



REPUBLIC OF KENYA



**Ojwang v Guya (Environment & Land Case 55 of 2021)
[2023] KEELC 16185 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16185 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT SIAYA
ENVIRONMENT & LAND CASE 55 OF 2021**

AY KOROSS, J

MARCH 9, 2023

BETWEEN

ESAU KHALUDO OJWANG PLAINTIFF

AND

ERIC ONGARE GUYA DEFENDANT

RULING

Plaintiff's Case

1. For determination is a notice of motion dated July 13, 2022 brought by the plaintiff under the provisions of sections 1, 1A, 1B and 3 of the *Civil Procedure Act* and order 8 rule 3 of the *Civil Procedure Rules* which sought the following orders:
 - a. That the honourable court be pleased to grant leave to the plaintiff to amend his originating summons dated 14/6/2016;
 - b. That upon the grant of leave and payment of requisite court fees, the annexed amended originating summons be deemed as duly filed and served upon the defendant; and
 - c. Costs of the application be in the cause.
2. The application is premised on the grounds enumerated on the face of the motion and the annexed supporting affidavit of the plaintiff Esau Khadulo Ojwang.
3. In brief, the plaintiff deposed inter alia, the suit property was originally land parcel number East Gem/Anyiko/436 [‘suit property’] before it was subsequently subdivided to create land parcel numbers East Gem/Anyiko/1554 and 1555 [‘subdivisions’]; the subdivision was conducted without his knowledge and it was significant for the court to litigate over existing parcels of land.



Defendant's Case

4. By the firm of DOE Anyul & Co Advocates, the defendant swore a replying affidavit dated August 18, 2022 which was in opposition to the motion. He deposed inter alia, the plaintiff had closed his case, the suit was due for defence hearing and there was nothing to be amended; the amendment was made late in the day and he would be denied a right to fair trial; the amendment was meant to tie loose ends that emanated during the trial; the plaintiff had no right to be informed of the subdivisions and urged the court to disallow the motion.

Parties' Submissions

5. As directed by the court, both parties' counsels disposed of the motion by written submissions. Mr Ashioya, counsel for the plaintiff, filed his written submissions dated November 16, 2022.
6. In his submissions, counsel submitted the defendant would not be prejudiced if the motion was allowed since he would have an opportunity to put in an amended reply to the originating summons and by order 8 rule 3 of the *Civil Procedure Rules*, a party was allowed to make amendments at any time before judgement was rendered.
7. Counsel argued that being a land dispute, it would be in the interests of justice if the amendment was allowed and, in any case, the defendant could be compensated by an award of costs. Counsel cited two decisions including *City Clock Limited v County Clock Kenya Limited & Another* [2020] eKLR which in its paragraph 9, it cited with approval the Court of Appeal decision of *Central Kenya Limited v Trust Bank Limited* (2000)2 EA 365 where the court stated: -

‘The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this (sic) is that it be in the interests of justice that the amendments sought (sic) be permitted in order that the real question in controversy between the parties be determined.’

8. Counsel for the defendant, Mr Anyul, filed his written Submissions dated 7/11/2022 in which he identified one issue for determination; whether the honourable court should be pleased to grant leave to the plaintiff to amend his originating summons dated June 14, 2016.
9. In addressing the singular issue, he reiterated the averments made in the defendant's replying affidavit. Counsel submitted that the plaintiff was seeking to reopen his case and introduce new evidence. He submitted that indeed the suit property was originally owned by James Ouko Tieng before it was subdivided to create the subdivisions which were transferred to the defendant. Counsel contended the intended amendment was meant to fill gaps in the plaintiff's case at the expense of the defendant. Counsel placed reliance on the case of *Martin Mugambi & another v Njeru Nyaga* [2018] eKLR where the court held: -

‘Allowing amendments after parties have closed their cases is akin to allowing parties to engage courts in evidence seeking fishing expeditions. This is not a practice that should be countenanced by courts of law.’



Analysis and Determination

10. Having carefully considered the pleadings on record, motion, affidavits, annexures and rival submissions, I will adopt the defendant's single issue for determination; whether the honourable court should be pleased to grant leave to the plaintiff to amend his originating summons dated June 14, 2016.
11. The statutory and procedural provisions of law on amendment of pleadings are provided for respectively within section 100 of the [Civil Procedure Act](#) and order 8 rule 3 of the [Civil Procedure Rules](#). Section 100 provides as follows;

‘100. General power to amend

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.’

While order 8 rule 3 states thus;

Amendment of pleading with leave [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.
 - (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 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.
12. Reading these provisions of law, it is clear that an amendment can be made at any stage of the proceedings. However, the right is not absolute and a party has to meet the threshold set out in the law. A court has to exercise its wide discretion set out in order 8 rule 3 of the [Civil Procedure Rules](#) in a judicious manner. By the provisions of section 100 of the [Civil Procedure Act](#), it is obvious that the eminence of an amendment is to ensure the main issues in controversy between the parties are dealt with by the court.
 13. I fully concur with the decision of *Central Kenya Limited v Trust Bank Limited (Supra)* which is binding on this court. As for [Martin Mugambi & another v Njeru Nyaga \(Supra\)](#), it is persuasive and



the facts therein are distinguishable from those obtaining in this case; in that case, both parties had closed their respective cases while in this case, only the plaintiff had closed his case and the suit had been slated for defence hearing.

14. The originating summons dated June 14, 2016 was deemed as a plaint and the replying affidavit dated 2/08/2016 a defence. The suit was on the suit property which was subdivided prior to the suit being instituted.
15. A scrutiny of the draft amended originating summons depicts the plaintiff merely intends to include the subdivisions which emanated from the suit property. From the pleadings, the court has noted that the ministry of lands-Siaya erred in issuing the plaintiff an official search certificate over the suit property yet its register had long closed. It is the considered view of this court that the issues being raised by the intended amended originating summons flow from the original suit. Apart from the issue of subdivision, no new facts are being introduced by the plaintiff.
16. Although the motion is strenuously opposed, the defendant's arguments that the amendment had been made late does not hold water for reasons inter alia, it has been made prior to this court rendering a judgment. The defendant will still have an opportunity to test the veracity of the plaintiff's case and he will also be at liberty to file an affidavit in response and testify. Additionally, the intended amendment would conclusively deal with the issues in controversy.
17. Order 18 rule 10 of the [Civil Procedure Rules](#) donates powers to this court to recall any witness who has been examined. In my humble opinion, any prejudice on the defendant on such a recall can be mitigated by an award of costs.
18. The upshot is that it is my finding the motion is merited and the same is allowed on the following terms follows;
 - a. The plaintiff is hereby granted leave to amend his originating in the manner proposed in the draft amended originating summons annexed to the supporting affidavit together with consequential amendments to other documents if need be including his list of documents within 7 days from today;
 - b. The defendant shall be at liberty to file and serve his further affidavit within 14 days of service by the plaintiff.
 - c. Hearing in open court on May 15, 2023.
 - d. Thrown away costs of Kshs 20,000/ shall be paid to the defendant by the plaintiff within 14 days from the date of this ruling.
 - e. Costs of the motion shall be borne by the plaintiff.

DELIVERED AND DATED AT SIAYA THIS 9TH DAY OF MARCH 2023.

HON. A. Y. KOROSS

JUDGE

09/03/2023

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the Presence of:

Mr. Ashioya for the plaintiff present

N/A for the defendant

Court assistant: Ishmael Orwa

