



**Werunga v Wanyonyi & another (Environment & Land Case
E002 of 2022) [2023] KEELC 16193 (KLR) (7 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16193 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT & LAND CASE E002 OF 2022
EC CHERONO, J
MARCH 7, 2023**

BETWEEN

CHARLES WAMBULWA WERUNGA APPLICANT

AND

PHANICE NEKESA WANYONYI 1ST RESPONDENT

**ELIUD WAFULA AINEAH (BEING SUED AS THE LEGAL REPRESENTATIVE
OF THE ESTATE OF MUKHOLI KIABI (DECEASED)) 2ND RESPONDENT**

RULING

1. The Applicant, Charles Wambulwa Werunga has moved this Honourable Court vide a Notice of Motion dated November 22, 2022 seeking the following orders;
 1. That the Plaintiff/Applicant be and is hereby granted leave to Amend the Originating Summons, the draft Amended Originating Summons hereto annexed be deemed to be duly filed and served subject to payment of the requisite Court fees.
 2. That Costs of this application be provided for The application is premised on grounds shown on the face of the said application and the affidavit of the Applicant sworn the same date. The application is further supported by numerous annexures to the supporting Affidavit.
2. In the supporting Affidavit, the Applicant deposed that there are subsequent events that necessitated the intended Amendment particularly after he carried out a Survey of the land and established the exact acreage of the land he is in possession of and further after he discovered in the course of the hearing that the Respondents have already transferred the entire land into their names.
3. The Applicant further stated that the intended amendment shall not prejudice the Respondents but will tacitly bring out the issues in controversy for determination by the court.



4. The application is opposed vide a Replying Affidavit sworn by Eliud Wafula Aineah, the 2nd Defendant on his behalf and on behalf of Phanice Nekesa Wanyonyi, the 1st Respondent on December 2, 2022. According to the Respondents, the application for Amendment of the Originating Summons is not deserving the exercise of the court's discretion since the Applicant has not given cogent reasons for the proposed amendment.
5. The Respondents this suit is part heard and that before the hearing date was taken by consent, all parties are satisfied that they have complied with Order 11CPR and that they are ready to proceed with the hearing of the dispute. The Respondents also deposed that what the Applicant is from the application is leave to amend evidence which is against the law and practice. According to the Respondents, the Applicant in the initial Originating Summons was claiming a portion of 4.2 acres of land out of land parcel No E Bukusu/S Nalondo/1280 and that he knew the said parcel of land was registered in their names.
6. In conclusion, the Respondents argued that should this Honourable court allow the application, it will be against the rule of Natural Justice as the Applicant will keep on amending his pleadings immediately after being cross-examined.

Analysis And Decision

7. I have considered the Notice of Motion application dated November 22, 2022, the supporting Affidavit as well as the Replying Affidavit and the annexures thereto. The principles guiding the amendment of pleadings was outlined in a number of decisions by the Superior Courts. In the case of case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013) eKLR, the Court held;

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading-12th Edition, in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago*, CivilAppeal NO.149 of 1991 as follows;

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the pleadings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to reply on Limitation Acts.”

8. Again in *Harrison C Kariuki v Blueshield Insurance Company Ltd* (2006) eKLR, the Court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* (2000)EALR 365 and held;

“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 is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.

9. It is not in dispute that this suit is part heard and that the plaintiff is the only witness who testified on October 31, 2022. It is not also in dispute that in the original Originating Summons dated March 26, 2022, the Plaintiff/Applicant is seeking to be registered as owner of a portion of land measuring 4.2 from land parcel No. E. Bukusu.S. Nalondo/1280. In the proposed amendment, the applicant is seeking to change the original claim from 4.2 acres to 5.16 acres to be curved from the same parcel of land.
10. Considering the reasons given by the applicant for the proposed amendments sought and the rival arguments by the Respondents in opposition thereto, it is clear that though the application is made after the hearing has commenced, the proposed amendment is not a new cause of action or one that would change the action into one of substantially different character and which could more conveniently be made the subject of a fresh action. The proposed amendment in my view is made in good faith and can be allowed subject to the Respondents being compensated by an award of costs.
11. For the above reasons and bearing in mind the principles set out in the cited authorities on amendment of pleadings, I find the Notice of Motion application dated November 22, 2022 merited and the same is allowed in the following terms;
 1. The Plaintiff/Applicant is granted leave to Amend the Originating Summons
 2. The draft amended Originating Summons annexed to the supporting Affidavit to be filed and served within 7 days from the date of this Ruling
 3. The Defendants/Respondents are granted corresponding leave to file and serve a Supplementary/Further Affidavit within 14 days from the date of service of the amended Originating Summons
 4. The Plaintiff/Applicant to pay the Defendants/Respondents thrown away costs of this application assessed at Kenya Shillings ten thousand (Kshs 10,000/=) within 14 days from the date of this Ruling

READ. DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 7TH MARCH, 2023

HON. E.C CHERONO

ELC JUDGE

In the presence of;

Mr Wamalwa R

M/S Natwati H/B for Were

Lusweti C/A

