



**Shee v Kamau & 2 others; Kibe & 2 others (Intended Defendant) (Environment & Land Case 49 of 2021) [2023] KEELC 18486 (KLR) (4 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 18486 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 49 OF 2021**

**AE DENA, J**

**JULY 4, 2023**

**BETWEEN**

**SALIM MWALIMU SHEE ..... PLAINTIFF**

**AND**

**MACHARIA KAMAU ..... 1<sup>ST</sup> DEFENDANT**

**MARTIN MONGWANJA ..... 2<sup>ND</sup> DEFENDANT**

**PAULIN MONGWANJA ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**JOSEPH GILBERT KIBE ..... INTENDED DEFENDANT**

**LAND REGISTRAR KWALE ..... INTENDED DEFENDANT**

**ATTORNEY GENERAL ..... INTENDED DEFENDANT**

**RULING**

1. This matter is fully heard. The parties called one witness each with the plaintiff testifying on his behalf and closed their cases. Thereafter parties were to file final submissions, though they did not and the reasons will become apparent in this ruling. Judgement was reserved for December 7, 2023 but the same was not ready due to exigency of work and it was the courts intention to take advantage of the impending vacation to write it. On the said December 7, 2022 the plaintiff was in court having filed a notice of intention to act in person on December 6, 2022 and informed the court he had two witnesses he intended to call. Noting that the plaintiff was acting in person I issued directions that he visits the stations help desk to be sensitized on how he could formally make an application for re-opening his case. I further directed that the case would be mentioned on notice for the delivery of judgement should the plaintiff fail to file the application. The application was subsequently filed under Notice of Motion dated January 27, 2023. This ruling is the subject of the said application.



2. The plaintiff/applicant seeks the following orders;
  - 1) Spent,
  - 2) That there be stay of proceedings and/or any other subsequent orders of the court pending the hearing and determination of this application,
  - 3) That this honourable court be pleased to set aside the proceedings of February 23, 2022 and May 16, 2022 and the Plaintiff/Applicant be granted leave to amend his pleadings,
  - 4) That the Plaintiff/Applicant be allowed to enjoin the intended 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants to this suit as defendants,
  - 5) That the annexed draft amended plaint be deemed as duly filed upon payment of the requisite fees
  - 6) That the honourable court be pleased to order that this matter be heard de novo.
  - 7) That the costs of this application be provided for.
3. The application is supported by grounds on its face and the averments in the affidavit of Joseph Makori Advocate sworn on February 3, 2023. It is deponed that following the change of advocates from Wesley John Austin & Associates to Makori Omboga & Company Advocates Counsel for the applicant found that the pleadings were confusing and did not represent all facts and required to be amended since it was trite a party was bound by its pleadings. It is alleged that the applicant was not aware of the proceedings of his case, was keen on testifying and desired to call two witnesses as well as enjoin the 4<sup>th</sup> -6<sup>th</sup> intended defendants who were respectively responsible for selling the suit property and issuing titles as per the green card annexed to the application.
4. The applicant states that in the event the court renders judgement without allowing the prayers as sought in the application, the decision will not effectually and completely adjudicate all issues involved in the suit.
5. The defendants filed grounds of opposition on February 22, 2023 stating that the proposed amendments were calculated at introducing a new cause of action, new evidence and sealing loopholes in the plaintiff's case which will greatly prejudice the defendants who cannot be compensated by an award of damages. It is stated that the plaintiff was adequately represented by counsel and even filed submissions after hearing the suit and was awaiting judgement. According to the defendants, the application is made in bad faith and is geared towards delaying the determination of the matter, that the same is devoid of merit and should not be allowed by the court.
6. On February 23, 2023 Ms. Kiti for the intended 5<sup>th</sup> and 6<sup>th</sup> defendants informed the court that they did not have objection to being enjoined as such.
7. The application was canvassed by way of written submissions.

### **Plaintiff's/Applicant's Submissions**

8. The plaintiff submissions were filed on March 15, 2023. It is submitted that the intended 5<sup>th</sup> and 6<sup>th</sup> defendants have not opposed the enjoinder in the suit and have not filed any documents to oppose the application. That there is no new cause of action as alleged by the defendants but a clarification of issues and to add prayers that were inadvertently forgotten for the court to deal and determine all issues at once.



