



Kiarie v Sang & 4 others; Jeptoo & another (Interested Parties) (Environment & Land Case 44 of 2015) [2023] KEELC 659 (KLR) (9 February 2023) (Ruling)

Neutral citation: [2023] KEELC 659 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 44 OF 2015
EO OBAGA, J
FEBRUARY 9, 2023**

BETWEEN

PETER MWANGI KIARIE PLAINTIFF

AND

ELIJAH KIPLAGAT SANG 1ST DEFENDANT

MICAH KIPTABUT KOSGEI 2ND DEFENDANT

ISAAC KIPTAKAM MAGUT 3RD DEFENDANT

ELIJAH KIPLANGAT SANG 4TH DEFENDANT

CHEPOR TABSERKA 5TH DEFENDANT

AND

MONICAH JEPTOO INTERESTED PARTY

METHUSEL KIPKURGAT KIRWA INTERESTED PARTY

RULING

1. This is a ruling in respect of a notice of motion dated 1 November 5, 2022 in which the defendants/ applicants and interested parties/ applicant seek to further amend their amended defence and amended counter-claim in the manner shown in the draft amended amended defence and counter-claim.
2. The applicants' application is opposed by the plaintiff/respondent based on a replying affidavit sworn on November 21, 2022. The Respondent contends that the proposed amendment seeks to introduce a new cause of action and that if the amendment is allowed, it will prejudice him as he has already testified.



3. The respondent further contends that the applicants have been seeking to amend their pleadings each time they engage services of a new lawyer and that the applicants are only out to delay the conclusion of this case. The Respondent further contends that the amendment being sought is time barred and that the applicants have had more than sufficient time to put their house in order.
4. I have carefully considered the applicants' application as well as the opposition thereto by the respondent. I have also considered the oral submissions by Advocates for the parties during the hearing of the application. The law on amendment of pleadings is that amendments can be made at any stage of the proceedings as long as the amendment does not introduce a new cause of action is not time barred or will prejudice the Respondent.
5. In the instant case, the applicants were allowed to amend their defence and counter claim on May 19, 2021. They proceeded to file an amended defence and counterclaim on February 25, 2022. In the amended pleadings of February 25, 2022, the parties who are now being sought to be interested parties namely Monicah Jeptoo and Methuselah Kipkurgat Kirwa were named as defendants.
6. The issues which then emerge for determination are firstly whether the amendments sought are time barred. Secondly, whether, the amendments sought will introduce a new cause of action. Thirdly, whether the Respondent will be prejudiced by the said amendments.
7. On the first issue, the respondent argues that the cause of action arose in 2008 and the amendments are being sought in 2022. A look at the amended defence and counter-claim filed on 25th February, 2022 shows that the reliefs being claimed in the proposed amendments were already claimed in the amended defence and counter-claim.
8. Order 8 rule (3) and (5) of the [*Civil Procedure Rules*](#) provides as follows:-

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 44 [Rev. 2020] Civil Procedure cap. 21 [Subsidiary] 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.

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.”
9. The relief which is being sought in the proposed amendments arises out of the same facts as those pleaded in the amendment of February 25, 2022. The Respondent’s mother who has since passed on had been named as an interested party and in pleadings which she had filed, she had stated that she was willing to refund what the applicants had paid. The respondent who is her son is the one who took up letters of administration in respect of her estate. The argument that the amendment is statute barred is therefore without merit.
 10. On the second issue, even if the applicants are seeking to introduce specific performance, order 8 rule (5) aforementioned clearly states that amendments can be allowed notwithstanding the fact that its effect will substitute a new cause of action. If the new cause of action arises out of the same facts as a cause of action in respect of which relief has already been in the suit by the party applying.
 11. In the instant case, the applicants had pleaded in their previous pleadings that they purchased their respective portions and were put in possession after making full payment. The proposed amendments are therefore properly founded.
 12. On the third issue, the respondent contends that he will be prejudiced as he has already testified. There will be absolutely no prejudice suffered by the respondent. He is the administrator of the estate of his mother who had filed pleadings and stated that she was willing to refund the purchase money. What the applicants’ are doing is to bring all issues before the court so that the same can be decided once. There will therefore be no prejudice on the part of the respondent if the amendments are made. I therefore find that the applicants’ application is well merited. The applicants are granted leave to file an amended amended defence and counter-claim within 21 days. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET on this 9th day of FEBRUARY, 2023.

E. O. OBAGA

JUDGE

In the virtual presence of;

Mr. Orina for Applicant.

Mr. Kinyanjui for Respondent

Court Assistant –Laban



E. O. OBAGA

JUDGE

9TH FEBRUARY, 2023

