



**Thuo & another v Adam & 6 others (Environment and Land Appeal E003 of 2024) [2024] KEELC 6795 (KLR) (8 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 6795 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAROK  
ENVIRONMENT AND LAND APPEAL E003 OF 2024  
CG MBOGO, J  
OCTOBER 8, 2024**

**BETWEEN**

**STEPHEN WAWERU THUO ..... 1<sup>ST</sup> APPELLANT**

**GILISHO OLE PESI ..... 2<sup>ND</sup> APPELLANT**

**AND**

**ISAAC MUSA ADAM ..... 1<sup>ST</sup> RESPONDENT**

**KARIM BUX MUSSA ADAM ..... 2<sup>ND</sup> RESPONDENT**

**NAZZIR ALI MUSSA ISSA ..... 3<sup>RD</sup> RESPONDENT**

**BASHIR MUSSA HAJI ..... 4<sup>TH</sup> RESPONDENT**

**HAMIN MUSSA HAJI ..... 5<sup>TH</sup> RESPONDENT**

**NAROK COUNTY GOVERNMENT ..... 6<sup>TH</sup> RESPONDENT**

**LAND REGISTRAR NAROK ..... 7<sup>TH</sup> RESPONDENT**

*(Being an appeal from the Ruling of the Honourable Samuel M. Mungai, Chief Magistrate delivered on 29th August, 2023 in MC ELC Case No. 150 of 2019)*

**RULING**

1. The appellants herein being aggrieved by the ruling of the Hon. S. M. Mungai, Chief Magistrate delivered on 29<sup>th</sup> August, 2023 filed the memorandum of appeal dated 23<sup>rd</sup> April, 2024 against the said ruling on the following grounds:-

1. That the learned trial magistrate erred in law and in fact by failing to exercise his discretion judiciously and allow the appellants to re-open their case and adduce additional evidence.



2. That the learned trial magistrate erred in law and fact by failing to appreciate the fact that the appellants will be greatly prejudiced if not allowed to adduce additional evidence as they will not be able to table their evidence before the court which in turn impacts their constitutional right to be heard.
  3. That the learned trial magistrate erred in law and fact by failing to exercise his discretion judiciously and allow the appellants to amend their pleadings.
  4. That the learned trial magistrate erred in law and fact in finding that by allowing the amendments sought by the appellants would be opening the door to introducing a new cause of action.
  5. That the learned trial magistrate erred in law and fact by ignoring the fact that the court has a constitutional duty to deliver substantive justice.
  6. That the learned trial magistrate erred in law and fact by solely relying on the respondent's submissions and disregarding the submissions by the appellants.
2. The appellants are seeking the following orders: -
- i. This appeal against the order and ruling of the Honourable Samuel M. Mungai (CM) delivered on 29<sup>th</sup> August, 2023 be allowed and the said ruling be set aside.
  - ii. The prayers in the notice of motion application dated 16<sup>th</sup> May, 2023 be allowed as prayed.
  - iii. Costs of the appeal be awarded to the appellants.
3. The grounds of appeal were canvassed by way of written submissions. The 1<sup>st</sup> to 5<sup>th</sup> respondents filed their written submissions dated 6<sup>th</sup> August, 2024 where they raised four issues for determination as listed below: -
- i. Whether the learned trial magistrate failed to exercise his discretion judiciously to allow the appellants re-open their case to adduce additional evidence and amend their pleadings.
  - ii. Whether the proposed amendments by the appellants will introduce a new cause of action.
  - iii. Whether the trial court ignored the fact that it has a constitutional duty to deliver substantive justice.
  - iv. Whether the respondents will be prejudiced if the appeal is allowed.
4. On the first and second issues, the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that the trial court was right in finding that the appellants amendments at that point of the trial would be opening a door for them to introduce a new cause of action. Further, they submitted that they stand to be greatly prejudiced since this is a 2002 case, and that the trial court has been gracious enough to grant the appellants amendments in two instances. They went on to submit that besides having a certificate of lease for the past 22 years, they have not been able to develop their property because of the suit before the trial court. The 1<sup>st</sup> to 5<sup>th</sup> respondents relied on the cases of Susan Wavinya Mutavi versus Isaac Njoroge & Another [2020] eKLR, and Gulf Energy Limited versus East African Safari Air Express Limited [2020] eKLR.
5. The 1<sup>st</sup> to 5<sup>th</sup> respondents further submitted that since the filing of the suit, the appellants have constantly referred and claimed that their plots are 117 and 118 Jua Kali, and that later they changed and now claim parcel no. 356A and 356B. While relying on the case of Samuel Kiti Lewa versus Housing Finance Co. of Kenya Ltd & Another [2015] eKLR, they submitted that there is deliberate, inordinate and unexplained delay on the part of the appellants who seek to introduce evidence



