



Elbi Homes Limited v Laura & 2 others (Environment & Land Case 143 of 2012) [2023] KEELC 18757 (KLR) (12 July 2023) (Ruling)

Neutral citation: [2023] KEELC 18757 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 143 OF 2012
EK MAKORI, J
JULY 12, 2023**

BETWEEN

ELBI HOMES LIMITED APPLICANT

AND

LENZI LAURA 1ST RESPONDENT

ROBERTO LENZI 2ND RESPONDENT

CRYSTAL BAY WATAMU 3RD RESPONDENT

RULING

1. The Applicant's application is premised under Sections 1A, 1B, and 3A of the *Civil Procedure Act*, Order 1 Rule 10(4) & 14, Order 8 Rule 3 (1) (2) (3) (4) (5) (7) & (8), and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. The Application seeks the following orders:
 - a. That leave of this Court be granted allowing the Applicant to further amend its amended Plaintiff dated the 23rd October 2017.
 - b. That the Order of amendment be effected by deleting the names of the 1st 2nd and 3rd Defendants/Respondents and substituting them with the name of Seven Islands Watamu Limited as the sole Defendant.
 - c. That the annexed Further Amended Plaintiff be deemed to be properly filed upon the issuance of the Order for amendment by this Court.
 - d. That this Court does grant further orders and directions to the substituted Defendant as to the filing of its pleadings thereto.



- e. That costs of this application be in the cause.
3. A Supporting Affidavit sworn by Allan George Njogu Kamau, the Director of the Applicant herein, supports the application.
4. In response to the Applicant's application the 1st and 2nd Defendants/Respondents (Respondents) have filed grounds of opposition dated 1st March 2023 which are:
 - a. The Application raises new points of law being the alleged sub-summation of property LR No. 683 by Kilifi/Jimba/1125.
 - b. The proposed amendments introduce a new and inconsistent cause of action that is substantially different in character from the suit filed herein.
 - c. The Amendment is aimed at defeating the limitation of action for trespass, which is 3 years by indirectly commencing a fresh suit for trespass against the proposed defendant, Seven Islands Limited.
 - d. The amendment seeks to remove 1st, 2nd, and 3rd Defendants/Respondents from these proceedings and instead introduce a new party to the suit who has neither been enjoined to the proceedings nor invited to participate in the hearing of this application.
 - e. The application is a mere subterfuge by the Applicant and an extended avenue to propound its hopeless and unfounded claim against the 1st and 2nd Respondents.
5. The Application came up for hearing on 3rd March 2023 when parties were directed to file and exchange their written submissions within 21 days each and consequently the matter was fixed for mention for compliance on 20th April 2023.
6. The Applicant submitted that he was issued by the Government of the Republic of Kenya with a Grant for Plot Number L.R 683, Title Number C.R 24169 (suit plot) situate at Watamu Township in the then Kilifi District measuring 1.272 hectares on 1st November 1992 which title was issued under the provisions of the Registration of Titles Act (RTA) (Repealed).
7. After the issuance of the said title, the Director of the Applicant and its agents constantly visited the plot to ascertain the user in which it would be utilized for purposes of carrying out developments.
8. The Applicant subsequently purposed to have the parcel of land subdivided into smaller portions to develop residential villas.
9. To carry out the said subdivision the Applicant hired the services of a land surveyor and environmental management expert one G.S Gachanja to first establish and identify the boundaries of the suit plot by locating its beacons to facilitate the drawing of a subdivisional scheme.
10. After some time the said G.S Gachanja advised the Applicant that though he had identified the general location of the suit plot he could not access the property as the same had been completely fenced off and security guards placed around the perimeter wall thereto to ensure that there was no access to the suit plot.
11. The Director of the Applicant confirmed personally that it was not possible to access the suit plot and even to determine the extent of its encroachment or not and on advice from the said surveyor



