



**Maina (Suing on behalf of the Estate of Peter Maina Waigwa) & 21 others v
Kimemia Engineering Construction Co Ltd & 3 others (Environment & Land
Case E439 of 2021) [2023] KEELC 21438 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21438 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E439 OF 2021**

**JO MBOYA, J
NOVEMBER 2, 2023**

BETWEEN

**LUCY NJERU MAINA (SUIING ON BEHALF OF THE ESTATE OF PETER
MAINA WAIGWA) & 21 OTHERS PLAINTIFF**

AND

**KIMEMIA ENGINEERING CONSTRUCTION CO LTD 1ST DEFENDANT
COUNTY GOVERNMENT OF NAIROBI 2ND DEFENDANT
CHIEF LAND REGISTRAR 3RD DEFENDANT
HON ATTORNEY GENERAL 4TH DEFENDANT**

RULING

Introduction And Background

1. The instant suit was filed and/or mounted by the Plaintiffs herein who contend to be the legitimate allottees of various Plots standing and/or situated within all that Parcel of Land know L.R No. 209/4844/124, (hereinafter referred to as the suit property).
2. Following the filing of the instant suit, the 1st and 2nd Defendants duly entered appearance and thereafter filed their respective Statement of Defense. In particular, the 2nd Defendant filed a Statement of Defense wherein same admitted and acknowledged inter-alia, that the suit property was lawfully allocated and/or alienated to the 1st Defendant.
3. Furthermore, the 2nd Defendant also filed a List of Witnesses and a Witness statement by the Acting County Attorney, namely, Eric Abwao wherein same contended inter alia-, that the Suit property was lawfully allocated to and in favour of the 1st Defendant herein.



4. Premised on the foregoing position, the instant matter proceeded for hearing, whereupon the Plaintiffs' case was heard and closed. Besides, the 1st Defendant's case was similarly heard and closed albeit on the basis of the Statement of Defense and Witness statement, wherein the 2nd Defendant had acknowledged and confirmed the propriety of the allocation of the suit property in favor of the 1st Defendant.
5. Be that as it may, when the instant matter was scheduled for hearing of the 2nd Defendant's case, the 2nd Defendant/Applicant herein filed and/or mounted the Application dated the 26th September 2023; and wherein same has sought for the following reliefs;
 - i. That this Honourable Court be pleased to grant leave to the 2nd Defendant/Applicant to file in this Court and serve the 2nd Defendant's Amend Statement of Defence in terms of the draft annexed hereto and the same be deemed as properly filed and served.
 - ii. That this Honourable Court be pleased to grant leave to the 2nd Defendant/Applicant to file a Further List of Witnesses.
 - iii. That this Honourable Court be pleased to grant leave to the 2nd Defendant/Applicant to file and serve a Supplementary Witness Statement of Benson Ndegwa Gichohi; detailing the correct factual position in respect to the suit property.
 - iv.Spent.
 - v.Spent.
 - vi. That the cost of this Application be in the cause.
6. Suffice it to point out that the instant Application is premised and anchored on the grounds which have been articulated in the body thereof. Furthermore, the Application is supported by the Affidavit of one, namely, Benson Ndegwa Gichohi, sworn on even date.
7. Upon being served with the subject Application, the 1st Defendant filed a Replying affidavit sworn by Eddy Peter Ndungu Kimemia, who describes himself as a Director of the 1st Defendant company. For coherence, the Replying affidavit is sworn on the 3rd October 2023.
8. Moreover, the instant Application came up for hearing on the 27th September 2023; whereupon the advocates for the respective Parties agreed to canvass the Application by way of written submissions. Consequently and in this regard, the Honourable court proceeded to and circumscribed the timelines for the filing and exchange of the written submissions.

Parties' Submissions:

a. Applicant's Submissions:

9. The Applicant filed written submissions dated the 9th October 2023; and in respect of which same have adopted the grounds contained at the foot of the Application as well as the contents of the Supporting Affidavit.
10. Further and in addition, Learned counsel for the Applicant has thereafter raised, highlighted and canvassed three (3) salient issues for consideration by the Honourable court.
11. Firstly, Learned counsel for the Applicant has submitted that at the onset, the 2nd Defendant/Applicant acknowledged and confirmed that the suit property had been lawfully allocated and alienated in favor of the 1st Defendant/Respondent.



