



**Ominde v Odongo (Environment & Land Case 300 of 2016)
[2022] KEELC 122 (KLR) (6 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 122 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT & LAND CASE 300 OF 2016**

A OMBWAYO, J

MAY 6, 2022

BETWEEN

WALTER EDWIN OMINDE PLAINTIFF

AND

VICTOR OTIENO ODONGO DEFENDANT

RULING

Brief Facts

1. Victor Otieno Odongo, the Defendant herein filed a Notice of Motion Application dated 19th April 2018 brought under section 1A, 1B, 3, 3A, 63 (e) of the *Civil Procedure Act*, Order 8 Rule 1, 3 & 5, Order 51 Rule 1 seeking for the orders that this Honourable Court be pleased to grant leave to the Defendant to amend its Statement of Defence dated 22/9/2017 to include a counterclaim and that costs of this Application be provided for. The Application was based on grounds that the Defendant needs to amend his Statement of Defence to include a counterclaim and that he has enough evidence to prove that the Plaintiff's claim is based on fraudulently/ illegally acquired title on lake riparian land.
2. That based on this illegally acquired title, the Plaintiff has illegally blocked access to the lake front and thus the Defendant cannot enjoy peaceful use and occupation of his parcel of land. The amendment will bring to fore all the issues in controversy and determination made.
3. That the amendment will not prejudice the Plaintiff as equity favours granting the orders sought and that the Application is made in good faith. The Application was supported by the Affidavit of Victor Otieno Odongo who deposed and stated that he filed through his Advocate a Statement of Defence on 22/9/2017 denying the claim and he has read through the pleadings filed by the Plaintiff and knows that the claim is based on fraud.
4. That the RIM issued to him in 2012 clearly shows that his parcel Kisumu/Nyalenda 'B'/1182 borders the lake riparian on the lower end but inexplicably this has been changed on the Plaintiff's



parcel illegally inserted where the lake riparian is situated and it is clear that the Plaintiff and a few unscrupulous persons at the lands office illegally conspired to alter the RIM for Nyalenda 'B' map sheet to extend the boundaries of parcel Kisumu/Nyalenda 'B'/ 564 to create new parcels Kisumu/Nyalenda 'B'/1508.

5. That by this illegal action, the Plaintiff and other proposed Defendants have denied the Defendant peaceful use and occupation of his parcel and lake from view and thus infringed on his constitutional right as enshrined in Article 40 of the [Constitution of Kenya 2010](#). He stated that the intended amended Defence will crystallize all the issues in dispute and have a determination made and no prejudice will be occasioned to the Defendant should the order sought be granted and that the Application is made in good faith.
6. The Application was to be heard on 6th July 2021 however the Plaintiff requested for leave to file a Replying Affidavit within 7 days and the court directed him to do so and the Defendant to also file a Supplementary Affidavit and the Application to be heard on 20th September 2021.
7. I have perused the file and do confirm that the Plaintiff failed to file a Replying Affidavit. The Defendant herein filed a Supplementary Affidavit where he deposed and stated that the significance of the documents annexed in the Supplementary Affidavit are to give proof of the original Registry Index Map of Kisumu/Nyalenda 'B'/1182 and Kisumu/Nyalenda 'B' / 564 and how inexplicably Kisumu/Nyalenda 'B' /564 measuring 0.15 Ha was subdivided to generate 0.80 Ha, a difference of 0.65 Ha hived off from adjacent riparian reserve.
8. He stated that the name Victor Otieno Odongo indicated on the title deed to Kisumu/Nyalenda 'B'/ 1182 is his name and the size of the said land is 0.3 Ha. That the name Obala Minala Nyamonywa indicated on the cancelled title deed Kisumu/Nyalenda 'B' / 564 measuring 0.15 Ha was an individual known to him but he is since deceased.
9. He further stated that during the process of acquiring Kisumu/Nyalenda 'B' /1182, he sought and was issued with the Registry Index Map at Kisumu Lands Office on 26th October 2004 and subsequently on 8th May 2012 which showed that his parcel Kisumu/Nyalenda 'B' /1182 borders the lake riparian on the lower end. It was the Defendant's case that he is not personally known to the Plaintiff and only came to know him when the suit was filed.
9. That upon seeking the current Registry Index Map on 23rd July 2019, he realized that a few unscrupulous persons at Kisumu land office illegally conspired to alter the Registry Index Map for Nyalenda B Map Sheet to extend the boundaries of Kisumu/Nyalenda 'B' /564 to create new parcels Kisumu/Nyalenda 'B' /1508. He stated that he conducted a land search which indicated that Kisumu/Nyalenda 'B' /564 measuring 0.15 Ha was successfully subdivided to generate Kisumu/Nyalenda 'B' /1468 measuring 0.06 Ha, Kisumu/Nyalenda 'B' /1507 measuring 0.26 Ha and Kisumu/Nyalenda 'B' /1508 measuring 0.48 Ha all totaling to 0.8 Ha.
10. The Defendant further stated in his Supplementary Affidavit that he made several visits to Kisumu land office in a bid to resolve the anomaly with no success and based on the order issued on 26th November 2018, there was a botched site visit on 24th June 2019 which used the current map that identified irregularities. He stated that he has attached a licensed land surveyor's ground report to corroborate his statement.
11. It is the Defendant's case that the allocation of riparian land from subdivision of Kisumu/Nyalenda 'B'/564 was an act of illegality contrary to Article 67 of the Constitution as the Kenyan law define riparian land as being a minimum of 6 meters and up to a maximum of 30 meters on either side of a bank from the highest water mark.