which they have been in possession since the year 2015. To buttress on this submission, the 1<sup>st</sup> to 5<sup>th</sup> respondents relied on the cases of Rupa Savings & Credit Cooperative Society versus Violet Shidogo [2022] eKLR, Zacharia Okoth Obado versus Edward Akong'o Oyugi & 2 Others [2014] eKLR, Raila Odinga & 5 Others versus IEBC & 3 Others [2013] eKLR and Johana Kipkemei Too versus Hellen Tum [2014] eKLR.

6. On the third issue, the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that the purported change of plot numbers from 117 and 118 Jua Kali to 356A and 356B does not change the ground, and neither does it influence the decision of the trial court. They submitted that this is an afterthought because of the administrative changes in the County Government. Reliance was placed in the case of Wycliffe Mwavali Ondari versus County Council of Narok & Another [2022] eKLR.
7. In conclusion, the 1<sup>st</sup> to 5<sup>th</sup> respondents submitted that they have been embarrassed and prejudiced by the 22 years the matter has been in court, and by the continued encroachment of their parcel of land by the appellants. They urged the court to dismiss the appeal with costs.
8. The appellants did not file their written submissions. Be that as it may, I have considered the grounds of appeal. In my view the issue for determination is whether the memorandum of appeal has merit. This being a first appeal, I am mindful that the duty of this court as set out in the decision of Selle & Another versus Associated Motor Boat Co. Ltd & Others (1968) EA 123 is to reconsider the evidence, evaluate it and draw its own conclusion of facts and law, and this court will only depart from the findings by the trial court if they were not based on evidence on record; where the said court is shown to have acted on wrong principles of law as was held in Jabane versus Olenja (1968) KLR 661, or where its discretion was exercised injudiciously as held in Mbogo & Another versus Shah (1968) EA 93.
9. The appellants herein filed the notice of motion dated 16<sup>th</sup> May, 2023 seeking the following orders: -
  1. This honourable court be pleased to grant leave to the plaintiffs/ applicants to reopen the plaintiffs' case.
  2. This honourable court be pleased to grant leave to the plaintiffs/applicants to adduce additional evidence limited to the production of the documents listed in the plaintiffs' annexed supplementary list of documents.
  3. The plaintiffs/applicants annexed supplementary list of documents be deemed as duly filed and upon payment of the requisite court fees.
  4. This honourable court be pleased to grant leave to the plaintiffs/applicants to further amend the amended plaint in terms of the draft further amended plaint attached hereto.
  5. The costs of this application be in the cause.
10. The application was premised on the grounds inter alia that the appellants while conducting pre-trial on the morning of 18<sup>th</sup> April, 2023, they realized that some of the documents which they intended to rely on in support of their case had not been included in their bundle of documents dated 11<sup>th</sup> March, 2019, and as such, were not tendered in evidence when they testified on 18<sup>th</sup> April, 2023. The application was supported by the affidavit of the 1<sup>st</sup> appellant sworn on even date. The 1<sup>st</sup> appellant deposed that they were desirous of relying on the said documents, and thus sought to reopen their case to tender evidence which is relevant and material to the just determination of the case. The 1<sup>st</sup> appellant further deposed that an injustice would be occasioned if the evidence is not admitted which evidence demonstrates that their plot numbers were changed from plot no.117 and 118 Jua Kali to plot no. 356A and 356B Block 3 by the Narok County Government.



