



REPUBLIC OF KENYA



KENYA LAW
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**Mungiria & 10 others v Mutuma & 2 others; Meme (Interested Party); Marangu (Applicant)
(Environment & Land Case 12 of 2010) [2023] KEELC 583 (KLR) (8 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 583 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT & LAND CASE 12 OF 2010**

CK NZILI, J

FEBRUARY 8, 2023

BETWEEN

THOMAS MUNGIRIA 1ST PLAINTIFF
**THOMAS MUNGIRIA LICHORO (SUING AS PERSONAL REPRESENTATIVE
OF JACOB MITHEU) 2ND PLAINTIFF**
**JOSHUA MWANGI KAMAU (SUING AS PERSONAL REPRESENTATIVE OF
KAMAU GITHONGI) 3RD PLAINTIFF**
**JACOB KALERIA M'AMURU (SUING AS REPRESENTATIVE OF STEPEHN
M'AMURU) 4TH PLAINTIFF**
**JONANINA IMPWI (SUING AS REPRESENTATIVE OF JOHN
THIKANYI) 5TH PLAINTIFF**
JAPHET MARANGU 6TH PLAINTIFF
SAMUEL LIBURU 7TH PLAINTIFF
CHEBERE ARUAKI 8TH PLAINTIFF
KIRAGU KAMUIRU 9TH PLAINTIFF
MWANGI MARATHI 10TH PLAINTIFF
**JULIUS GIKONYO GACHUHI (SUING AS PERSONAL REPRESENTATIVE OF
GACHUHI KAMWANGI) 11TH PLAINTIFF**

AND

JOSEPH MUTUMA 1ST DEFENDANT
THE DISTRICT LAND ADJUDICATION OFFICER 2ND DEFENDANT
THE HON. ATTORNEY GENERAL 3RD DEFENDANT



AND

BEARNARD MUTHOMI MEME INTERESTED PARTY

AND

MARY PHILOMENA MARANGU APPLICANT

RULING

1. By an application dated October 25, 2022, the court is asked to grant leave to amend the plaint so as to include extra defendants to the suit.
2. The reasons as contained in the affidavit of Thomas Mugiria sworn on the even date are that during the pendency of this suit the suitland was subdivided and transferred by the 1st defendant to Ruth Kaburo, Joseph Mulwa Mutua and Teresia Rimba Buamba, the intended defendants as per attached copies of official searches for Parcels No's Tigania/Antuamburi/9802, 9805, 9803, 9842, 9798, 9804, 9801, 9841, 9799 and 1767 and marked TM 1 (a-b) TM "2" and TM "3" (a-f) respectively.
3. Through oral submissions made on November 24, 2022 the plaintiff sought reliance on [*Inter Tropical Timber Trading Ltd v KPLC Ltd*](#) (2021) eKLR and [*Lewar Ventures Ltd v Equity Bank*](#) (K) Ltd (2022) eKLR on the proposition that where the intended amendments are necessary in order for the court to effectually determine the issues at hand, courts should allow them. The application was not opposed by the defendants.
4. Order 8 Rule 3 of the [*Civil Procedure Rules*](#) grants the court power to allow for amendments of pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just. Even where any relevant period of limitation has expired, under Sub-Rules (4) and (5) thereof provides that the court may allow any amendments to alter the capacity of a party notwithstanding that its effect will be to add or substitute a new cause of action, so long as 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.
5. The plaintiffs herein have past been granted several orders to amend the original plaint in the course of the history of this suit. In particular the plaintiffs have stated herein that the intended amendments will reflect that the land is now registered and not falling under adjudication.
6. The plaintiffs came to court through a plaint dated February 3, 2010 accompanied by a consent dated December 22, 2009 seeking for the cancellation of Parcels No's 1507, 1209, 626, 1662, 1787, 2167, 1157, 1452, 1582 and 1767 Antuamburi Adjudication Section said to have been fraudulently subdivided and recorded in favour of the 1st defendant by the 2nd defendant. The 1st defendant filed a defence dated March 9, 2010 denying the allegations in the plaint. He specifically pleaded at paragraph 10 thereof that there was a pending arbitration Case No. 1 of 2010 involving the parties yet to be heard and determined. Further he averred that the plaintiffs had stayed the ruling of the District Land Adjudication and Settlement Officer Tigania District on November 19, 2009. The plaintiffs thereafter filed a reply dated March 15, 2010 claiming a purchasers' rights over the said parcels. The plaintiffs by an application dated September 22, 2010 sought for an injunction against the 1st defendant stopping any demarcation or alienation of the land which elicited a response dated February 20, 2011 where the 1st defendant claimed that the 2nd and 11th plaintiffs were dead before filing the suit. Interim orders were granted on October 6, 2010 and confirmed by a ruling dated June 7, 2012 till the hearing of the suit.