- after consulting the Officer Commanding Station (OCS) Watamu it was resolved to seek a court order directing access to the suit plot to determine its encroachment and its state.
12. The said Surveyor had advised the Applicant that the suit plot had been trespassed by some Italians whose identity was unknown as their community normally operates via a code of secrecy and at that time, they were said to be out of the country and in Italy.
 13. In obedience to the said advice the Applicant filed the current suit naming the 1st and 2nd Respondents as the Defendants as these are the names that had been given to it as belonging to the Italians who had encroached upon its parcel of land on the 29th August 2012.
 14. Contemporaneous with the filing of this suit the Applicant filed an application for an order compelling 1st and 2nd Respondents to allow it and or its agents to access the suit plot and to ascertain the true and real identity of the trespassers and in default, the court order be enforced by the Officer Commanding Watamu Police Division (O.C.P.D).
 15. On the 31st August 2012 Meoli J. allowed the order ex-parte and further directed that the Applicant's application be heard inter-partes on 14th September 2012.
 16. The 1st and 2nd Respondents instructed advocates to act for and on their behalf who proceeded to file their written statements of defence to the Applicant's claim to the effect that they did not know either the Applicant or the suit plot with the 1st Respondent stating that he/she was only a tenant at Crystal Bay Watamu Resort.
 17. The suit was thereafter fixed for hearing and the Applicant's Director Allan George Njogu Kamau testified and was cross-examined.
 18. Before the suit could proceed for further hearing the advocates for the 1st and 2nd Respondents advised the Applicant that the Respondents ran a company designate Crystal Bay Watamu Limited and it thus appeared prudent and appropriate that the said Company be added as a Defendant in this suit.
 19. By a letter dated 8th December 2014 the Respondents indicated that the said Crystal Bay Watamu Limited was owned by Roberto Lenzi who had 360 shares and Laura Lenzi 40 shares.
 20. On the 16th October 2017, by consent of the parties the said Crystal Bay Watamu Limited was added as 3rd Defendant in this suit and the pleadings similarly amended in tandem with the said amendments with the suit being fixed for further hearing on the 30th January 2023.
 21. Given the above litigation the order to access the suit plot initially applied for was not pursued as the Respondents had appointed advocates to act for and on their behalf and thus no access was ever awarded to the Applicant to the suit plot.
 22. It was anticipated that the said Director of the Applicant Company would proceed to testify during the said scheduled hearing of the 30th January 2023 because the 3rd Defendant had been added to this suit.
 23. In the meantime, the Applicant has established that the suit plot was subsumed under a title designated as Kilifi/Jimba/1125, which is situated in Watamu Township, and which title was issued to Seven Islands Watamu Limited (the proposed Defendant) which title was issued under the provisions of the Registered Land Act (RLA) (Repealed). The Applicant has further established that the said proposed Defendant acquired the said parcel of land on 7th March 2003.
 24. A perusal of the Registry Index Map (RIM) for the said Kilifi/Jimba/1125 under schedule 10 demonstrated that the said parcel of land was subdivided into plots Kilifi/Jimba/1719, Kilifi/Jimba/1720 and Kilifi/Jimba/1721.



25. The Applicant contended that since it has no access to the above parcels of land the suit plot is situated in either plot Kilifi/Jimba/1719, Kilifi/Jimba/1720, or Kilifi/Jimba/1721.
26. A search of the Company's registry shows that the proposed Defendant's Directors are amongst others Remo Lenzi, Crystal Bay Resort Kenya Limited, Roberto Lenzi, and Riccardo Lenzi. It should be noted that the suit was originally filed against Lenzi Laura and Roberto Lenzi. That at the instance of the Respondents, the Plaintiff was amended adding Crystal Bay Watamu as a party to the suit.
27. As revealed by the said search the above parties were Directors of the proposed Defendant and thus have a nexus either directly or otherwise with the proposed Defendant.
28. The current Defendants being Directors of the proposed Defendant have deliberately and by subterfuge knowingly failed to disclose that the real and true Defendant herein is the proposed Defendant to shield its true identity as the real Defendant herein for they have no credible defence in this case. Before allocation of the suit plot, it was comprised of plots number 98, 99, 107, and 108, which were subsequently combined to make plot number 683 the current suit plot.
29. The Plan for the area was allocated to the proposed Defendant as Kilifi/Jimba/1125 which is the same area as the suit plot and has been the subject of well-documented litigation with plot number 103 being the subject of Mombasa Court of Appeal Civil Appeal No. 67 of 2016 and in which case Postal Corporation of Kenya as the 4th Respondent claims that the Proposed Defendant had also subsumed its plots No 96 and 110 just as it had subsumed plot number 103 under land parcel Kilifi/Jimba/1125.
30. In Malindi ELC case No. 18 of 2021; - Karin Anne Challis v Attorney General and 4 Others similarly claims that the proposed Defendant had subsumed its plot No 104 under Kilifi/Jimba/1125 by pretending that it does not exist and this is the same case with ELC Malindi Court Misc. Application No. 29 of 2019; - Watamu Mens Friday Limited similarly claimed that the proposed Defendant had subsumed its plot No 696 by pretending that it was not part of Kilifi/Jimba/1125.
31. A perusal of the above litigation and findings by the court has demonstrated that Kilifi/Jimba/1125 which now comprises the subdivided portions of Kilifi/Jimba/1719, Kilifi/Jimba/1720, and Kilifi/Jimba/1721 was a double allocation upon the Applicant's parcel of land and litigants who went to the court whose allocations were much earlier and thus by the time Kilifi/Jimba/1125 came into existence the said land upon which the said impugned title is based had already been alienated and it, therefore, could not and cannot own the land it purports to own.
32. The Applicant averred the record would bear the Applicant's position that the identity of the trespassers and the encroachment of their suit plot has always vexed it until recently when it came upon the above critical information, which identifies the proposed Defendant as the trespasser masquerading as the registered owner of Kilifi/Jimba/1125. The discoveries have now prompted the Applicant to file the instant application seeking to bring in the actual trespasser to this suit who is the proposed Defendant as per the draft further amended plaintiff.
33. The Applicant stated that in opposition to the application, it is not contested that the only responses by the Respondents thereto are the grounds of opposition. By their very nature, grounds of opposition consist of a challenge on matters of law and not of fact.



34. Since no Replying Affidavit was filed to rebut the Applicant's Supporting Affidavit its case is thus essentially admitted. The Applicant relied on the case of Kennedy Otieno Odiyo & 12 Others v. Kenya Electricity Generating Company Limited [2010] eKLR where it was held that:

“The respondents only filed grounds of opposition to the application reproduced elsewhere in this ruling. Grounds of opposition address only issues of law and no more. The grounds of opposition aforesaid are general averments and in no way respond to the issues raised by the application in its supporting affidavit. Thus, what was deponed to was not entered 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.

