



REPUBLIC OF KENYA



KENYA LAW
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**Olalui Group Ranch v Konchella & 608 others (Civil Suit
23 of 2022) [2023] KEELC 723 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 723 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
CIVIL SUIT 23 OF 2022**

M SILA, J

FEBRUARY 7, 2023

BETWEEN

OLALUI GROUP RANCH PLAINTIFF

AND

TAKARI KONCHELLA & 608 OTHERS DEFENDANT

RULING

(Application by plaintiff seeking to amend plaint; application allowed)

1. The application before me is that dated 4 February 2022 filed by the plaintiff. It seeks the following orders (slightly paraphrased) :-
 - i. Spent (certification of urgency).
 - ii. That the Honourable Court does grant leave to the plaintiff to amend its plaint dated 18 September 2012.
 - iii. That upon amendment, the plaintiff to effect service upon any unrepresented party by way of substituted service.
 - iv. That costs of the application be in the cause.
2. The application is opposed.
3. To put matters into context, this suit was commenced through a plaint filed on 19 September 2012 against 609 defendants. The plaintiff is a Group Ranch and avers to be the owner of the land parcel Narok/Transmara/Olalui/13, land measuring 5769 Ha or thereabouts. The plaintiff contended that this land was illegally subdivided into several parcels of land, being the parcels No. 15 – 607 which parcels were then allocated to the 1st – 604th defendants. The persons who were said to have committed the fraudulent allocation were the 605th – 608th defendants. It is claimed that the transfers of the land



were done secretly without the consent of the members of the plaintiff and that land was distributed to non-members. It is pleaded that this illegal allocation was discovered in the year 2012 as a result of concealment of the fraud by previous Group Ranch officials. The plaintiff averred that as a result the plaintiff's members have been disentitled to their land. In the suit, she has asked for an order to cancel these titles No. 15 – 613 and restitution of the original title i.e Olalui/13 and a permanent injunction to restrain the defendants from the land, and vacant possession. She did mention in the pleadings that there was an existing suit, being Nakuru HCCC No. 129 of 2004 now Kisii HCCC No. 359 of 2010. That suit has now been determined.

4. One group of defendants appointed M/s Tobiko & Njoroge Advocates. They filed defence opposing the case. Another group appointed B.O Akang'o & Company Advocates. They filed a defence which more or less supports the plaintiff's case. Initially the 54th defendant was being represented by M/s Koceyo & Co. I have seen that M/s Musalia Mwenesi & Co have taken over from M/s Tobiko & Njoroge and M/s Koceyo & Co. Parties have undergone pretrial and the matter was due for hearing before this application was filed.
5. In this application, I have seen that the plaintiff wants to remove Michael Lekishon Ole Risa, Mwaneki Ronko, Kotikash Ololtalam, and Udula Magutian as defendants in this suit. It is said that Ole Risa is Chairman of the plaintiff and the others are committee members and they have therefore been sued by error. The plaintiff also wants to include some new facts which she says arose out of documents filed by the Attorney General, on behalf of the 605th – 608th defendants.
6. The application is opposed by the 54th defendant who is a former Secretary and subsequently Chairman of the plaintiff. He avers that the defendants to be removed from the case are beneficiaries of the titles in issue. He is also surprised that the application seeks to remove the 182nd defendant as it was said that he is deceased in the notice of withdrawal of suit of 3 December 2012. He adds that there has been no attempt to sue the legal representatives of the deceased defendants. He states that he has not seen any document supporting the position that Ole Risa and the other persons sought to be removed are Chairman and Committee members of the plaintiff. He contends that they are in fact not officials of the plaintiff. He further avers that Ole Risa and Ololtalam are represented by M/s B.O Akang'o & Company Advocates and they filed defence. He is afraid that if the plaintiff's suit succeeds, all other titles will be cancelled and their's saved. He has also mentioned that the other issues being raised, being issues of fraud, are caught up by limitation of time and he has denied participating in any fraud. He reads mischief in this new pleading. He does not think that the amendment is fair.
7. I have considered the application alongside the submissions of Mr. Ogolla for the applicant and Mr. Mwenesi for those opposing the application. I need not be too lengthy in my ruling.
8. Applications to amend pleadings where leave is required are addressed in Order 8 of the [*Civil Procedure Rules 2010*](#). Order 8 Rule 3 and Rule 5 are operative and they provide as follows :-

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.”

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.”

9. It will be observed from the above, that a court may at any stage of the proceedings allow a party to amend. The purpose of amending is seen in Rule 5 which provides that it is to enable the determination of the real question in controversy. It should always be remembered that a case belongs to the parties. If a party feels that his pleadings do not reflect precisely what he intends to achieve in the case, and that an amendment will help him in making a better presentation, then there would need to be very good reason for a court to deny him this chance. Indeed, in exposition of this principle, courts are generally liberal when it comes to amendments. In the case of *Eastern Bakery vs Castelino* (1958) EA 461, O'Connor J, presented the following dictum on amendments at page 462 of the ruling :

“It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs: *Tildesley v. Harper* (10 (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya vs. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

10. From the above, it will be observed that amendments coming before the hearing, unless there will be injustice to the other party, ought to be allowed. This is because the defendant, in case of amendment to the plaint, will have a chance to rebut whatever is raised in the amended plaint, and it is difficult in those circumstances to see injustice to the defendant. In our case, the hearing of the matter is yet to commence. I observe that the defendants opposing the motion contend that removal of some of the defendants will mean that the titles they hold are not affected. I wouldn't think so. One can also sue or be a witness in a case where the result will negate his title. It should not be forgotten that this case is being presented by a Group Ranch. It can only present its case through some individuals. It is also upon the Group Ranch to fashion its case. It can, in fact, fashion its case in a manner that exempts some other parties. It all depends on what it wishes to present to court and it will be in special circumstances where a court directs a party to fashion her case in a particular way. That, ideally, should be left to the parties.
11. In our case, I can see that the plaintiff wishes to remove some of the defendants who are going to be her witnesses. I do not see why I should prevent the plaintiff from doing that if that is her wish and I see no prejudice to the defendants. The case of the plaintiff still remains the same that all titles should be nullified.
12. I am aware that the defendants opposing the application have raised several issues including that the amendments will be caught up by limitation, and that the said persons sought to be removed are not officials of the Group Ranch. I think those are issues that can adequately be addressed in defence to the amended pleadings and/or during the hearing of the suit.



13. I am persuaded to allow the application and I do allow it in terms of prayer (ii) of the same. I direct the plaintiff to file her amended plaint and serve within the next 14 days. I am not too sure about the place of prayer (iii) for no new parties are being added so I will make no orders on it. If the plaintiff wishes to have an order for substituted service, she can make the requisite application at a later time and the same will be considered.
14. The only issue left is costs. I make no orders as to the costs of this application.
15. Orders accordingly.

DATED AND DELIVERED THIS 7 DAY OF FEBRUARY 2023

JUSTICE MUNYAO SILA

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JUDGE, ENVIRONMENT AND LAND COURT

AT KISII