7. Meantime the 2nd and 3rd defendants filed a defence dated August 27, 2011 and raised several issues which the plaintiffs responded to by a reply dated August 29, 2011. The plaintiffs by a bundle dated January 9, 2020 in which they listed title deeds dated June 6, 2017 and October 3, 2019 for L.R No. Tigania/Antuamburi/1789 in favour of Bernard Muthomi Meme and a letter dated October 2, 2019 from the Sub-County land surveyor Meru North to the land registrar.
8. Thereafter an amended plaint dated December 8, 2021 was filed bringing on board the said registered owner as an interested party. Later on, the plaintiffs brought an application dated December 16, 2021 seeking to further amend the amended plaint in order to replace the 6th plaintiff said to be dead.
9. The court declined to grant the said application for inter alia being offensive to Order 1 Rule 12 of the *Civil Procedure Rules* and on a cause of action said to have occurred 9 years after the death of the 6th plaintiff. Essentially therefore there is no existing further amended plaint in the court file filed with leave of the court. The one filed on August 23, 2022 is improperly before the court as no leave was granted on July 12, 2022.
10. Strangely by a notice of motion dated June 21, 2022, one John Kathiari appointed by the firm of Mwirigi Kaburu and Co. advocates to act for him in this suit. He also filed an application dated June 21, 2022 seeking to be joined in the suit. This was allowed on July 12, 2022.
11. Having set the record of the court file, In *Civicon Ltd v Kivuwatt Ltd & 2 others* (2015) eKLR, the court held that the power to allow for amendments and joinder of parties is discretionary one and must be exercised judicially so as to bring on board all the persons who are parties to the dispute relating to the subject matter so that the dispute may be determined in their presence without any protraction, inconvenience and to avoid multiplicity of proceedings.
12. As to delay in seeking for joinder, the court in *Sammy Kanyi Kareithi v Barclays Banks of Kenya and 2 others* (2021) eKLR, the court held that a mere delay was not fatal where a suit was yet to be heard and if the party affected has not demonstrated the prejudice to be suffered by the late amendments. In *Tang Gas Distributors Ltd v Said & others* (2014) E.A 448, the court held that a joinder could be done either before or during the trial and even after judgment where damages were yet to be assessed or even at the appeal stage.
13. Concerning some defects in the plaint in *Kassam v Bank of Baroda* (K) Ltd (2002) 1KLR 294, the court held that the factors to consider while exercising the discretion may include; if the party applying was not acting malafides; if the amendment will not cause some injury to the other side which may not be compensated by way of costs; if the amendment was not an attempt to abuse the court process; if the amendment was necessary and lastly; if it will not alter the character of the suit.
14. In *Daniel Ngetich and another v K-Rep Bank Ltd* (2013) eKLR, the court held that a court should be liberal in exercising its discretion which however should not be exercised if the amendment would cause injustice or irreparable loss to the other side.
15. In this application and as can be seen from the history of the matter, the deponent to the affidavit in support of the application appears oblivious of the previous orders of this court and directions to comply with the law.
16. The suit was filed by some dead person which facts were brought to the attention of the court as early as March 9, 2010 and February 2, 2011. The court declined to allow the application dated December 16, 2021. The applicants were allowed to amend the plaint on May 7, 2019 but failed to do so. They belatedly purported to do so by a further amended plaint filed without leave of court on August 23, 2022. There was no leave to do so granted on October 21, 2021 and July 12, 2022 as indicated in the said



documents. As at 2020, the plaintiffs filed copies of title deeds before this court indicating that the land was already registered. It cannot therefore be true that the plaintiffs only came to know that the land had title deeds by way of the official searches conducted in October 2022. As at the time the defendants filed their defences it was indicated there were pending arbitration cases which the plaintiffs were party to. Further, despite the glaring defects to the original plaint and a consent to sue purportedly signed and executed by dead parties as at its onset, the 1st plaintiff still averred that he had a consent to swear the affidavit from his co-plaintiffs.