35. The Applicant further relied on the case of Mohammed & Another v Haidara [1972] E. A 166 (as cited in the case of Mustano Rocco) where the court considered the failure by a party to file any reply to allegations set out in evidence and expressed itself as follows:

“The respondent did not attempt to reply to these allegations and they therefore remain unrebutted... Here, the respondent's affidavit gives no material facts and the only real evidence of facts is that contained in the appellant's affidavit. In these circumstances, it seems to me that a replying affidavit was essential. There was no need for it to be prolix but it should have made clear which of the facts alleged by the appellants were denied...”

36. The Applicant also relied on the holding by Chepkwony J. in the case of Mustano Rocco v Aniello Sterelli [2019] eKLR that:

“With regard to the foregoing authorities, I find the Respondent only filed grounds of opposition there being no replying affidavit to the application, the facts deponed to in the supporting affidavit are therefore considered unrebutted and I take them to be true.”

37. In this regard, the Applicant submitted that since its application before the court is uncontested it is in the interest of justice that the prayers sought therein are allowed as prayed.

38. On whether the application was merited, Applicant stated that that application essentially sought a further amendment to the plaint dated 29th August 2012 and first amended on 23rd October 2017 to bring in Seven Islands Watamu Limited as the Defendant in this matter. The Applicant has attached to its application a draft further amended plaint to that effect. The Applicant has detailed the reasons why it seeks to amend its plaint and bring in the proposed Defendant earlier in these submissions.

39. The law on amendments of pleadings is provided for under Order 8 of the Civil Procedure Rules 2010. Under the provision of Order 8 Rule 3 of the Civil Procedure Rules, 2010, it grants this Court wide and unfettered powers to allow any party to amend his/her pleadings on such terms as may be just.

40. The Applicant submitted that the proposed amendment is necessary to effectively determine the dispute herein as it is intended to correctly identify and enjoin in this suit the actual trespassers upon its suit plot, which will aid this court in determining the case justly and fairly.

41. Order 8 Rule 5 of the Civil Procedure Rules expressly provides as follows:

“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 motion or on



the application of any party order any documents to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

42. It is trite law that this Court has the power to amend pleadings which power can be exercised at any stage of the proceedings before the judgment

43. In the Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, as it relates to the amendment of pleadings it aptly provides as follows:

“...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...”

44. Similarly, in Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose, the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its motion. The person applying for an amendment must be acting in good faith. The amendment will not be allowed at a late stage of the trial if an analysis of it is intended for the first time thereby advancing a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

45. It is the Applicant's submission that its intended amendment is in good faith and will not in any way change the character of the suit as the suit will remain as on for an action of trespass upon the Applicant's parcel of land.

46. The Applicant submitted that its proposed amendment is necessary and places its reliance in the Court of Appeal case of Central Kenya Limited v Trust Bank Limited [2000]2 EA 365 where the court held that:

“...that 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.”

47. The Applicant further submitted that Order 8 Rule 3(3) allows an amendment that seeks to “substitute a new party where 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”.



48. Further Order 8 Rule 3(4) provides that :

“an amendment to alter the capacity in which a party sues (whether as a plaintiff or as a defendant by counterclaim) may be allowed under sub-rule (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”.

49. The Applicant stated that the proposed Defendant is the correct party to be sued in this matter and it is evident from the record that the issue of who is to be sued has been the center of the proceedings herein with even the 1st and 2nd Respondents herein bringing in the 3rd Defendant/Respondent and enjoining it in this suit.

50. It has now emerged that the parties herein are all Directors of the proposed Defendant whom the Applicant has just discovered that its suit plot has been subsumed under a title designated as Kilifi/Jimba/1125 whose registered proprietor is the proposed Defendant.

51. Further, the Applicant submitted that it discovered that the proposed Defendant allegedly acquired the land in the year 2003, which was before the filing of this suit, and hence could have been the proper party to this suit only that the details had not become known at the time.

52. The Applicant further averred that as alluded to earlier in the submissions, a search at the Company's Registry has confirmed that Remo Lenzi, Crystal Bay Resort Kenya Ltd, Roberto Lenzi, and Riccardo Lenzi are Directors of the proposed Defendant.

53. It is therefore clear that the Applicant's intended amendment will not prejudice the Respondents herein and it is in the interest of justice that the application before the court is allowed as prayed for purposes of determining the dispute before the court conclusively and substantively and to avoid orders or decrees that may end up being in executable and futile.

54. The Applicant stated that it is not true that the application raises new points of law which vary and diverges from the pleadings before the court as the amendment sought seeks to shed more light on the dispute before the court and in aiding the court to determine the real issue in controversy for purposes of a fair, just and valid conclusion.

55. Applicant further contended It is also not true that the proposed amendments introduce a new and inconsistent cause of action which is substantially different in character from the current one as the Applicant only seeks to substitute a party who is the proper party to be sued for having trespassed upon the Applicant's suit plot which is still the nature of the current suit.

56. The Applicant proceeded to state that averment by the 1st and 2nd Respondents that the amendment sought will defeat the Limitation of Action from trespass which is 3 years is misconceived as the tort of trespass is a continuing tort hence the defence of limitation does not arise.

