



Mukuha & 2 others v County Government of Nakuru & 4 others (Environment & Land Case 551 of 2016) [2023] KEELC 17973 (KLR) (6 June 2023) (Ruling)

Neutral citation: [2023] KEELC 17973 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 551 OF 2016
FM NJOROGE, J
JUNE 6, 2023**

BETWEEN

LINET WAIRIMU MUKUHA 1ST PLAINTIFF

GRACE WAMBUI MUKUHA 2ND PLAINTIFF

**LUCY WANJIKU NYAGA (SUING AS THE ADMINISTRATOR OF THE
ESTATE OF JOSEPH NYAGA WAMBITI) 3RD PLAINTIFF**

AND

COUNTY GOVERNMENT OF NAKURU 1ST DEFENDANT

PHARIS NDUNGU CHEGE 2ND DEFENDANT

GURSHARN SINGH 3RD DEFENDANT

CHIEF LAND REGISTRAR, NAIVASHA LAND REGISTRY ... 4TH DEFENDANT

NAIVASHA INDUSTRIAL COMPLEX 5TH DEFENDANT

RULING

1. This ruling is in respect of the plaintiffs' application dated 17/04/2023 which is expressed to be brought under order 1 rules 3 & 10, order 8 rules 2, 3 and 4 of the *Civil Procedure Rules*, sections 1A, 1B, 3, 3A, 99 and 100 of the *Civil Procedure Act* and articles 10, 27, 47, 48, 50(1) and 159 (2) of the *Constitution* of Kenya which sought the following prayers:
 - a. Spent
 - b. Spent
 - c. The honorable court be pleased to grant leave to the plaintiffs/applicants to file a further amended plaint with a view to introducing and impleading additional defendants as well as



additional causes of action/reliefs, which are pertinent to the determination of all the issues in controversy over and in respect of the subject matter.

- d. Consequent to prayer (3) above, the draft further amended plaint annexed herewith be deemed as duly filed upon payment of the requisite court fees.
 - e. Further in the alternative and without prejudice to prayer (4) herein the plaintiffs/applicants be at liberty to file a further amended plaint and same be filed within 14 days from the date of issuance of the leave or such other shorter period as the honorable court may decree and/or direct.
 - f. The honorable court be pleased to grant corresponding leave and/or liberty to the defendants/respondents to file amended/further amended statement of defense, if any and same to be filed and served within 14 days from the date of service of the further amended plaint or such shorter duration as the honorable court may deem fit, just and expedient.
 - g. Pursuant to the grant of leave, details in terms of the preceding paragraph, the honorable court be pleased to grant liberty to the plaintiffs/applicants and the defendants/respondents, leave to file further bundle of documents and witness statements, if any within a set and circumscribed timeline.
 - h. The honorable court be pleased to revert the matter to case conference and enable the parties to confirm due compliance.
 - i. The costs of the application do abide the cause.
 - j. The honorable court be pleased to grant such further and/or other orders as maybe deemed fit, just and expedient.
2. The application was supported by the affidavit of Linet Wairimu Mukuha sworn on 17/04/2023. The grounds on the face of the application and the supporting affidavit are that Plot No 103 Lakeview Naivasha was allocated to Joseph Nyaga Wambiti (deceased) by the Municipal Council of Naivasha; that the deceased carved out two plots out of the suit property referred to as Plot 1 and 2 ; that after the deceased passed away, his estate was succeeded by the 3rd plaintiff herein who was issued with the requisite grant of letters of administration; that plots 1 and 2 were acquired by Peter Mukuha (deceased) who transferred the plots to the 1st and 2nd plaintiffs; that the 1st and 2nd plaintiffs begun to put up permanent structures on the said plots; that despite their occupation, the Municipal Council of Naivasha purported to allocate the said plots to Naivasha Industrial Complex Ltd; that the Commissioner of Lands purported to allocate Plot No 103 Lakeview Naivasha vide the letter dated 6/09/2011; that the portion of the suit property they were in occupation of was surveyed and assigned as LR No Naivasha Municipality Block 6/117 without notice to them; that the said actions were calculated to defraud them of the suit properties; that there is a perspective of the claim that has not been pleaded and it needs to be included in the present suit; that they are keen to impeach the said allotment of the property that they were in occupation of; that they therefore need to implead additional parties to include Naivasha Industrial Complex Ltd, National Land Commission and the Honorable Attorney General; that if the intended parties are not joined, there will be a segment of the suit that would not have been adjudicated upon; that the said joinder will enable the court determine all the issues in controversy in the present matter and that the application has been made without undue and inordinate delay.
3. In response to the said application, the 3rd and 5th defendants filed their grounds of opposition dated 8/05/2023 which are on the following grounds:



- a. The plaintiffs have no locus standi in the matter.
 - b. The application seeks to introduce new parties and new causes of action in respect of which the suit is time-barred under the law on limitation of time.
 - c. The court has no jurisdiction to entertain matters that are time barred by statute.
 - d. The application seeks to enjoin to the suit parties who are already parties herein.
 - e. The plaint herein has already been amended multiple times and the present application is merely another desperate fishing expedition by the plaintiffs.
 - f. The said application is bad in law, fatally incompetent, vexatious, scandalous and an abuse of court process.
4. The application was canvassed by way of written submissions. The plaintiffs filed their submissions dated 19/05/2023 on 25/05/2023 while the defendants did not file any submissions.
 5. The plaintiffs in their submissions identified the following issues for determination:
 - a. Whether the proposed amendment and joinder of the additional parties shall enable the honorable court to effectively and effectually deal and dispose of the issues in controversy;
 - b. Whether the applicants have established and met the threshold to warrant the intended amendment;
 - c. Whether the defendants/respondents shall suffer any prejudice or detriment, if the proposed amendment is allowed.
 6. On the first issue, the plaintiffs reiterated the grounds on the face of the application and the supporting affidavit and submitted that the 2nd defendant is claiming to hold a lease certificate to the portion of the suit properties that the 1st and 2nd defendants are in occupation of. The plaintiffs also submitted that the 2nd defendant is alleging to have acquired the suit property from Naivasha Industrial Complex Limited, the proposed 5th defendant. The plaintiffs further submitted that the claim by the 2nd defendant that he bought the suit property from the proposed 5th defendant makes the 5th defendant a necessary party to the suit. The plaintiffs submitted that since the suit properties were already allocated to them, there was no way they would have been allocated to the proposed 5th defendant which makes it imperative that the National Land Commission be joined to the present proceedings. The plaintiffs also submitted that the joinder of the proposed parties would enable the court to effectually determine all the issues in controversy. The plaintiffs relied on the cases of *Civicon Limited v Kivuwatt Limited & 2 Others* [2015] eKLR, *Pravin Bowry v John Ward & another* [2015] eKLR in support of their arguments.
 7. Regarding the second issue, the plaintiffs submitted that when they were filing the present suit, crucial documents were not in their possession but they have since acquired the said documents making it necessary for them to amend their pleadings. The plaintiffs also submitted that some of the issues that inform the current application were not in their knowledge and were discovered in April 2023 when they tried to procure a witness from the National Land Commission. The plaintiffs rely on the cases of *Central bank of Kenya v Trust Bank Ltd* [1996] and *Elija Kipng'eno Arap Bii v Kenya Commercial Bank Ltd* [2014] eKLR in support of their arguments.
 8. Coming to the third issue, the plaintiffs submit that it is common ground that the suit has not proceeded for hearing since it was filed in the year 2016 and that since the defendants shall be at liberty to file amended pleadings, the court should exercise its discretion and allow the proposed amendments. The plaintiffs concluded their submissions by seeking that their application be allowed as prayed.