17. In *Salesio M'Aribu v Meru County Council* Civil Appeal No 183 of 2002, the Court of Appeal took the view that what may have appeared as a weak pleading might have had some life injected into it through an amendment. The court went to further to say that a court should not act in darkness without full facts of a case before it. In *Kenya Commercial Finance Co Ltd v Richard Akwesera Onditi* Nairobi Civil Application No 329 Of 2009, the court held that it had wide powers and will not automatically strike out proceedings, but will do so only after looking at the available alternatives. Mbogholi Msagha J as he then was in *Viktrar Maina Ngunjiri & 4 others v Attorney General & others* High court at Nairobi Civil Suit No 21 of 2016 (2018) eKLR, reviewed various authorities among them *C Mattu v Bharath Match Workings* Air 1964 Kant 293 where the court observed a suit brought against a dead man was a nullity from inception and could not be cured by an amendment no matter whether the suit was brought bona fide and in ignorance of the death of such a person. In *Geeta Bharat Shah & 4 others v Omar Said Mwatayari & another* (2009) eKLR the court held that the suit was a nullity as filed and so was the judgment entered while a judgment debtor was already dead.
18. Munyao Sila J in *Japhet Nzila Muangi v Hamisi Juma* (2022) eKLR was faced with an application for joinder of interested parties seeking for declaration of a suit as a nullity, filed against a dead person. He similarly held that the suit was nullity ab initio and struck it out for one could not sue a dead person and claim that the suit was properly before the court. In *Benjamin Leonard Macfoy v United Africa Co Ltd* (19610 ALL ER 1169 the court held that if an act is void, then it is in law a nullity and every proceeding which was founded on it was also bad and incurably bad. The court said that it could not put something on nothing and expect it to stay there for it will collapse.
19. In this application the applicants counsel is trying to put something on nothing by way of seeking to further amend the plaint and or introduce new parties to the suit. Dead parties tell no tales; Kemei J in *Gladys Njeri Mubura v Daniel Kariuki Muthiguro* (2018) eKLR, held that as a general rule suits and actions must be prosecuted and brought against living parties.
20. In *Geeta Bharat Shah* (*supra*), the court took the view that once the respondent admitted he sued a dead person the court was duty bound to down its tools since it has no jurisdiction to proceed to hear a suit filed against a person already dead by the time the suit was filed and that because the person cited in the plaint as the first defendant was already dead by the time the suit was filed meant, the plaintiff did not tell the truth when he said in his verifying affidavit that he had read the plaint and verified the facts therein otherwise he could not say that against undisputed fact later discovered that by the time he was saying so the 1st defendant was long dead. See also *Mayfair Establishment Ltd v Stephen Mbugua Kibanya* (2020) eKLR.
21. Given by the foregoing cited case law, the caselaw cited by the plaintiffs is distinguishable and inapplicable to the facts herein.
22. The application is seeking to redeem an already null and void suit. It cannot breathe any life to the suit as brought by some dead plaintiffs who purported to swear and give authority to sue to the 1st plaintiff, the applicant herein especially the 6th plaintiff to swear a false pleading. Again, the application seeks to raise similar issues which were determined in the ruling delivered on March 30, 2022.



23. The upshot, is I find the application without merits and proceed to strike out the entire suit as nullity *ab initio* with no orders as to costs.
24. The 4th defendant is at liberty to prosecute his counter claim.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS/OPEN COURT THIS 8TH DAY OF FEBRUARY, 2023

In presence of:

C/A: Kananu

Wambua for plaintiff

Koech for Omari for 1st defendant

HON. C.K. NZILI

ELC JUDGE