57. It is the Applicant's submission that his claim is based on the tort of trespass that happened and is continuing to happen on the suit plot. The Applicant finds traction in the case of Eliud Njoroge Gachiri v Stephen Kamau Ng'ang'a [2018] eKLR where the court held as follows; -

“

“ 21. The Defendant pleaded limitation of time on the Plaintiff's claim for trespass. This is a correct plea going by the provisions of the Limitations of Actions Act section 4(2), which provide that an action founded on tort may not be brought



after the end of three years from the date on which the cause of action accrued. This presupposes a case of a one-time trespass. The term accrue in the context of a cause of action means to arrive, to commence, to come into existence, or to become a present enforceable demand or right the time of accrual of a cause of action is a question of fact (see Black's Law Dictionary at Page 23). However, in a case of a continuing trespass, a trespass consists of a series of acts done on consecutive days that are of the same nature and that are renewed or continued from day to day so that the acts in the aggregate form one indivisible harm.

22. Trespass is described under the *Trespass Act* Cap 403 to mean any person who without reasonable excuse enters, is or remains upon, or erects any structure on, or cultivates or tills, or grazes stock or permits stock to be on, private land without the consent of the occupier thereof shall be guilty of an offence.

23. A continuing trespass is defined in JOWITT'S DICTIONARY OF ENGLISH LAW 2ND EDITION as follows: -

"A continuing trespass is permanent in its nature; as where a person builds on his land so that part of the building overhangs his neighbor's land".

In BLACK'S LAW DICTIONARY 8TH EDITION, a continuing trespass is defined as:

"A trespass in the nature of a permanent invasion on another's rights, such as a sign that overhangs another's property".

Finally, in CLERK & LINDSELL ON TORTS 16th EDITION, paragraph 23 - 01, it is stated that: -

"Every continuance of a trespass is a fresh trespass of which a new cause of action arises from day to day as long as the trespass continues".

The court further held that;

"The Defendant, therefore, is reasonably in occupation of a section of plot T/19. The Plaintiff's claim for trespass being a continued tort is not time-barred."

58. The averment by the 1st and 2nd Respondents that the amendment to remove the Respondents herein and substitute them with the proposed Defendant is unconstitutional as it deprives the proposed Defendant its right to be heard on the instant application is misconceived and misleading because once the amendment has been allowed, the proposed Defendant will be served with the amended plaint, witness statements and the documents filed by the Applicant and will be granted time to respond and file its defence and thereafter the matter will proceed accordingly. The 1st and 2nd Respondent cannot purport to act for and on behalf of the proposed Defendant as they do not have such instructions. Once the proposed Defendant is substituted, it will defend its case on merits.
59. 1st and 2nd Respondents in rejoinder submitted that the facts of this case are considerably plain and straightforward. The present application filed by the Plaintiff is a classic embodiment of abuse of the court process. The Plaintiff has now deemed it fit to further amend the Amended Plaint dated 23rd October 2017, the original Plaint is dated 29th August 2012. The new amendment seeks to discharge all the present defendants and substitute them with a very new one. This signals a new cause of action.
60. Through this proposed amendment, the Applicant raises a new cause of action being the alleged sub-summation of the suit property referred to as LR No. 683 within a title known as Kilifi/Jimba/1125,



which is at variance with the original pleadings, which claimed trespass against the 1st, 2nd and 3rd Defendants.

61. This new issue alters the nature of the suit in its entirety and an amendment is not proper in the circumstances. The Defendants/Respondents vehemently opposed the Application and filed Grounds of Opposition dated 1st March 2023.
62. The Respondents averred that Plaintiff filed its original Plaint dated 29th August 2012 against Lenzi Laura and Roberto Lenzi seeking entitlement to exclusive and unimpeded right of possession and occupation over Land Reference Number 683. On 23rd October 2017, it filed, with leave of the court, an Amended Plaint to introduce Crystal Bay Watamu as a 3rd Defendant in the suit. The Plaintiff now seeks a further amendment to remove the Defendants and substitute them with a new Defendant - Seven Island Watamu Limited.
63. The Defendants contended that they firmly believe that this amendment is aimed at defeating the limitation of action for trespass, which is 3 years under Section 4(2) of the Limitations of Actions Act by indirectly commencing a fresh suit against the proposed Defendant through the amendment sought herein without first obtaining leave to extend the time under the Limitations of Actions Act. Further, the amendment seeks to introduce a new party who was neither enjoined to the proceedings nor invited to participate in the hearing of this Application thus, depriving the proposed Defendant of its right to be heard on the instant Application, which undoubtedly will prejudice the proposed defendant's defence of Limitation of Action that had accrued over the last twelve (12) years.
64. In the testimony of Allan George Njogu Kamau (PW-1) testified in the examination that he sued the correct parties. This is further compounded by the advisory of Mr. G.S Gachagua to the Plaintiff/Applicant by asserting that the Respondents had constructed a high perimeter wall encompassing the suit property. This testimony, together with the Surveyor's Report dated 15th November 2011 is in flat contradiction with the averments contained in paragraphs 7, 8, and 9 of the Supporting Affidavit to the instant Application. The central thesis or pillars of the Plaintiff/Applicant's case were an argument that the Defendant's title has been imposed on the Plaintiff's title (double allocation) and that the said Defendants have trespassed on its property. This new formulation of the case is starkly different from the case defended by the Defendants/Applicants and seeks to introduce a new character to the case by the alleged introduction of the sub-summation of the title.
65. The Respondents stated further that the application is, therefore, an afterthought whose real objective is to have the Applicant reframe its case so that it can fill gaps that were exposed during the cross-examination of the expert on 1st November 2022 when it came out succinctly that Plaintiff's title Land Reference number 683 has no nexus with the Defendants' title. The two sets of titles do not even feature on the same survey plan FR 238/62. After this revelation during cross-examination, the Applicant has come to the painful realization that it has no legitimate claim against the Defendants and to pursue and further a case against them is an effort in futility. It is bound to fail.
66. The Respondents have cited several authorities on whether the application seeking the further amendment of the amended plaint ought to be granted. Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose, the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its motion. The person applying for an amendment must be acting in good faith. The amendment will not be allowed at a late stage of the trial if an analysis of it



