



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT BUNGOMA**

**ENVIRONMENT & LAND CASE NO. 101 OF 2015**

GEORGE OLEL MUNG'AU.....1<sup>ST</sup> PLAINTIFF  
AMBROSE CHELONGO SOITA.....2<sup>ND</sup> PLAINTIFF  
GLADYS L. OLUNGA.....3<sup>RD</sup> PLAINTIFF  
JULIUS NDIWA MASARANGA.....4<sup>TH</sup> PLAINTIFF  
EDITH AKINYI IAMO.....5<sup>TH</sup> PLAINTIFF  
ELIMINA ATANG'A MAKHANU.....6<sup>TH</sup> PLAINTIFF

**VERSUS**

JOSEPH SITUMA MATAFARI.....1<sup>ST</sup> DEFENDANT  
MELAB ANGAI WASIKE.....2<sup>ND</sup> DEFENDANT  
ROBERT WANJALA.....3<sup>RD</sup> DEFENDANT  
CHARLES SIFUMA.....4<sup>TH</sup> DEFENDANT  
MOSES WAFULA.....5<sup>TH</sup> DEFENDANT  
PATRICK JUMA.....6<sup>TH</sup> DEFENDANT  
MOSES KHAEMBA.....7<sup>TH</sup> DEFENDANT  
MOSES MAKACHA.....8<sup>TH</sup> DEFENDANT  
EDWARD KHAEMBA.....9<sup>TH</sup> DEFENDANT  
GABRIEL WEKESA.....10<sup>TH</sup> DEFENDANT  
JACK WANYAMA.....11<sup>TH</sup> DEFENDANT

**RULING**

1. Section 100 of the Civil Procedure Act provides as follows: -

*100: "The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."* Emphasis mine.

Order 8 Rule 5(1) of the Civil Procedure Rules on the other hand reads: -

**5(1)** *“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceeding, the Court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”* Emphasis mine.

In **CENTRAL KENYA LTD .V. TRUST BANK LTD & OTHERS C.A CIVIL APPEAL No 222 of 1998 [2002 eKLR]**, the Court had the following to say about the Court’s latitude in allowing amendments of proceedings:-

*“It is also trite that as far as possible, a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the Court will not later permit him to reopen the same subject of litigation (see O11 rule1 of the Civil Procedure Rules) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendments of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in application for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see BEOCO LTD .V. ALFA LAVAL CO LTD 1994 4 ALL. E.R 464).”* Emphasis mine.

The Court went on to add that: -

*“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”* Emphasis mine.

What is clear from all the above is that whereas it is preferable that parties should as much as possible plead their cases fully and precisely to enable the opposite party to also respond to it fully and thereafter have a seamless trial in the spirit of **Article 159 2(b)** which requires that *“justice should not be delayed,”* and also to achieve the overriding objective under **Section 1B(d)** of the **Civil Procedure Act** on *“the timely disposal of the proceedings”* of the Court, it is nonetheless recognized that in order to do justice to the parties, the Court must retain unfettered discretion to allow them to amend their pleadings at any stage of the proceedings. The caveat, however, is that the opposite party should not be prejudiced in a manner that costs will not be a sufficient compensation. The application for leave must also be made in good faith and not malafide.

2. By a plaint dated 15<sup>th</sup> September 2015 and filed herein on the same date, the plaintiffs seek the main remedy that the defendants jointly and severally be permanently enjoined from interfering with their possession and use of the land parcels **NO BUNGOMA/KAMAKOIWA/5087, 5088, 5089, 5090, 5091 and 5092** (the suit properties) and should be evicted therefrom. The plaintiffs pleaded that whereas they are the registered proprietors of the suit properties, the defendants, unlawfully and actuated by malice, are interfering with the said properties.
3. The record shows that in the plaint, the plaintiffs pleaded particulars of malice on the part of the defendants in paragraph 13.
4. The 1<sup>st</sup> defendant filed a separate defence denying the plaintiffs’ averments and pleading that infact the plaintiffs fraudulently sub – divided the land parcel **NO BUNGOMA/KAMAKOIWA/298** to create the suit properties.
5. The 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants filed a joint defence and Counter – Claim denying the plaintiffs’ averments and also pleading that the plaintiffs fraudulently sub – divided the land parcel **NO BUNGOMA/KAMAKOIWA/298** to create the suit properties.
6. The plaintiffs filed a reply to the defence and a defence to the Counter – Claim.
7. The 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 7<sup>th</sup>, 8<sup>th</sup>, and 9<sup>th</sup> defendants, though served, have yet to file any defences.
8. The plenary hearing commenced on 25<sup>th</sup> may 2021 and the plaintiffs called four (4) witnesses in support of their case which is yet to be closed.
9. The plaintiffs have now approached this Court vide their Notice of Motion dated and filed herein on 2<sup>nd</sup> November 2021 seeking the following orders:-

**(a) That this Honourable Court be pleased to grant leave to the plaintiffs/Applicants to amend their plaint as per the draft amended plaint annexed to the application.**

**(b) That the draft amended plaint in (a) above be deemed as properly filed subject to payment of the requisite Court fees.**

**(c) That the costs of this application be in the cause.**

The application is premised on the provisions of **Order 8 Rules 3, 4 and 5** of the **Civil Procedure Rules** and the grounds set out therein. It is also supported by the affidavit of **GLADYS L. OLUNGA** (the 3<sup>rd</sup> plaintiff/Applicant) herein sworn with the consent of the 1<sup>st</sup>, 2<sup>nd</sup>, 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> plaintiffs/Applicants.

