



**Chelimo v Chemweno (Environment & Land Case 29 of 2022)  
[2023] KEELC 16257 (KLR) (10 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16257 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ITEN  
ENVIRONMENT & LAND CASE 29 OF 2022**

**L WAITHAKA, J  
MARCH 10, 2023**

**BETWEEN**

**BENJAMIN CHELIMO ..... APPLICANT**

**AND**

**PHILIP CHEMWENO ..... RESPONDENT**

**RULING**

1. Benjamin Chelimo hereinafter referred to as the applicant, instituted the suit herein inter alia seeking an eviction order against the respondent, Philip Chemweno, who he accuses of having unlawfully encroached on his parcel of land, plot No. 37 located within Chebara Trading Centre, Elgeyo Marakwet County.
2. Pursuant to an order issued by this court to the County Land Registrar to visit the suit properties, Moiben Chebara/130 and Chebara/37, and file a report; the County Land Registrar visited the suit properties and filed a report showing that the respondent has not encroached on the plaintiff's land as claimed.
3. Following filing of the report of the County Land Registrar, the applicant filed the notice of motion dated October 7, 2022, seeking leave to amend his plaint.
4. The application is premised on the ground that during interlocutory proceedings, new facts arose that necessitates the amendment of the plaint so as to bring additional parties.
5. Claiming that the proposed amendment is necessary in order to conclusively address the issue raised in the suit, the applicant urges the court to allow the application.
6. The application is supported by the affidavit of the applicant in which the grounds on the face of the application are reiterated. Annexed to the affidavit is a copy of the draft amended plaint marked BC1.



7. The application is opposed through the replying affidavit of the respondent sworn on October 22, 2022. In that affidavit, the respondent has *inter alia* deponed that the application seeks to defeat his accrued defence hence brought in bad faith; that the amendments sought will completely alter and/or change the substratum and fundamental character of the suit and complicate the issues in dispute.
8. The respondent contends that the amendments sought embody an illegal and/or invalid claim and are prejudicial to him in that they amount to an endorsement of the applicant's view of the case before it is determined by the court.
9. Pursuant to directions given by this court on October 26, 2022, the application was disposed of by way of written submissions.

### **The Applicant's Submissions**

10. In his submissions filed on November 1, 2022, the applicant has given a brief account of the circumstances leading to the filing of the application, thus:-

“Faced with conflicting assertion by the parties, the honourable court issued an order directing the County Land Registrar, Elgeyo Marakwet County to ascertain the position of land parcel Moiben/Chebara/130 and plot No.37 and inform the court whether the respondent has encroached on the applicant's plot No.37.”
11. The applicant states that the report of the County Surveyor confirms the structure erected by the respondent is on a road reserve close to his property.
12. The applicant confirms that the application for amendment is premised on the survey report.
13. Explaining that he seeks to join in the suit relevant public authorities whom he accuses of having allowed the respondent to erect illegal structures on a road reserve thereby interfering with his property, the applicant submits that it is fair that he be allowed to amend his plaint to bring on board the issues that arose from the report of the Land Registrar.
14. With regard to the issues raised in the respondent's replying affidavit, the applicant submits that no prejudice would be occasioned on the respondent if the application is allowed as he can still amend his defence, if need be.
15. Based on Order 8 Rule 3(5) of the [Civil Procedure Rules](#), the applicant submits that an amendment may be allowed even where its effect would be to add or substitute a new cause of action.
16. Maintaining that the intended amendment is intended to join the custodian of public roads and the urban planning regulator for purposes of adducing evidence on the validity of the respondent's structure, the applicant contends that the intended amendment would not change the character of his claim.
17. The applicant further submits that, even if the proposed changes have the effect of changing the character of his case, that fact would not vitiate his right to amend pleadings.
18. Based on Order 8 Rule 5(1) of the [Civil Procedure Rules](#) which gives the court power to amend pleadings for purpose of determining the real issues in controversy; the applicant reiterates his contention that the intended amendments are necessary for purpose of enabling the court to determine the real issues in controversy. Reliance is placed on the case of [Lewar Ventures Limited vs. Equity Bank \(Kenya\) Limited](#) (2022) e KLR where the plaintiff was allowed to amend his pleading to address new facts arising out of a valuation report.