is intended for the first time thereby advancing a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

67. That the Law on amendment of pleadings is based on Order 8 Rule 5 of the [Civil Procedure Act](#) which provides for the general power to amend and states as follows:

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 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.

68. That a wider and further buttress of the same issue was given in the case of Joseph Ochieng & 2 Others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991 cited with approval in St. Patrick’s Hill School v Bank of Africa Ltd [2018] e KLR the Court of Appeal set out the principles under which Courts may grant leave to amend the pleadings as follows:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) 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;
- e) 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 the limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of the current period of limitation.

69. The Respondents further submitted that for the court to allow the amendment it has to first look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs. Whether an amendment should be granted is a matter for the discretion of the trial judge and they should be guided in such exercise of the discretion by the assessment of where justice lies. Lord Griffiths said in the *Ketteman v Hansel Properties Limited* [1988] 1 All ER 38 on page 62:

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or be wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further, to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the fight on an entirely different defence.”



70. The Respondents submitted that in the instant case and in consideration of the prerequisites to allow for amendment of pleadings specifically in the determination of the true substantive merits of the case, the Applicant failed to justify their case for amendment. The Applicants instead seek to delete all current defendants and introduce a completely new Defendant. The question that therefore arises is why the Applicant does not institute a new case against the new Defendant it purportedly wants to introduce. It seeks to defeat the limitation of time that arises out of the existent cause of action. The cause of action in the instant suit is trespass, which has a time limitation of three (3) years. It has now been more than twelve (12) years since the suit was filed. The Plaintiff seeks to amend the Amended Plaintiff to delete the current Defendants and replace them with a very new Defendant. Why did it not instead file a completely new suit? To defeat the limitation of time trespass attracts and instead ensure that a new Defendant is in place to further their course. Looking at the limitation of time, the Applicant believes that this is aimed at defeating the limitation of action for trespass which is 3 years under Section 4(2) of the Limitations of Actions Act by indirectly commencing a fresh suit against the proposed Defendant through the amendment sought herein without first obtaining leave to extend the time under the Limitations of Actions Act.
71. The Respondents contended that this was rightfully explained in *Phillips, Harrison & Crosfield Ltd v Mansur B H Kassam* [1975] eKLR, the Court held that:
- “I think, since *Mabro v Eagle, Star and British Dominions Insurance Company Ltd* [1932] 1 KB 485, and prior to the passing of the new Civil Procedure Rules, that an amendment would be refused where, if it were allowed, a defence of limitation would be defeated.
- An application for amendment is always in the discretion of the court and in my view the court would not have been justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a prima facie defence of limitation.”
72. The Respondents stated that in the instant case, the Applicant has taken the Respondents on a frolic seeing as this is the second time the Applicant seeks to amend the Plaintiff. It alleviates the situation seeing as the two amendments have been in a bid to change the Defendants, which rightly denotes that the Applicants have no idea whatsoever of whom they have a case against and are now playing the lottery with the Court by fishing for a suitable defendant. If unchecked, the Plaintiff will continue subsisting defendants until it gets a favourable scapegoat or gullible party to sue. The Applicants are wasting the court’s time frustrating the entire process and existence of justice by chasing shadows.
73. Therefore, looking at the merits of the case, The Respondents concluded that the Applicant’s prayer completely lacks merits and simply seeks to prejudice all the Defendants. The Applicants are seeking to mischievously conjure a new cause of action without bringing in a new suit that will be time-barred.
74. That the Court of Appeal outlined the principles in the amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows:
- “The law on the 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 versus First National Bank of Chicago*, Civil Appeal No. 149 of 1991 (supra) as follows: -
- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow an 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.”

75. That the legal parameters governing the amendment of pleadings from the above-cited decisions can be summed up as follows; the amendment should not introduce a new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party. In taking the above approach, this Application is not merited and it ought to be dismissed in limine. On the first limb that pertains to the introduction of new or inconsistent causes of action, the Applicant is guilty of the same and has sought to introduce new components to the cause of action. The components are: Substantial devaluation of the suit property and environmental degradation which fall under the jurisdiction of the Environment and Land Court. The case of *Eastern Bakery v Castelino* [1958]1 EA 461 (CAK) is cited where the court held that; -

“Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle.