11. The 1<sup>st</sup> appellant further deposed that the respondents would not be prejudiced since they would have a right to file a rejoinder witness statement, and that it was also necessary that the amended plaint be further amended to capture the correct and up to date plot numbers. The application was further supported by the affidavit of Daniel Mukeli, Advocate, sworn on even date. The learned counsel deposed that he took over the matter in the year 2020, and upon perusal of the file, he realized that the matter was set down for pre-trial conference on 25<sup>th</sup> April, 2019, when it was certified ready for hearing. He deposed that while conducting a pre-trial session, it was brought to his attention that there were documents which confirmed that the plot numbers had changed numbers, and which had not been tendered in evidence.
12. The learned counsel further deposed that failure to include the documents was inadvertent, and that the said omission had not been detected by the counsel who previously handled the matter. He contended that it was also necessary that the amended plaint be further amended to capture the correct and up to date plot numbers.
13. In their replying affidavit in opposition to the application, the 2<sup>nd</sup> respondent deposed to the history of the matter before the trial court and deposed that at no point did the appellants ever referred to their parcels of land as being 356A and 356B or produce any documentation for the past 21 years. He deposed that this issue is an afterthought with the aim of delaying the matter to keep enjoying the use of his property. The 2<sup>nd</sup> respondent further deposed that the appellants wanted to introduce new evidence in their case at a time when they had closed the plaintiffs' case. He deposed that they are undeserving of the orders since the same is intended to fill the gaps in their evidence, and or lengthen the suit to protect their illegal encroachment and forceful occupation of his property.
14. The appellants filed their written submissions dated 9<sup>th</sup> June, 2023. The 1<sup>st</sup> to 5<sup>th</sup> respondents filed their written submissions dated 29<sup>th</sup> June, 2023. I have carefully read the impugned ruling that was delivered on 29<sup>th</sup> August, 2023. Section 100 of the [Civil Procedure Act](#), provides 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”.
15. Order 8, Rules 3 and 5 of the Civil Procedure Rules, provides as follows:
  - “(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
  - (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) .....
  - (4) .....



- (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.”

16. Further, Order 8, Rule 5 of the Civil Procedure Rules provides: -

“(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.”

17. My reading of the above provisions shows that indeed, amendment of pleadings may be allowed at any time of the suit. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the case. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. Having said that, it is preferable that applications to amend pleadings come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

18. In this regard, and in the impugned ruling, the trial court observed as reproduced below: -

“19. This is an admission that the applicants were in possession of the cited documents from the year 2019 yet they did not see the need to amend their pleadings until after they had closed their case as pointed out by the respondents. As if this is not enough from the date of 18<sup>th</sup> April, 2023 they did not immediately proceed to file and serve the present application but waited until the eve of the hearing to serve the respondents which is a demonstration of lack of good faith. This can only be interpreted to mean that the late service was calculated to ensure that the case would not proceed.

20. The second deponent who has been in conduct of this case has deponed that they took over this matter from the firm of M/S Bowry & Company in the year 2018 and he personally took over the case in the year 2020. He prosecuted the matter on 18/4/2023 when both plaintiffs testified and their case was closed. He has deponed further that he discovered the existing of the missing documents on the morning of 18/4/2023 when conducting the pre-trial. He does not disclose the source of the information but assuming for a minute that it was the plaintiffs the question which begs an answer is; why despite the discovery did they still opt to proceed and close their case instead applying for the matter to be adjourned.”

19. The power of the courts to allow amendment is discretionary and such discretion ought to be exercised judiciously. The object and rationale behind this principle of amendment of pleadings was outlined in



the case of Institute for Social Accountability and Another versus Parliament of Kenya and 3 others (2014) eKLR as follows:

“The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461; *Ochieng and others v First National Bank of Chicago CA Civil Appeal Number 149 of 1991*, *Kenyatta National Hospital v Kenya Commercial Bank Limited & Another* [2003] 2EA.

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the 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 rather than holding it captive to form of the action or proceedings.”

20. While I place reliance on the above cited authority and the provisions of the law, vis a vis the impugned ruling, I concur with the rationale adopted by the trial court. One would wonder why the appellants failed to seek to include these amendments when they were granted leave on 18<sup>th</sup> November, 2018. As correctly stated by the trial court, there is mischief and intended delay whose effect is to prejudice the 1<sup>st</sup> to 5<sup>th</sup> respondents.
21. I have no reason whatsoever to interfere with the said ruling. The intention of the appellants in my view reeks of malice and mischief. This court will not enable such disgrace. The memorandum of appeal dated April 23, 2024, is hereby dismissed with costs to the 1<sup>st</sup> to 5<sup>th</sup> respondents. Orders accordingly.

**DATED, SIGNED & DELIVERED VIA EMAIL THIS 8<sup>TH</sup> DAY OF OCTOBER, 2024.**

**HON. MBOGO C.G.**

**JUDGE**

**08/10/2024.**

In the presence of: -

Mr. Meyoki Pere – C.A