9. The Plaintiff avers that the 1<sup>st</sup> to 3<sup>rd</sup> defendants introduced new evidence in their witness statements and annexures which identified the parties intended to be enjoined. It is averred that the land officers involved in the fraudulent transactions in this matter were employees of the intended 6<sup>th</sup> interested party. That the Plaintiff is the grandson of one Amir Ali Boi and inherited the suit property as his heir. That the defendants have failed to demonstrate how one Mr. Joseph Gilbert Kibe obtained a good title to the suit property and was able to transfer the same to them. That the plaintiff seeks to be allowed to enjoin the said Mr Joseph Gilbert Kibe in order to establish the foundation of the title held by the 1<sup>st</sup> to 3<sup>rd</sup> defendants. Further that the intended 5<sup>th</sup> and 6<sup>th</sup> defendants being custodians of titles in this country will demonstrate to the court how they entered Mr Joseph Gilbert Kibe in their green card entries and how they authenticated the documents were genuine before making entries which were illegal and fraudulent.
10. It is submitted that the guiding principles in allowing amendments provide that the same should be allowed freely at any stage of the proceedings as long the same will not result in prejudice or injustice to the other party which cannot be compensated by costs. It is contended the draft amended plaint raises triable issues and should be admitted to ensure effective determination of the plaintiff's case. Reliance is placed on the holding by the Court of Appeal in [\*Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited \[2013\] eKLR\*](#). Other authorities were also attached which the court has considered.

#### **Defendants Submissions**

11. The Defendants identify two main issues for determination Whether Messrs Makori Omboga & Company Advocates are properly on record in the matter and Whether the plaintiff is entitled to amend its plaint and re-open this case at this late stage in the proceedings.
12. On the 1<sup>st</sup> issue for determination the court is referred to the provisions of Order 9 Rule 5 of the [\*Civil Procedure Rules\*](#). According to the defendant, the plaintiff's new advocates had not presented anything before the court to the effect that they filed and served any Notice of Change of advocate herein. That they were therefore not properly on record for failure to meet critical and mandatory requirements of law in regard to representation. Reliance is placed on the holding in *Monica Moraa Versus Kenindia Assurance Co Ltd [2010] eKLR* and several other authorities listed which this court has duly considered.
13. It is submitted that the application was not made timeously contrary to the provisions of Order 2 Rule 13 and Order 8 Rule 1[1] of the Civil Procedure Rules 2010. That the plaintiff had on more than one occasion sought to delay the hearing of the case in order for them to adjust their case or otherwise present new evidence. That the plaintiff should not be allowed seal loopholes in their case. Reliance is placed in the holding in *Municipal Council of Thika & Another Versus Local Government Workers Union [Thika Branch] Civil Appeal No NAI 41 of 2001* where the court refused to show indulgence towards the negligent conduct of litigants and disallowed an amendment at a very late stage of the proceedings. The defendants seek that the application is dismissed with costs to the defendants/respondents.

#### **Plaintiffs/Applicants Supplementary Submissions**

14. Reiterating earlier submissions, the plaintiff contends that no new evidence has been adduced by the plaintiff who was simply keen on replying to the statement of defence and list of documents filed before court and which introduced documents of interest to the plaintiff. That introduction of the new prayer seeks to address the documents filed by the defendants.



## Analysis and Determination

15. Having considered the application, the response in opposition thereto and the rival submissions of the parties, the issue for determination is whether the plaintiff is entitled to the prayers sought in the application.

In the meantime, I do not find it necessary to dwell on the prayer for stay of execution of the proceedings in this case for the reason that the same has been overtaken by events. I say so because the stay orders sought were to forestall further proceedings pending the determination of the present application and which has been largely achieved. It is spent.

16. The application has been filed under the provisions of Orders 1 Rules 3, 10(4), Order 8 rule 3(1),5(1) and 7 & 8 of the Civil Procedure Rules 2010. Sections 1A,1B,3,3A and 100 of the Civil Procedure Act. Article 159(d) of the Constitution of Kenya 2010 have also been relied upon.

Order 1 Rules 3 is on who may be joined as defendants and provides as follows; -

All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.

Orders 1 Rule 10(4),

Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.

Order 8 is on amendment of pleadings, rule 3 is on amendment of pleadings with leave and rule 3(1) states that; -

- (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.

(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.

17. As already set out at the beginning of this ruling this matter is awaiting judgement. It was heard on February 23, 2022 and May 16, 2022. The applicant seeks to set aside the said proceedings together with leave to amend his pleadings. The amendment is to enable the applicant bring on board Joseph Gilbert Kibe to establish the foundation of the 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendants titles whom he transferred the title to, the Land Registrar Kwale for his role in the registration and Attorney General is sued on behalf of the Government of Kenya.