The court further held: -

...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

76. The Respondent further stated that Applicant makes a statement referring to the alleged sub-summation of the title, which averment is greatly at variance with the Plaint dated 29th August 2012 as amended on 23rd October 2017 is not sufficient. Allowing this averment and or amendment would change the nature of the suit before the Court. The Defendants are entitled to as much protection by the court as the Plaintiff. If allowed, the proposed amendments will fundamentally depart from the original pleadings and will inevitably introduce a very new and inconsistent claim, which will defeat the Defence, filed herewith and shall highly be prejudicial to the Defendants.
77. Further, the Respondent s averred that it is well settled that a person seeking to amend his pleadings should apply without any inordinate delay whatsoever being occasioned. Justice works both ways. What amounts to inordinate delay was discussed by the court in the case of *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR where it was held thus:

“There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus



test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.....”

78. Specifically, the time taken to present the amendments before this Court, the first Plaintiff was filed on 29th August 2012, it was then amended on 23rd October 2017 to reflect the addition of Crystal Bay Watamu. It is now seven years after the first amendment and the Applicant does not even seem to understand who is a proper party to its suit. Is it unfair that for the past 11 years, the present Defendants have been dragged through the court system as the Applicant played a game of darts to see whether it would hit the bull’s eye. The Applicants have occasioned that undue delay, which has negatively affected the Respondents.
79. The Respondents submitted that the Plaintiff/Applicant has not offered any explanation other than raising new issues being the alleged sub-summation of the title. Suffice to state that the Applicant knew or ought to have known of the alleged sub-summation of the title and should have raised the same frontally at the very least before the close of pleadings which was done by effluxion of time. In support of the above assertion, the case of *Central Kenya Limited v Trust Bank Limited* [2000]2 EA 365 is cited where the court held that:
- “..... 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.”
80. The actions by the Applicant, the Respondent further contended have occasioned prejudice and caused injustice to the Respondent. Looking at the proceedings of the case, at no given point was the Applicant sure whom to claim against, this has persisted for eleven (11) years whereupon the Applicant woke up and sought an amendment to delete the current Defendants and replace them with another Defendant. The doctrine of equity rightly puts it in two ways; equity aids the vigilant and not the indolent and he who comes to equity must come with clean hands. The Applicant sitting on its rights for all those years should in no way prejudice a party that is in no way part of this suit. Further, the Applicant’s attempt of convoluting the process to avoid the issue of limitation of time is in bad faith.
81. In addition to the above issues canvassed, the Respondents reiterated that a fundamental issue that must be addressed is whether the Applicant’s actions constitute an abuse of the court process. In the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR defines abuse of judicial process as a term generally applied to a proceeding that is wanting in bona fides and is frivolous vexatious and oppressive. It also means abuse of legal procedure or improper use of the legal process. Abuse of the court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society. As previously observed, the amount of litigation undertaken by the parties herein has been enormous and unrelenting and in a rather confused manner. It is trite law that litigation must, sooner than later, come to an end. This principle is also founded on equity, justice, and good conscience. In *Kassam v Bank of Baroda* [2002] eKLR the court upon putting into consideration the circumstances of that particular case, found it necessary to refuse the requested amendments pointing out that the same would be to facilitate abuse of the court process. In that case, the Court went on to say that, the power of amendment is to be jealously exercised in all the circumstances of each case so that a party may not turn his suit or defence into a gamble at the opponent’s expense.



82. Therefore, it is submitted that declining the prayer for amendment will enable the matter to proceed and ultimately come to a conclusion and meet the ends of justice. It will be a disservice if this Court were to reward the Applicant for the unjustified delay they have occasioned the Court and the Defendants. Further, the Defendants will in no way be remedied for the prejudice caused all those years, and the same cannot be made good with costs. Reliance was placed on the cases of Lawrence Owino Omondi v Kenneth Inea Muyera [2017]eKLR and John Mulwa Kangáatu v Pan African Insurance Co. Ltd [2015] eKLR where in the latter case the court denied the request for amendments on the ground that the same would occasion great prejudice to the opposing party which could not be made good by costs.
83. Parties extensively submitted on the issues before this court, which is, a further amendment to the Plaintiff. Can the same be allowed under the circumstances we have? Who should bear the costs of this application?
84. The history of the current suit is such that it was filed vide original Plaintiff dated 29th August 2012 against Lenzi Laura and Roberto Lenzi seeking claim to exclusive and unhindered right of possession and occupation over Land Reference Number 683. On 23rd October 2017, it filed, with leave of the court, an Amended Plaintiff to introduce Crystal Bay Watamu as a 3rd Defendant in the suit. The Plaintiff now seeks a further amendment to remove the Defendants and substitute them with a new Defendant - Seven Island Watamu Limited. The suit has therefore been in this court for over 11 years.
85. All the parties as I have stated extensively submitted the conditions to be attained for this court to allow the amendment, particularly on a matter, which is quite aged and partly heard. It will be reckoned that this court has already heard 3 witnesses for the Plaintiff. It will seem there remained to recall the Plaintiff and have the Plaintiff's case closed before the current application for Amendments was made.
86. That the Law on amendment of pleadings as correctly submitted by both parties is based on Order 8 Rule 5 of the [Civil Procedure Act](#) which provides for the broad power to amend and deposits as follows:
2. 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 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.
87. For an amendment to substitute or add a party to already existing proceedings, as submitted correctly by the applicant, Order 8 Rule 3(3) allows an amendment that seeks to:
- “substitute a new party where 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”.
- Further Order 8 Rule 3(4) provides that:
- “an amendment to alter the capacity in which a party sues (whether as a plaintiff or as a defendant by counterclaim) may be allowed under sub-rule (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”.