10. The gist of the application is that the plaintiffs claim against the defendants is based on illegal entry and trespass by the defendants on the suit properties. However, the plaintiffs have pleaded a cause of action founded on malice. It is desired to amend the plaint to reflect the cause of action as founded on illegality and unlawfulness on the part of the defendants. That the defendants will not be prejudiced in any way and they can amend their defence(s) if need be. Annexed to the application is the draft amended plaint.

11. When the application was mentioned on 3<sup>rd</sup> November 2021 for directions, I directed that it be canvassed by way of written submissions and that it be served upon the defendants who would then have fourteen (14) days within which to file and serve their responses and submissions. The matter would then be mentioned on 6<sup>th</sup> December 2021 to confirm compliance.

12. However, only **MELAB ANGAI WASIKE** (the 2<sup>nd</sup> defendant herein) has, on behalf of her sons **GABRIEL WEKESA** and **JACK WANYAMA** (the 10<sup>th</sup> and 11<sup>th</sup> defendants), filed a replying affidavit dated 11<sup>th</sup> November 2021 in opposition to the application. In the said replying affidavit, the 2<sup>nd</sup> defendant has averred, inter alia, that the application is frivolous, vexatious and an afterthought meant to achieve a hidden target of introducing new evidence by the plaintiffs who have already testified. That this is a 2015 case and the plaintiffs cannot wait to bring this application seven (7) years down the line. That the plaintiffs are represented by an energetic and able lawyer but have now sensed defeat and want to use the back door by introducing new testimony. That the 2<sup>nd</sup> defendant is an elderly woman who is being represented by an advocate on pro – bono basis who might pull out of the case.

13. I notice from the record that the 3<sup>rd</sup> plaintiff filed a further affidavit dated 31<sup>st</sup> December 2021 without leave. The same is hereby expunged from the record.

14. Only **MR ANWAR** Counsel for the plaintiff filed his submissions.

15. I have considered the application, the replying affidavit by the 2<sup>nd</sup> defendant and the submissions by **MR ANWAR** Counsel for the plaintiffs.

16. At the commencement of this ruling, I made reference to the relevant law and some of the precedents that guide the Court while considering an application of this nature.

17. As is now clear, the power to allow amendment of pleadings should be liberally exercised at any stage of the proceedings so long as no prejudice is caused to the other party. The purpose is to facilitate the just determination of the read issues in controversy between the parties. That ought to be the overriding objective of any application for leave to amend pleadings. And whereas it is preferable to make such applications timeously, a mere delay in doing so is not fatal.

18. I have looked at the proposed amendments to the plaint. The main amendment sought is to plead illegality and unlawfulness on the part of the defendants in the manner in which they have entered and occupied the suit properties. Although the 2<sup>nd</sup> defendant has alleged that this application is intended to introduce new evidence in a matter that was filed in 2015, I have not seen any attempt to introduce new witness statements by the plaintiffs. And with regard to the 2<sup>nd</sup> defendant's averment that this application has been brought some seven (7) years down the line, mere delay is not fatal. I notice from the pleadings that the plaint was first filed on 15<sup>th</sup> September 2015 by the firm of **C. K. AREBA ADVOCATES** then acting for the plaintiffs before the firm of **ANWAR & COMPANY ADVOCATES** came on record on 22<sup>nd</sup> February 2018. That is a plausible explanation for the delay. The plaintiffs have not closed their case and are available for further cross – examination if necessary. The defendants are yet to testify in support of their cases and any Counter – Claim and will be at liberty to amend their defences and Counter – Claim. I did not hear the defendants allege any prejudice that may be occasioned to them which cannot be atoned for with an order for costs. It is in the interest of justice that the plaintiffs be given an opportunity to place before the Court what they consider to be the real controversy in the dispute relating to the suit properties so that the Court is well seized of the issues which it has to determine. That is the primary reason why the parties have come to Court for a determination of their dispute. The 2<sup>nd</sup> defendant has averred in paragraph 14 of her replying affidavit that the plaintiffs are introducing in the proposed amendment a new claim for eviction. That is not true. The prayer for eviction was clearly pleaded in the plaint filed on 15<sup>th</sup> September 2015 and in any event, the Court retains the power to allow an amendment even if it introduces a new claim unless it changes the cause of action into one of a substantially different character which could more conveniently be made the subject of a fresh suit – **BULLEN AND LEAKE & JACOBS PRECEDENTS OF PLEADINGS 12<sup>TH</sup> EDITION**. That is not the situation in this application.

19. Having considered the Notice of Motion dated 2<sup>nd</sup> November 2021, I am persuaded that it is meritorious. I therefore allow it in the following terms: -

**1. The plaintiffs shall file and serve the amended plaint within 7 days of this ruling.**

**2. The defendants shall file and serve their amended defences, if need be, within 14 days of service upon them of the amended plaint.**

**3. The plaintiff shall meet the costs of the 2<sup>nd</sup>, 10<sup>th</sup> and 11<sup>th</sup> defendants occasioned by this application.**

**4. This being a part heard case filed in 2015, I direct that it be mentioned virtually before the Deputy Registrar on 7<sup>th</sup> February 2022 for purposes of taking an early date for further hearing.**

Boaz N. Olao.

J U D G E

**3<sup>rd</sup> February 2022.**

Ruling dated, signed and delivered at **BUNGOMA** on this 3<sup>rd</sup> day of February 2022 by way of electronic mail in keeping with the **COVID – 19** pandemic guidelines.

**Boaz N. Olao.**

**J U D G E**

**3<sup>rd</sup> February 2022.**