18. From the law and authorities cited by counsel (I need not reinvent the wheel) it is clear the power to amend pleadings is discretionary. However, it must be exercised judiciously putting into consideration



whether there has been inordinate delay, whether or not the opposite party will suffer prejudice which cannot be compensated by costs and whether or not the application for amendment is bonafide or made in good faith, see *Andrew Ouko v Kenya Commercial Bank Limited & 3 others [2014] eKLR*. A wider footage of the principles to be considered is given in the case of *Ochieng & Others Vs First National Bank of Chicago Civil Appeal No 147 of 1991* where the Court of Appeal stated thus; -

- 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 be 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 limitations Act subject however to the powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation
19. Indeed, the amendment for purposes of the proposed joinder and the reasons thereto is highly contested by the 1<sup>st</sup> – 3<sup>rd</sup> defendants. It is submitted that the plaintiff is not entitled to amend its plaint and re-open this case at this late stage in the proceedings including sealing loopholes in their case. Applying the principles set out above to the facts of this case I will proceed to analyse them globally to avoid repetition.
20. I'm aware that under Order 8 rule 3(1) pleadings may be amended at any stage of the proceedings but the request to amend must be timeously made. The gist of the application which is to reopen the proceedings and goes hand in hand with the proposals for amendment herein to enjoin the proposed 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> defendants. Timeliness will depend with the circumstances of each case and the court is inclined to look at the circumstances under which the application herein has been made and the reasons advanced by the applicant. It is averred that, the defendants introduced documents alluding to them having purchased the suit property from a third party and who was not a party to this suit. This is the proposed 4<sup>th</sup> defendant Mr Kibe. Further that the documents produced by the defendants were in the custody of the intended defendants who the applicant sought to enjoin as parties in the suit.
21. Flowing from the above I posed the question whether parties are not supposed to exchange documents at the pretrial stage. Indeed, before a matter is set down for hearing, parties are given the opportunity to engage in pretrial proceedings to ensure that all the documents and evidence to be tendered in court are exchanged to give them ample and sufficient time to prepare for the suit from an informed point of view or even raise objections appropriately. The plaintiff cannot be heard after both parties have been heard to allege that they have been ambushed by the documents produced by the defendants in cementing their claim before court when the applicant had the opportunity to interrogate these documents even before the matter was set down for hearing.
22. Additionally, even in the application for injunction dated July 31, 2017 it was stated by the plaintiff that he intended to move the court at the appropriate moment to amend the pleadings and this was not done. Would this then be the said appropriate moment after the case has been heard. Clearly not after



the plaintiff waited for the matter to proceed the entire journey to the point when filing of submissions was being awaited as well as judgement.

23. I have read the case of *St Patricks Hills School Ltd Vs Bank of Africa Kenya Ltd 2018 eKLR* referred to by the plaintiff and which I found distinguishable. The application for amendment was made when the trial was ongoing, the plaintiff had not closed its case unlike in the present case where the same is made after hearing and fixing of a date for judgement. Moreover, the amendment had been necessitated by the courts directive that a reconciliation of the accounts be undertaken by a qualified accountant or expert and which largely swayed the courts decision to allow the amendment.
24. In the present case I find that there has been a considerable delay in making the application to amend. But even assuming that this court was to consider time from the point the new counsel came on record and find that there was no delay, still this parameter is not the only factor to be considered.
25. The above then takes me to the rest of the principles laid out in *Ochieng & Others Vs First National Bank of Chicago (supra)* and which I will look at globally together with the prayers sought. The gist of the application is to reopen the proceedings and which goes hand in hand with the fact that the plaintiff wants to amend his pleadings to enjoin the proposed 4<sup>th</sup> 5<sup>th</sup> and 6<sup>th</sup> defendants. The court is enjoined to consider whether there is bonafides in the application made and if the defendants will suffer prejudice by the said amendments incapable of compensation by way of costs.
26. On the prayer to enjoin the 4<sup>th</sup> to 6<sup>th</sup> intended defendants, under the provisions of Order 1 of the Civil Procedure Rules a party may seek joinder either as a plaintiff or defendant. Order 1 Rule 10 (2) provides as follows:

' 10 (2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit, be added.'
27. And indeed the principle that the power of the court to allow amendments is intended to determine the true substantive merits of the case derives from the above provisions inter alia. The reason given by the applicant is that he seeks to enjoin the intended defendants to have them confirm the authenticity of the documents relied upon by the defendants in their case. Again, it is for the additional reason that the defendants have failed to demonstrate how one Joseph Gilbert Kibe obtained a good title to the suit property and was able to transfer the same to them. Clearly this is not for the reason of substantive merits of the case but a sure way of introducing fresh evidence to rebut the defendant's evidence. The plaintiff also wants to add a prayer challenging the titles of the 1<sup>st</sup> 2<sup>nd</sup> 3<sup>rd</sup> and 4<sup>th</sup> defendants yet from inception this has been in the knowledge of the plaintiff. I do not find this explanation reasonable. And to me this is why the amendment would additionally be considered not to have been made in good faith. It appears to me intended at filling up gaps that the plaintiffs' counsel has discovered and this is demonstrated and supported in paragraph C titled 'The Upshot Of The Applicants Submissions' with regard to annexures PMK3, PMK4, PMK5, PMK12, PMK10. Clearly all these would prejudice or embarrass the opposite party.