88. Several authorities were cited before me by both parties on the general considerations before allowing an amendment - significantly see the guidance by the Court of Appeal outlined in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows:

“The law on the 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 versus First National Bank of Chicago*, Civil Appeal No. 149 of 1991 (*supra*) as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow an 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.”

89. The case summary of the test for amendment as laid in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 is as follows:

- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) the amendments should be timeously applied for;
- c) power to amend can be exercised by the court at any stage of the proceedings;
- d) 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;
- e) 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 the limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of the current period of limitation.

90. Placing the principles as laid in the cited authorities to this matter, the power to amend is to allow the court to determine the real substantive issues in controversy. The second amendment we are now having seeks to bring a very new dimension to this matter. The Plaintiff now wants to further amend the Amended Plaint dated 23rd October 2017, the original Plaint is dated 29th August 2012. The new amendment seeks to discharge all the present Defendants and substitute them with a very new one. This hints at a new cause of action. Through this suggested amendment, the Applicant raises a new cause of action for the alleged sub-summation of the suit property referred to as LR No. 683 within a title known as *Kilifi/Jimba/1125*, which is at variance with the original pleadings, which claimed trespass against the 1st, 2nd and 3rd Defendants. These new features to the amendment in my view as



correctly submitted by the Respondents alter the nature of the suit in its entirety. The Plaintiff now seeks a further amendment to remove the Defendants and substitute them with a new Defendant - Seven Island Watamu Limited. This amendment while introducing a new party will end up defeating the limitation of action for trespass, which is 3 years under Section 4(2) of the Limitations of Actions Act by indirectly commencing a fresh suit against the proposed Defendant through the amendment sought herein without first obtaining leave to extend the time under the Limitations of Actions Act. The Applicant seeks to substitute the 3 Defendants but at the same time retain them. The explanation is that the three Defendants are Directors of the proposed new Defendant. The question, which lingers is – won't the amendment limit the rights of the Defendants to plead limitation? Why not bring a new cause of action against the intended Defendant altogether?

91. In the testimony of Allan George Njogu Kamau (PW-1) testified in the examination that he sued the correct parties. This is further reinforced by the advisory of Mr. G.S Gachagua to the Plaintiff/Applicant by asserting that the Respondents had constructed a high perimeter wall encompassing the suit property. This testimony, together with the Surveyor's Report dated 15th November 2011 is in incongruity with the averments contained in paragraphs 7, 8, and 9 of the Supporting Affidavit to the instant Application. The central thesis or pillars of the Plaintiff/Applicant's case were an argument that the Defendant's title had been imposed on the Plaintiff's title (double allocation) and that the said Defendants had trespassed on its property. This new formulation of the case is different from the case defended by the Defendants/Applicants and seeks to introduce a new character to the case by the alleged introduction of the sub-summation of the title. The application will have a bearing of reframing the current case so that it can answer what was exposed during the cross-examination of the expert on 1st November 2022 when it came out concisely that Plaintiff's title Land Reference number 683 has no nexus with the Defendants' title. The two sets of titles do not feature on the same survey plan FR 238/62. This revelation was during cross-examination.
92. On the next test, whether the amendments have been brought in good time and do not have the potential to abuse the court process, a person seeking to amend his pleadings should apply without any inordinate delay whatsoever being occasioned. What amounts to inordinate delay was discussed by the court in the case of *Mwangi S. Kimenyi v Attorney General & Another* [2014] eKLR where it was held thus:

“ There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case, the explanation given for the delay; and so on and so forth” nevertheless, inordinate delay should not be difficult to ascertain once it occurs, the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable.....”
93. Specifically, regarding the time taken to present the amendments before this Court, the first Plaint was filed on 29th August 2012, it was then amended on 23rd October 2017 to reflect the addition of Crystal Bay Watamu. It is now seven years after the first amendment and .that for the past eleven years; the present Defendants have been through the court system with the Applicant oblivious of the right parties to sue. The information sought to be relied on in the current amendment has been available since 2003. The Applicant needed to have acted with due diligence in pursuit of expeditious disposal of this matter. The Applicants have occasioned that undue delay, which has negatively affected the proceedings herein. The Plaintiff/Applicant has not offered any explanation other than raising new issues being the alleged sub-summation of the title. Suffice to state that the Applicant knew or ought to have known of the alleged sub-summation of the title and should have raised the same frontally at



the very least before the close of pleadings which was done by effluxion of time. See *Central Kenya Limited v Trust Bank Limited* [2000]2 EA 365 where the court held that:

“..... 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.”