19. Concerned that he would lose the case if he proceeds with it in the manner pleaded, the applicant urges the court to allow the application.

### **The Respondent's Submissions**

20. In a rejoinder, the respondent submits that the application does not meet the threshold of grant of leave to amend pleadings under Order 8 of the Civil Procedure Rules as it contravenes Rule 7(2) of the Civil Procedure Rules, thereof which provides as follows:-

“All amendments shall be shown by striking out in red ink all deleted words but in such a manner as to leave them legible by underlining in red ink all added words.”

21. Pointing out that the applicant has not strictly complied with the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules aforementioned in his draft amended pleadings, based on the decision in the case of Cooperative Insurance Company of Kenya Limited vs Paem Agencies Company Ltd (2014) e KLR in which the court dismissed an application for amendment of pleadings for want of compliance with Order 8 Rule 7(2), the applicant submits that the instant application should suffer the same fate for want of compliance with the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules.

22. In the case of Cooperative Insurance Company of Kenya Limited vs. Paem Agencies Company Limited supra, the court stated:-

“Any pleadings and or documents relied upon by parties should be self-explanatory. The court finds that the issue of underlining of the amended parts in red and the heading of the draft pleading is not a procedural technicality that could be saved by the provisions of Article 159(2)(d) of the Constitution of Kenya, 2010. Rather it is a fundamental error that goes into the root of the plaintiff's application as it sought that the Amended Pleadings be filed and served in terms of the draft Amended Pleadings.”

The court does not look kindly at parties who do not adhere and follow the laid down procedures and rules. For the reason that the plaintiff failed to comply with the provisions of Order 7 Rule 7(2) of the Civil Procedure Rules, 2010, its application would not succeed.”

23. Terming the intended amendment, a gamble that is prejudicial to him, the respondent maintains that the intended amendment if allowed, will introduce a new cause of action at his expense and/or prejudice as he will be denied an accrued defence to his case. Based on the decision in the case of Eastern Bakery v. Castelino (1958)EA 462 CAU where it was stated:-

“the court will refuse leave to amend where the amendment would change the action into one of substantially different character”; and the decision in the case of Central Kenya Limited v. Trust Bank Limited (2000)E.A 364 where it was stated:-

“...A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits; provided there has been no undue delay; that no new or inconsistent cause of action is introduced; that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side;”, it is submitted that the applicant has not made up a case for being granted leave to amend his pleadings.”



### **Analysis and determination**

24. I have read and considered the application by the applicant. I have also taken note of the circumstances leading to the plaintiff's desire to amend his pleadings, to wit the evidence that arose after the Land Registrar filed a report showing that the defendant has not trespassed into the plaintiff's parcel of land as alleged by the plaintiff in his case. Admittedly, the plaintiff seeks to rescue his case which appears to have been dealt a fatal blow by the report of the Land Registrar filed pursuant to the order of this court directing him to visit the suit properties and file a boundary report.
25. The intention of the court in ordering the site visit was not to help any of the parties repair their case but to assist it make a determination on the issues placed before it for determination.
26. If this court accedes to the plaintiff's plea to amend its case in order to repair or resurrect his case, it would fail in its duty of being an impartial arbiter.
27. Having looked at the proposed amendments, I agree with the defendant that they have the effect of changing the character of the plaintiff's pleaded case and/or the effect of denying the defendant an accrued defence hence prejudicial to the defendant.
28. In view of the foregoing and based on the decision in the case of Central Kenya Limited v. Trust Bank Limited supra, I find the application dated October 7, 2022 to be lacking in merit and dismiss it with costs to the defendant/respondent.

**RULING READ, DELIVERED, DATED AND SIGNED AT ITEN THIS 10<sup>TH</sup> DAY OF MARCH, 2023**

**L. N. WAITHAKA**

**JUDGE**