28. In respect of the above, this court is persuaded by the dictum of Hatari Waweru J in [\*Harrison C Kariuki v Blue Shield Insurance Co Ltd \[2006\]eKLR\*](#) referred by the defendants where faced with almost similar circumstances and grounds necessitating the amendments therein stated thus;-

'If these proposed amendments are permitted, the Defendant will be faced with a much more expanded case than it has already defended. It appears to me that the case would have to be heard afresh. Witnesses would have to be summoned again and the parties would have to present their respective cases again. This is an old matter and with each passing year the memories of witnesses become hazier. Why should the Defendant have to go through the trial of the Plaintiff's case again? Why has the Plaintiff waited until so late to seek to amend his plaint?

The deficiencies in the Plaintiff's case became apparent when he was being cross-examined. Why did he not apply to amend at that stage? In this application he has sought to blame his previous counsel. Assuming that that blame is merited, is it a sufficient reason to allow the amendments sought at this late stage? The Court of Appeal had this to say in the case of *Municipal Council of Thika And Another Vs Local Government Workers Union (Thika Branch)*, Court of Appeal, Civil Appeal No NAI 41 of 2001: -

' We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings.'

I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs.

This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted.'

29. Also see [\*John Karuga Wabinya v Attorney General & 4 others \[2020\] eKLR\*](#) and [\*Samuel Kiti Lewa v Housing Finance Co Of Kenya Ltd & another \[2015\] eKLR\*](#).
30. It has been urged by counsel for the plaintiff that the intended 5<sup>th</sup> and 6<sup>th</sup> defendants have not objected to their joinder. With due respect to counsel this is not a parameter set out in law or precedent. I would not put weight on it myself.
31. It has been submitted on behalf of the defendants that the firm of Benedict Odhiambo Oloo & Company advocates is not properly on record. The firm filed its Notice of change of advocates on April 25, 2023. I note that when the plaintiff was acting in person and therefore what ought to have been filed is a notice of appointment of advocate. To me every litigant has a right to be represented by an advocate of his choice and the plaintiff has now chosen the firm of Benedict Odhiambo Oloo & Company advocates. I don't think this is an issue that should hamper access to justice. Deploying the inherent powers of this court I will deem the said firm of advocates to be properly on record.
32. Let me add that the dispute surrounding the suit property is old. From the pleadings and exhibits attached to the various affidavits it appears to have started way back in the year 2012 at the Magistrates



court and thereafter the present case filed in 2017. The court has a duty to ensure that matters are concluded expeditiously without inexcusable delay. Sections 1A and 1B of the [Civil Procedure Act](#) provides for the overriding objective of the Act and which is to facilitate the just, expeditious, proportionate and affordable resolution of civil disputes governed by the Act. The constitutional underpinnings on timely disposal of matters are captured under Article 159[2][b] of the [Constitution](#) which provide that justice shall not be delayed. The essence of this provisions of law were encapsulated by Justice JB Havelock, as he then was, in [Gideon Sitelu Konchella Vs Daima Bank Ltd \[2013\] eKLR](#) citing [Mobil Kitale Service Station v Mobil Oil Kenya Limited & another \[2004\] eKLR](#) and held:

' It is the interest of justice that litigation must be conducted expeditiously and efficiently so that injustice by delay would be a thing of the past. Justice would be better served if we dispose of matters expeditiously. The overriding objectives of the Act and the Rules made thereunder are to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.'

33. I find that no justifiable reasons have been given to warrant this court to exercise its discretion in favour of the plaintiff/applicant. I find no merit in this application and the same is dismissed. Ordinarily costs follow the event, however in the circumstances I hereby direct that the costs shall await judgement.
34. The Parties shall file their final submissions starting with the plaintiff within 14 days of the date of this ruling and thereafter the defendants within 14 days of service and or on expiry of the 14 days.
35. Judgement shall be delivered on July 4, 2023.

It is so ordered.

**Delivered and Dated at Kwale This 4th Day of July 2023**

**A.E. DENA**

**JUDGE**

**Judgement delivered virtually through Microsoft teams Video Conferencing Platform in the presence of:**

**\*\*Mr. Mbithe holding brief for Oloo for the Plaintiff/Applicant\***

**Mr Gitahi H/B for Ms. Waihenya for Defendant/Respondents**

**Mr. Daniel Disii- Court Assistant.**

**PAGE | 5 ELC No. 49 OF 2021 HON LADY JUSTICE A.E. DENA**