12. Further and in addition, Learned counsel for the Applicant has contended that based on the instructions from the Applicant, same proceeded to and filed a Statement of Defense which adverted to the fact that the suit property lawfully belonged to and was thus the property of the 1st Defendant/Respondent.
13. On the other hand, Learned counsel for the Applicant has ventured forward and similarly contended that same also procured and filed a witness statement by the Acting County Attorney, which vindicated the fact that the suit property was lawfully allocated to the 1st Defendant.
14. Secondly, Learned counsel for the Applicant has submitted that subsequently same received instructions from the 2nd Defendant, wherein same now contends that the suit property was (sic) lawfully allocated to the Plaintiffs and not the 1st Defendant/Respondent.
15. Arising from the foregoing, Learned counsel for the Applicant has thus submitted that it is therefore imperative that the 2nd Defendant/Applicant be granted liberty to amend her Statement of Defense; and to reflect the correct and obtaining status, as pertains to the allocation of the suit property.
16. Furthermore, Learned counsel has also submitted that it would also be appropriate and expedient to allow the 2nd Defendant/Applicant to file a Supplementary List of witness and additional witness statement, which accords with the latest instructions.
17. Thirdly, Learned counsel for the Applicant has submitted that an amendment ought to be freely granted so as to enable the Parties to bring forth the true set of facts and issues for determination by the court.
18. At any rate, Learned counsel for the Applicant has submitted that the discretion of the court to allow an Application for amendment is unfettered and thus same ought to be exercised towards affording the Applicant herein, the liberty to amend her Statement of Defense and thus allow the determination of the actual issues in controversy.
19. In support of the foregoing submissions, Learned counsel for the Applicant has cited and relied on inter-alia the case of John Nyagaka Osoro vs Reyonold Karisa Charo & 5 Others (2021)eKLR, Moses Nyambega Ondieki vs The Vice Chancellor Masaai Mara University & 2 Others (2018)eKLR, Institute for Social Accountability & Another vs Parliament of Kenya & 3 Others (2014)eKLR and St. Patrick Hills School Ltd vs Bank of Africa Kenya Ltd (2018)eKLR, respectively.
20. Consequently and in view of the foregoing, the Applicant has implored the Honourable court to find and hold that the Application beforehand, is meritorious and thus to be allowed.

b.Plaintiffs'/respondents' Submissions:

21. The Plaintiffs'/ Respondents' filed written submissions dated the 12th October 2023; and in respect of which same has canvassed and highlighted one issue for determination by the Honourable court.
22. For coherence, the Learned counsel for the Plaintiffs/Respondents has submitted that the Application by and on behalf of the Applicant herein and which seeks for amendment of the Statement of Defense, is meritorious and thus ought to be allowed.
23. Further and addition, Learned counsel for the Plaintiffs'/Respondents' has also contended that the purpose of an amendment is to enable the court to interrogate the true issues for determination and thereafter to determine the dispute on merits and not otherwise.



24. On the other hand, Learned counsel for the Plaintiffs'/Respondents' has also invited the court to find and hold that an Application to amend can be made and/or mounted at any stage of the proceedings, irrespective of whether either of the Parties have closed their cases, or otherwise.
25. Suffice it to point out that Learned counsel for the Plaintiffs'/Respondents' has contended that the instant Application has been made prior to and before the conclusion of the hearing; and therefore same ought to be granted. Further and in any event, Learned Counsel has added that the 1st Defendant, shall not suffer any undue prejudice or injustice, if the application is allowed.

c.1ST Defendant's/respondent's SubmissionNs:

26. The 1st Defendant/Respondent filed written submissions dated the 16th October 2023; and in respect of which same (Learned counsel) has raised, highlighted and canvassed three issues for consideration by the Honourable court.
27. Firstly, Learned counsel for the 1st Defendant/Respondent has submitted that the intended amendment by and on behalf of the 2nd Defendant/Applicant is calculated to alter, vary and/or change the substratum of the Defense that had hitherto been filed on behalf of the 2nd Defendant/Applicant.
28. Instructively, Learned counsel for the 1st Defendant/Applicant has submitted that the intended amendment, if allowed, is geared towards changing the cause of action and completely altering the position that was hitherto taken by the 2nd Defendant.
29. Secondly, Learned counsel for the 1st Defendant/Respondent has also submitted that the intended amendment, which is being pursued by the Applicant, is informed by bad faith and thus reeks of mala fides.
30. To this end, Learned counsel for the 1st Defendant/Respondent has submitted that the intended amendment is intended to defeat and/or circumvent a lawful Judgment of the court which was issued vide Milimani ELC No. 114 of 2009; Between Kememia Engineering Company Ltd vs City Council of Nairobi; wherein the court found and held that the 1st Defendant herein was truly the registered proprietor of the suit property.
31. Additionally, Learned counsel for the 1st Defendant/Respondent has therefore contended that the intended amendment would thus create an absurdity and hence same ought not to be allowed.
32. Thirdly, Learned counsel for the 1st Defendant has submitted that the grant of the Application herein would also be tantamount to defeating the legitimate rights of the 1st Defendant/Respondent, which situation ought not to be allowed to happen.
33. In support of the foregoing submissions, Learned counsel for the 1st Defendant/Respondent has cited and relied on inter-alia, the case of Central Bank of Kenya Ltd vs Trust Bank Ltd (2000)eKLR; Julius Njiraini Nyamo vs Henry Mburu Murungo & Others, ELC No. 19 of 2018(UR); Kimemia Construction Company Ltd vs City Council of Nairobi ELC No. 114 of 2009(UR) and Abukar G Mohamed vs IEBC Constitutional Petition No. 255 of 2017(UR); respectively.
34. In a nutshell, the 1st Defendant/Respondent has thus impressed upon the Honourable court to find and hold that the Application beforehand is bereft of merits; and thus same ought to be dismissed.



Issues For Determination:

35. Having reviewed the Application beforehand and the Response thereto; and upon taking into consideration the written submissions filed by and on behalf of the Parties, the following issues crystalize and are thus worthy of determination;
 - i. Whether the instant Application reeks of Bad faith and Mala fides.
 - ii. Whether the intended amendment is calculated to facilitate the determination of the Real Question in controversy or otherwise.
 - iii. Whether the intended amendment will alter and/or change the cause of action/substratum of the Defense hitherto ventilated by the 2nd Defendant/Applicant and if so; whether such a situation ought to be countenanced.

Analysis And Determination

Issue Number 1. Whether The Instant Application Reeks Of Bad Faith And Mala Fides.

36. It is instructive to note that at the onset of the matter, the 2nd Defendant instructed her counsel on record to file a Statement of Defense and witness statement, wherein it was contended that the suit property was lawfully and legally alienated to and in favor of the 1st Defendant/Respondent.
37. Pursuant to and in line with the instructions emanating from the 2nd Defendant/Applicant, Learned counsel proceeded to and filed the Statement of Defense which adverted to and authenticated that the suit property was lawfully alienated in favor of the 1st Defendant.
38. Pertinently, Learned counsel for the Applicant also filed a Witness statement by the Acting County Attorney of the 2nd Defendant/Applicant, wherein it was stated that the suit property was lawfully alienated in favor of the 1st Defendant/Respondent.
39. Be that as it may, the Applicant herein now seeks to switch position and to contend that contrary to her initial averments and position, the suit property was actually allocated to the Plaintiffs herein and not otherwise.
40. Furthermore, the Applicant is now seeking to be granted liberty to file and serve a Supplementary witness statement. However, it is not lost on the court that the initial witness statement by the County Attorney, remains and forms as part of the record.
41. Surely, there is a serious disconnect on the part of the Applicant herein and the records that same intend to bring forth before the Honourable court.
42. To my mind, the switching of position by the Applicant herein, as pertains to the true status and in particular, ownership of the suit property, appears to be informed by some ulterior motives and bad faith, which the Applicant is not intent on disclosing and/ or bringing forth.
43. Secondly and in any event, even though the Applicant now wishes to switch position and to contend that the allocation of the suit property in favor of the 1st Defendant was informed by fraud, no doubt, the Applicant is privy to and knowledgeable of a Judgment of the Environment and Land court rendered vide Milimani ELC No. 114 of 2009 between Kimemia Engineering Construction Company ltd vs City Council of Nairobi.



