil Procedure Rules](#) and all other enabling rules, regulations and provisions of the law. The Plaintiff is seeking the following orders:
 1. That leave be granted to the Plaintiff/Applicant to Further amend this Plaint as shown in the annexed draft and further amended plaint.
 2. That the draft-further amended plaint annexed herewith be deemed as duly filed and cost of the application be in the cause.
2. The Application is premised on the grounds cited at the foot of the Application and it is further grounded on the Supporting Affidavit of Anthony Mindu, the Plaintiff herein, sworn on 8/03/2024.



3. The Application is opposed. The Defendants filed a Replying Affidavit sworn by Esther Waringa Ndirangu, the 1st Defendant herein on behalf of her co-Defendants, on 21/05/2024 in response to the Application.
4. The Court gave directions that the Application be canvassed by way of written submissions. By the time of writing this Ruling, none of the parties had duly submitted.

Issues for determination

5. Having considered the Application and the rival affidavits, the issue that arises for determination before this court is whether the Application dated 8/03/2024 is merited.
6. It is the Plaintiff/Application's case that they wish to further amend the Plaint so as to determine all the issues in controversy. The amendment has been necessitated by the fact that the 2nd Plaintiff, the 1st Plaintiff's grandmother passed away on 14/08/2022. The green card has mentioned some parties who are not in the matter as envisaged by the annexed copy of the green card and burial permit. For the real issues in controversy to be determined, it is imperative that they enjoin the people who purportedly registered themselves as owners of the land to wit Joseph Kimani Gatheca and the Land Registrar, Ruiru. The land belonged to Githunguri Constituency Ranching Ltd and they have confirmed that they don't have a member by the name Joseph Kimani Gatheca.
7. On the other hand, in a nutshell, the 1st Defendant/Respondent and her co-defendants argued that they are registered owners of the property in question since 22/04/2010. She opposes the plaintiffs' application to amend their complaint, arguing that it is unmeritorious, legally flawed, and an abuse of court process. She claims the application is similar to a previously dismissed one and is being made eight years after the suit was filed. She asserts that the plaintiffs' proposed amendments are untimely, prejudicial, and intended to counter evidence already presented, thus complicating the trial and violating legal procedures and timelines. She also argued that the proposed joinder would be in violation of both Section 4 and 7 of the [Limitation of Actions Act](#).
8. The instant application has been brought under the provisions of Order 8 Rule 3 and 5 of the [Civil Procedure Rules](#).
9. Order 8 Rule 3 of the [Civil Procedure Rules](#) 2010 provides as follows: -

“Amendment of pleading with leave [Order 8, rule 3].

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 subrule (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 subrule if it thinks just so to do.
3. An amendment to correct the name of a party may be allowed under subrule (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.

4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (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 a 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.”

10. Order 8 Rule 5 of the *Civil Procedure Rules* 2010 provides as follows: -

“General power to amend [Order 8, rule 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.
- (2) This rule shall not have effect in relation to a judgment or order.”

11. Section 100 of the *Civil Procedure Act* provides that: -

“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.”

12. It is evident that from the above provisions of the law, an amendment of pleadings may be permitted at any stage for purposes of determining the real question in controversy between the parties. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously.

13. I have looked at the draft further amended plaint purports to strike out the name of the 2nd Plaintiff. Order 24 of the *Civil Procedure Rules*, 2010 comprehensively outlines what ought to happen if a party or parties to a suit dies; Order 24, rules 1 and 2 provide as follows:

- “1. The death of a plaintiff or defendant shall not cause the suit to abate if the cause of action survives or continues.
2. Where there are more plaintiffs or plaintiffs alone or against the surviving defendant or defendants alone, the court shall cause an entry to that effect to be made on the record, and the suit shall proceed at the instance of the surviving plaintiff or defendant or defendants.”

14. The Plaintiffs have purported to show that the 2nd Plaintiff passed away as evidenced by the burial permit serial number 1021017 dated 14/08/2022 adduced before me, marked as AM2(2a). The Applicants amendment purports to strike out the name of the 2nd Plaintiff from the Plaint. I take this



to mean that the surviving Plaintiff is admitting that the cause of action survives and continues to the surviving Plaintiff alone against the Defendants. Therefore, the action shall not abate by reason of death. After the death is noted on the record, the action shall proceed.