Analysis and Determination

9. After considering the application, the grounds of opposition and submissions, the only issue that arises for determination is whether the plaintiffs should be granted leave to further amend their plaint.
10. Section 100 of the [Civil Procedure Act](#) provides that: -

“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.”
11. Order 8 Rule 5 (1) of the [Civil Procedure Rules](#) provides as follows:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on 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.”
12. Amendment of pleadings is permitted at any stage of the proceedings in order for the court to determine the real issues in controversy but the granting of the said orders is discretionary which discretion must be exercised judiciously. The plaintiffs in this matter are seeking to further amend their plaint to include Naivasha Industrial Complex Ltd as the 5th defendant because the 2nd defendant claims to have acquired the suit property from it. The plaintiffs are also seeking to join the National Land Commission as the 6th defendant because the proposed 5th defendant is alleged to have been issued with a letter of allotment by the Commissioner of Lands dated 6/09/2011.
13. The 3rd and 5th defendants opposed the plaintiffs’ application by filing grounds of opposition. Some of which grounds were that the plaintiffs had no locus standi, that the plaintiffs sought to introduce new parties and new causes of action which were time barred and the court did not have jurisdiction to entertain matters that were time barred. The court in the case of [Kennedy Otieno Odiyo & 12 Others v Kenya Electricity Generating Company Limited](#) [2010] eKLR held as follows:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition addresses only issues of law and no more. The grounds of opposition aforesaid are basically general averments and in no way respond to the issues raised by the applicant in its supporting affidavit. Thus what was deponed to was not countered nor rebutted by the respondents. It must be taken to be true. In the absence of the replying affidavit rebutting the averments in the applicant’s supporting affidavit, means that the respondents have no claim against the applicant.”
14. The court in the case of [Faustina Njeru Njoka v Kimunye Tea Factory Limited](#) [2022] eKLR held as follows:
 36. From the authorities I have cited above, grounds of opposition are to be deemed as general averments and do not deny or respond to issues in an application. A preliminary objection and grounds of opposition though means of opposing an application they are not to be used when one intends to deny allegations in an application. In my view a replying affidavit would best serve to deny issues raised in an application. It has been held that where a replying affidavit is not filed then in essence the averments in an application are deemed as uncontroverted and



unchallenged. In considering the mode of opposition opted to by the respondents and the averments therein I find that the issues in the application are not rebutted and the application stands unopposed.

37. However, though having held as such, the application by the applicant should not be deemed as having been allowed. This court has a duty to consider the application and proceed to determine it on its merits.”
15. Similarly, in the present case, the 3rd and 5th defendants only filed grounds of opposition in response to the plaintiffs’ application. As was held in the above decisions, grounds of opposition are deemed to be general averments and do not respond to issues raised in an application. Therefore, the plaintiffs’ application dated 17/04/2023 is unopposed but it still has to be determined on merits. The Court of Appeal in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR held as follows:

“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*, Civil Appeal 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 proceedings (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 a 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 rely on Limitation Acts.”

16. As aforementioned, the plaintiffs are seeking to amend their plaint to join three more parties who they argue will assist the court to effectually determine all the issues in controversy. They argue that they were not aware that a letter of allotment had been issued to the proposed 5th defendant by the Commissioner of Lands at the time of the institution of the suit. The proposed 5th defendant allegedly sold the property to the 2nd defendant. It is my view that the proposed amendments are consistent with the subsisting cause of action and no prejudice will be suffered if the plaintiffs’ application is allowed.
17. Consequently, the plaintiffs’ application dated 17/4/2023 has merit and it is hereby allowed as prayed in terms of prayers no. (c), (e), (f), (g) (h) and (i). The suit will be mentioned on 26/9/2023 for further directions.

DATED, SIGNED AND DELIVERED AT NAKURU VIA ELECTRONIC MAIL ON THIS 6TH DAY OF JUNE 2023.

MWANGI NJOROGE

JUDGE, ELC, NAKURU