94. In the case of *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR, Wabwoto J. expressed as follows on abuse of the court process:

“Abuse of judicial process is a term generally applied to a proceeding that is wanting in bona fides and is frivolous vexatious and oppressive. It also means abuse of legal procedure or improper use of the legal process. Abuse of the court process is an obstacle to the efficient administration of justice. Tinkering with the administration of justice in the manner indisputably shown here involves far more than an injury to a single litigant. It is wrong against the institutions set up to protect and safeguard the public, institutions in which such abuse cannot complacently be tolerated consistent with the good order of society.”

95. As previously observed, the amount of litigation undertaken by the parties herein has been huge and insistent and in a rather confused manner. It is trite law that litigation must, sooner than later, come to an end. The provisions of Section 1(A) (B) and 3(A) *Civil Procedure Act* (the O2 Rules) and the in-house Environment and Land Court Practice Directions, 2014 Note 1, abhor a process that does not put to an end litigation. In the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & Others* [2013] eKLR the Court of Appeal in discussing the application of the overriding objective principle had this to say on the O2 Rule:

“Abok James Odera t/a A.J. Odera & Associates V. John Patrick Machira t/a Machira & Co. Advocates, Civil Appeal No. 161 of 1999 was an appeal raising, inter alia, the question whether a record of appeal not containing Memorandum of Appeal, as required by Rule 82 (1) (a) of the Court of Appeal Rules, was competent. In answer to this, the Court (Githinji, Nambuye & Koome, JJ.A) in one of the most comprehensive review of case law on the application of the overriding objective principle stated the law in this area as it is today. Because of its importance and relevance to the application before us, I will reproduce it in extenso as follows:-

The complaint on lack of inclusion of the memorandum of appeal as a primary document in the record of appeal is genuine. We also wish to confirm that the defects noted in the notice of appeal on which this appeal is premised, were not cured as advised by this court in its rulings of 20th April, 2000 and 24th May, 2002.

The question we have to ask ourselves is whether we can take refuge under the oxygen rule enshrined in section 3A and 3B of the *Appellate Jurisdiction Act* (Supra) which underpins the overriding objective principle introduced in the appellate jurisdiction in 2009, long after the appeal subject of this Judgment had been filed in order to breathe life into an otherwise incurably defective appeal as per the contention of the respondent.

On the applicability of the overriding objective principle in the appellate jurisdiction, we wish to draw guidance from case law. The principle confers on the courts considerable latitude in the exercise of its discretion in the interpretation of the law and rules made



thereunder. (See the case of City Chemist (NB1) Mohamed Kasabuli suing for and on behalf of the Estate of Halima Wamukoya Kasabuli versus Orient Commercial Bank Limited Civil Application No. Nai 302 of 2008 (UR.199/2008); The aim of the overriding objective principle is to enable the Court achieve fair, just, speedy, proportionate, time and cost saving disposal of cases before it. (See the case of Kariuki Network Limited & Another versus Daly & Figgis Advocates Civil Application No. Nai 293 of 2009); that the application of the overriding objective principle does not operate to uproot established principles and procedures but to embolden the court to be guided by a broad sense of justice and fairness (See the case of Kariuki (Supra); that in applying or interpreting the law or rules made thereunder, the Court is under a duty to ensure that the application or interpretation being given to any rule will facilitate the just, expeditious, proportionate and affordable resolution of appeals (See the case of Deepak Manlal Kamani and another versus Kenya Anti-Corruption and 3 others Civil Application No. 152 of 2009); that there is a mandatory requirement that the Court of Appeal rules of procedure should also be construed in a manner which facilitates the just, expeditious, proportionate or affordable resolution of appeals. (See the case of Dorcas Indombi Wasike versus Benson Wamalwa Eldoret Civil Application No. 87 of 2004); that the overriding objective principle is intended to re-energize the process of the court, encourage good management of cases and appeals, and ensure that interpretation of any of the provisions of the Act and the rules made there under are 2” compliant (see the case of Hunter Trading Company Limited versus ELF Oil Kenya Limited, Civil Application No. Nai 6 of 2010 (UR3 (2010); that the principal aim of the overriding objective principle is to give the court greater latitude to overcome any past technicalities which might hinder the attainment of the overriding objective (See the case of Caltex Oil Limited versus Evanson Wanjihia Civil Application No. Nai 190 of 2009 (UR). And, lastly, that the “O2” principle does not cover situations aimed at subverting the expeditious disposal of cases or appeals, mistakes or lapses of counsel, or negligent acts, or dilatory tactics or acts constituting abuse of the court process (See the case of Kenya Commercial Bank vs. Kenya Planters Co-operative Union Nai Civil Application No.85 of 2010 (UR) 62 of 2010

96. In my view, too much time and resources have been expensed so far in this matter with no end game. That in itself is an abuse of the court process. The intended amendment herein in my view, is a hallmark of abuse of the court process. As stated, this matter has been in court since 2012. Eleven years down the line. With the amendment in the offing. The entire substratum of the case will have to change with the introduction of the new party it will mean reopening of pleadings, new witness statements, pre-trials, and recalling of the witnesses who have already testified. It will be a fresh restart of the litigation in this case. Application dated 26th January 2023 is hereby dismissed with costs.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 12TH DAY OF JULY 2023

E.K. MAKORI

JUDGE

In the presence of:

Mr. Kiarie for the Applicant/Plaintiff

Court Clerk: Happy

In the Absence of:-



M/s Ahmednasir Abdikadir for Defendant