15. The draft further amended plaint purports to enjoin Joseph Kimani Gatheca as the 4th Defendant and the Hon. Attorney General being sued on behalf of the Land Registrar Ruiru sub-county as the 5th Defendant. I note that the Plaintiff already applied for Joseph Kimani Gatheca to be enjoined in the suit in their application dated 25/04/2023 and the Court already determined the Application and issued a final decision on the issues raised therein on 18/01/2024. The Court found that the joinder of new parties in the instant case at that stage will amount to an abuse of the process of the Court. To this end, this issue is res judicata.
16. With regard to the joinder of the Attorney General, the Plaintiffs/Applicants aver that for the real issues in controversy to be determined it is imperative that they enjoin the people who purportedly registered themselves as owners of the land to wit Joseph Kimani Gatheca and the Land Registrar – Ruiru. I have perused the green card that has been adduced before me and it is not clear whether the Land Registrar Ruiru has registered themselves as the owners. A perusal of the further amended Plaintiff demonstrates that the Plaintiff accuses the intended 5th Defendant of fraudulently issuing the title to the 1st Defendant without following the due process of the law in relation to land owned by Githunguri ranching as to issuance of clearance certificate. The intended 5th Defendant is only referred to under the Particulars of fraud. The Plaintiff also seeks for an order directed to the Ruiru District Land Registrar for cancellation of title deeds or in the alternative, for the Land Registrar Ruiru to issue a title deed in the names of the Plaintiff. From the time of filing the suit, the initial Plaintiff still included particulars of fraud by the Defendants. Joinder of the Attorney General being sued on behalf of the Land Registrar – Ruiru seems like an afterthought. The Court is in agreement with the Defendants/Respondents sentiments made and included in the Ruling of 18/01/2024 as it appears that the Plaintiffs are litigating this matter in installments after learning their gaps.
17. This matter has already proceeded for hearing. The Plaintiffs' witnesses PW1 and PW2 already testified on 20/07/2022 and 23/11/2022 respectively. PW3 testified on 23/11/2022 but was stood down. Hearing of this matter commenced on 20/07/2022. The instant motion was filed on 8/03/2024, two years after hearing begun. The Plaintiff does not state why the said amendments were not brought earlier in the day. This suit was filed in 2016, some nine years before this application was filed. As it were, the parties went for pre-trial directions and thereafter the Plaintiffs' witnesses testified and their third witness was stood down at the trial. There is no satisfactory explanation given by the Plaintiffs.
18. Considering the record and the material placed before me, it is evident that by this application, the Plaintiffs seeks to fill the gaps that were raised in trial. I also reiterate that the Plaintiffs made a similar application before this Court and a determination was made. The Ruling of 18/01/2024 has not been set aside or varied. The only thing that is different with this amendment is that the 2nd Plaintiff is deceased. In my view, allowing the plaintiffs to further amend their plaint at this stage will be a waste of precious Judicial time and an injustice to the defendants. Further I am also of the view that the instant application has been made in bad faith in order to bridge gaps which were formed during trial.
19. In the case of *Joshua Kimani v. Kiso Enterprises Ltd & 3 others* [2020] eKLR,



the Court held as follows:-

“6. The Learned Authors of *Halsbury’s Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state 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, 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...”.

20. I am of the view that allowing this application will prejudice the Defendants as was held in the case of *Harrison C. Kariuki –vs- Blue Shield Insurance Co. Ltd* 2006 eKLR, whereby the learned Judge held: -

“I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. It will occasion injustice to the Defendant who will have to extensively amend its defence. The Defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expanded case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted. Having considered all matters placed before me, and in exercise of my discretion I will refuse the application. It is hereby dismissed with costs to the Defendant.”

21. The upshot of the foregoing is that I find the application by the Plaintiffs dated 8/03/2024 to be devoid of any merit and I accordingly order the same dismissed with costs.

22. It is so ordered.

DATED SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 11TH DAY OF JULY, 2024.

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MOGENI J

JUDGE

In the presence of: -

Ms. Nyaguthie for Defendant

Ms. Muturi holding brief for Mr. Kanyi for Plaintiff

C. Sagina - Court Assistant



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**MOGENI J
JUDGE**