44. For coherence, the Environment and Land court held and declared that the suit property, which is now disputed lawfully belongs to the 1st Defendant herein. Furthermore, the court proceeded to and directed the 2nd Defendant (now Applicant) to place the 1st Defendant herein in possession of the suit property.
45. Suffice it to point out that the said Judgment, (whose terms have been alluded to in the preceding paragraphs) , has neither been set aside nor varied. For good measure, the said Judgment remains in existence to date.
46. Be that as it may, the Applicant herein now wishes to ventilate a position that the allocation of the suit property in favor of the 1st Defendant herein, was fraudulent, illegal and thus unlawful.
47. In my humble and considered view, it cannot lie in the mouth of the Applicant to contend that the allocation of the suit property in favor of the 1st Defendant was fraudulent, yet the same Applicant is privy to and knowledgeable of a Judgment in Rem; which was never appealed against or at all.
48. Additionally, to allow the Applicant herein to ventilate the position at the foot of the intended amendment, albeit, during the lifetime of the lawful Judgment issued vide ELC No. 114 of 2009; would be tantamount to a legal absurdity.
49. On the other hand, to facilitate the propagation of the issues sought to be brought forth at the foot of the intended amendment, would also be tantamount to allowing the Applicant herein, to seek to defeat and negate a lawful Judgment, through the backdoor and by side-wind.
50. Clearly, a court of law ought not to assist a Party to defeat a lawful Judgment unless such a Party deploys the lawful court process, inter-alia, review and/or appeal, subject to the obtaining Law and not otherwise.
51. Arising from the foregoing, it is my finding and holding that the current Application, which seeks to propagate a position that is antithetical to the Judgment rendered in ELC No. 114 of 2009; is actually informed by bad faith and mala fides.
52. To the extent that the intended amendment is not being brought forth in good faith, it would not be in the interests of justice, to grant such an Application. Instructively, any favorable order towards the impugned Application would technically amount to sanitizing bad faith and mala fides.
53. To vindicate the foregoing position, it suffices to reiterate the holding of the Court of Appeal in the case of Elijah Kipngeno Arap Bii versus Kenya Commercial Bank Limited [2013] eKLR, where the court held thus;

“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 vs. 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.” (Emphasis supplied)

Issue Number 2. Whether The Intended Amendment Is Calculated To Facilitate The Determination Of The Real Question In Controversy Or Otherwise.

54. Other than the question of want of bona fides, which has been canvassed in the preceding paragraphs, it is also important to underscore that the true purpose/ intendment of an amendment is to enable the court to determine the real issues in controversy.
55. To my mind, the real issues in controversy, which ought to be facilitated by way of an amendment, must relate to the genuine issues, in respect of which the Disputants require the intervention of and adjudication of the court.
56. Put differently, the court would find it appropriate, just and expedient to lend and exercise discretion for purposes of amendment, if the intended issues are truly genuine and would culminate into an effective and effectual resolution of the issues in controversy between the Parties.
57. Given the foregoing position, I hasten to state and reiterate that where a Party is keen to propagate issues that are laced with falsehoods/ distortions; and which are meant to convolute the proceedings, then a court of law, may very well be reluctant to exercise discretion in favour of such an Applicant.
58. Furthermore, it is not lost on this court that an amendment which is intended to convolute and/or distort the true state of facts, would not by its nature be geared towards serving the true purposes of an amendment, which is to facilitate the determination of the Real question(s) in controversy.
59. In respect of this matter, it is imperative to recall and reiterate that the Environment and Land court (differently constituted); found and held that the suit property lawfully belongs to and is registered in the name of the 1st Defendant
60. Additionally, it is imperative to reiterate that the Judgment wherein the declaration (supra) was made, was in a suit pitting the current 1st Defendant (who was the Plaintiff) and the current 2nd Defendant (who was the Defendant).
61. Nevertheless, despite the fact that the Applicant herein is aware of the said Judgment, same now wants to be granted leave to amend and to bring forth an issue that the suit property was illegally and fraudulently alienated in favor of the 1st Defendant.
62. Surely, the question that does arise is whether the issue or the intended issue of fraud, would enable the court to determine the “Real question” in controversy, on the face of a lawful Judgment that is in existence and continues to hold sway.
63. To my mind, the intended amendment, whose purpose is to convolute, nay, distort, the issues, which had hitherto been determined, will not serve the true and genuine purpose of an amendment.
64. Similarly and in view of the foregoing, I come to the conclusion that the intended amendment would be counter-productive and in any event, would be contrary and inimical to the true purport, tenor and intendment of the Rule of Law.
65. To this end and to highlight the position that an intended amendment ought to be geared towards the determination of the Real questions in controversy, it suffices to take cognizance of the holding of the



Court of the Appeal in the case of Central Kenya Ltd versus Trust Bank Ltd & 5 others [2000]eKLR, where the court held thus;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

“that a party is allowed to make such amendments as maybe 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.