12. On 10th November 2021 when the matter came up for Hearing, the court ordered that the Application be canvassed by way of written submission and therefore parties to file and serve written submissions. I have perused the file and do confirm that the Defendant filed his submissions while the Plaintiff failed to file submissions.

Defendant's Submissions

13. The Defendant filed his submissions on 18th November 2021 where he relied on Order 2 Rule 6 of the Civil Procedure Act and stated that the amended Statement of Defence is consistent with the previous pleading and will bring to fore all the issues in controversy and a determination thereof made.
14. He submitted that the amendment sought will not prejudice the Plaintiff and it is made in good faith. That if leave is not granted, it will destroy the substratum of the Application for Counterclaim and ultimately deny the Defendant the opportunity to exhaust his legal remedies. The Defendant relied in the case of *Ramco Investments Limited vs Nairobi City Water & Sewerage Company* (2017) eKLR and prayed for the Application to be allowed.

Analysis and Determination

15. This suit commenced on 15th November 2016 and it is the Plaintiff's case that he is the registered owner of all that property known as Kisumu/Nyalenda 'B' /1508 while the Defendant is not registered in any of the neighboring plots. The Plaintiff averred that on or about 11th November 2016, he found the Defendant's contractor ferrying and heaping building materials on the Plaintiff's parcel of land with intention to fence off and without lawful cause barricade access path to the Plaintiff's parcel and with the aid of hooligans the Defendant threatened to cause harm to him if he dared to step into his land. The Plaintiff's claim against the Defendant was for a mandatory injunction to restrain the Defendant from trespassing onto the suit property and to restrain the Defendant from interrupting the Plaintiff's contractors, agents and /or workers who are working on the suit property and to restrain him from any doing that are in a manner adverse to the Plaintiff's proprietary interest over the suit property.
16. The Defendant on the other hand filed a Statement of Defence on 22nd September 2017 where he denied the allegations made in the Plaintiff's Statement of Claim and put the Plaintiff to strict proof. The Defendant stated in his Defence that he does not intend to dispossess the Plaintiff his proprietary rights on the suit property and has not trespassed onto the Plaintiff's land parcel no. Kisumu/Nyalenda 'B' /1508 as alleged by the Plaintiff. The Defendant averred that he is the proprietor of land parcel number Kisumu /Nyalenda 'B'/1182 having bought it from one John Odhiambo Onunga. He alleged that after he had bought his land and settled on it and after some lake water receded, someone illegally caused the riparian area between his land parcel number Kisumu/Nyalenda 'B' /1182 and the lake to be registered as land parcel numbers Kisumu/Nyalenda 'B' /1507,1508 and 1468. The Defendant further averred that he has never occupied the suit property and that the Plaintiff's Statement of Claim does not disclose any reasonable cause of action against him.
17. I have looked at the draft amended Statement of Defence and what the Defendant seeks in the Counter-claim is a declaration that land parcel number Kisumu/Nyalenda 'B' /1508 was illegally created and is situated in riparian land, an order of mandatory injunction directing the 2nd and 3rd Defendants in the Counterclaim to cancel all entries, registered creating land parcel Kisumu/Nyalenda 'B' /1508 to amend the Registry Index Map reverting the riparian land to its original position, an order of permanent injunction restraining the 1st Defendant in the counterclaim, his agents, servants, employees or anybody claiming through him from interference with quiet use and possession of



land parcel number Kisumu/Nyalenda 'B' / 1182, general damages for unlawful conversion, punitive damages against the 4th Defendant and costs of this suit.

18. Order 8 Rules 3 and 5 of the [Civil Procedure Rules](#) states as follows:

“3.

- (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 do so.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if 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.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (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.
- (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.

4. Rule 3 shall have effect in relation to an originating summons, a petition and an originating notice of motion as it has effect in relation to a plaint.”

“5.

- (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 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.



(2) This rule shall not have effect in relation to a judgment or order.”

19. The principles of amendments of pleadings were set out in the case of *Coffee Board of Kenya Vs Thika Coffee Mills Limited & 2 Others* [2014] eKLR which was quoted with approval in the cases of *Rael Moraa Ondika Vs Swanya Limited & Anor* [2020] eKLR and *Management Committee of AGC Riverside Church Vs Mosonik & Anor* [2017] eKLR where the court held as follows:

“The principles that should guide the Court in dealing with Applications for amendment are elaborated in Mulla, Code of Civil Procedure, 18th edition, Volume 2 Pages 1751-1752 which has been cited in various authorities including the case of *Coffee Board of Kenya -Vs- Thika Coffee Mills Limited & 2 Others* [2014] eKLR where it is stated as follows:

- I. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- II. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- III. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporated by means of amendments;
- IV. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
- V. Amendments of a claim or relief barred by time should not be allowed;
- VI. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- VII. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties;
- VIII. The delay in filing the petitions for amendments should be properly compensated by costs;
- IX. Error or mistake which is not fraudulent, should not be made the ground for rejecting the Application for amendment of pleadings.”

20. The Plaintiff herein did not oppose to the Defendant’s Application. I have carefully considered the Application and I am of the view that the amendments are necessary as they will help determine the controversies surrounding the suit property and that the Plaintiff will suffer no prejudice if the Application is allowed. On whether the counter claim is time barred, this issue can be brought at the hearing of this suit. This court is of the considered view that by allowing the amendments being sought by the Defendant, it gives him an opportunity to plead his case and on the issue of delay in filing the amendments, the Defendant herein should bear the costs.

21. In the upshot, this Application is hereby allowed and the Defendant is hereby ordered to file his amended Statement of Defence within 14 days from the date of today and to pay for costs of this Application.

DATED AT KISUMU THIS 6TH DAY OF MAY, 2022



ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2020.

ANTONY OMBWAYO

JUDGE