66. In my humble view, the intended amendment is neither calculated nor geared towards facilitating the real issues in controversy to be determined by the Honourable court. To the contrary, the true purport of the intended amendment is to convolute and obscure the issues for determination and thus muddle the stream of Justice, including delaying/ defeating effective determination of the issue(s) in dispute.

Issue Number 3. Whether The Intended Amendment Will Alter And/or Change The Cause Of Action/substratum Of The Defense Hitherto Ventilated By The 2nd Defendant/applicant And If So; Whether Such A Situation Ought To Be Countenanced.

67. It is worthy to recall that the 2nd Defendant herein had previously filed a Statement of Defense and in respect of which same contended that the suit property was duly and lawfully allocated to the 1st Defendant/Respondent.
68. Furthermore, the 2nd Defendant/Applicant also proceeded to and filed a witness statement executed by the Acting County Attorney, wherein it was underscored that the suit property was duly and lawfully allocated to the 1st Defendant/Respondent.
69. On the other hand, it is imperative to state that the 1st Defendant proceeded to and called witnesses, who testified on her behalf and on the basis of the factual position that the suit property was lawfully alienated to and in favor of the 1st Defendant.
70. Be that as it may, the 2nd Defendant who had hitherto provided a basis, which was appropriated by the 1st Defendant, is now keen to alter and completely change the background facts. Suffices to point out that the intended change, is being propagated long after the 1st Defendant had tendered evidence and acted on the premise that the position taken by the 2nd Defendant was correct.
71. Other than the foregoing, it is not lost on this court that the intended position is diametrically opposed to the previous position and in any event, same constitutes a 360 degrees about-turn; which constitutes an alteration of the character of defense on behalf of the 2nd Defendant/Applicant.
72. Given the foregoing position, the issue that the court must grapple with is; whether a Party, the 2nd Defendant/Applicant not excepted, can alter the cause of action and/or the substratum of the Defense and thereby adopt a completely new stand point, albeit midstream the proceedings and in any event, long after the adverse Parties have closed their respective cases.
73. To my mind, to allow the 2nd Defendant to adopt the proposed stand point, particularly, at this stage of the proceedings and long after the adverse Parties had closed their respective cases, would be inimical to the Rule of Law and General Administration of Justice.



74. Consequently and in the circumstances, the proposed change of cause of action (read substratum of defense) by the 2nd Defendant/Applicant herein, is not one that ought to be sanctioned and/ or countenanced by the Honourable court, either as sought or at all.
75. For coherence and to buttress the foregoing exposition of the law, I can do no better than to cite and reiterate the holding of the Court of Appeal in the case of Catherine Koriko & 3 others versus Evaline Rosa [2020] eKLR, where the court held thus;
- “In Abdul Karim Khan –v- Mohamed Roshan (1965) EA.289, this Court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and which entirely alters the nature of the Defence or Plaintiff.”
76. The court proceeded and stated as hereunder;
- “Comparatively, in the South African case of Robinson –v- Randfontein Estates Gold Mining Company Limited, 1925 AD 173 Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court’s refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.”
77. Suffice it to point out that the situation obtaining over and in respect of the instant matter replicates what the Honorable Court of Appeal was dealing with in the decision cited and alluded to in the preceding paragraphs.
78. Consequently and in my humble view, the fact that the intended amendment would introduce an inconsistent defense to the one which had hitherto been propagated by the 2nd Defendant, is sufficient to disentitle the 2nd Defendant/Applicant from the discretion of this Honourable court.

Final Disposition:

79. Having duly analyzed and considered the issues which were itemized in the body of the Ruling; and having taken into account the relevant principles of the law, it is evident that the subject Application is devoid of merits and would in any event, culminate into an absurdity.
80. Consequently and in the premises, the Application dated 26th September 2023; be and is hereby Dismissed with costs to the 1st Defendant/Respondent only.
81. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF NOVEMBER 2023.

OGUTTU MBOYA,

JUDGE.

In the Presence of:

Mr. Gachie Mwanza for the Plaintiffs/Respondents.

Mr. Karuga Maina for the 1st Defendant/Respondent.

Ms. Karanja for the 2nd Defendant/Applicant.



N/A for the 3rd and 4th Defendant/Respondents.

