



**Mwihaki v Kigui & 2 others (Environment & Land Case  
572 of 2015) [2022] KEELC 2771 (KLR) (7 July 2022) (Judgment)**

Neutral citation: [2022] KEELC 2771 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 572 OF 2015**

**JO MBOYA, J**

**JULY 7, 2022**

**BETWEEN**

**REUBEN GACHAU MWIHAKI ..... PLAINTIFF**

**AND**

**JAMES KIGUI ..... 1<sup>ST</sup> DEFENDANT**

**GUESTCARE IDEAL HOMES LTD ..... 2<sup>ND</sup> DEFENDANT**

**IRENE WANJIKU GIKANGA ..... 3<sup>RD</sup> DEFENDANT**

**JUDGMENT**

1. Vide the Chamber Summons Application dated 16<sup>th</sup> May 2022, the Plaintiff/Applicant approached the court seeking the following Reliefs:
  - a. ....Spent.
  - b. The Chief Land Registrar in charge of Nairobi Land Registry be joined as a Necessary Party in order to enable the Court effectually and completely adjudicate upon and settled all questions involved in the suit.
  - c. Costs of the Application be borne by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
  - d. Cost of this Application be provided for.
2. The subject Application is premised on the grounds contained in the body thereof and same is supported by an affidavit of the Plaintiff, namely, Reuben Gacau Mwihaki, sworn on the 16<sup>th</sup> May 2022, and to which the deponent has attached two annextures.
3. Upon being served with the subject application, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein filed Grounds of opposition dated the 27<sup>th</sup> June 2022, whereas the 3<sup>rd</sup> Defendant filed Grounds of opposition dated the 24<sup>th</sup> June 2022.



## **Deposition by the Parties**

### **Plaintiff's/Applicant's case**

4. Vide Supporting Affidavit sworn on the 16<sup>th</sup> May 2022, the Plaintiff/Applicant, hereinafter referred to as the deponent, has averred that same is the lawful owner and/or proprietor of the suit property, that is, L.R No. 7785/824.
5. Further, the deponent has averred that upon the filing of the subject suit, same proceeded to and tendered his evidence and that same has since closed his (Plaintiff's case).
6. Besides, the deponent has averred that at all material times, up to and including the close of the Plaintiff's case, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant herein had mounted and/or maintained a Counter-claim against the Chief Land Registrar, but which Counter-claim was irregularly and/or unlawfully withdrawn on the 25<sup>th</sup> March 2022.
7. On the other hand, the deponent has further averred that the Chief Land Registrar, who was hitherto a Party herein, ought to be joined as a Necessary Party to the subject proceedings and that his presence, participation and/or involvement in the subject matter is necessary and would enable the court to effectually and or effectively deal with all the issues in Dispute and/or Controversy.
8. Further, the deponent has averred, that the presence of the Chief Land Registrar would also be of great assistance to the court and would enable the court to unravel the truth and/or otherwise, concerning the issue of Ownership of the suit property.
9. Finally, the deponent has stated that prior to and/or before of the purchase of the suit property, same carried out and/or conducted an official search at the Land registry and thereafter confirmed that indeed the suit property was registered in the name of the vendor, who sold and transferred the suit property unto him.
10. At any rate, it has also been averred that the Chief Land Registrar, who is sought to be joined in the proceedings, remains the sole custodian of the records pertaining to and/or concerning the suit property.
11. Consequently and in the premises, it is the Plaintiff's position that the joinder and/or presence of the Chief Land Registrar as a Necessary party, would be appropriate, just and expedient and hence the subject application ought to be allowed.

### **Response by the 1st and 2nd Defendants' Respondents**

12. Upon being served with the Application, the 1<sup>st</sup> and 2<sup>nd</sup> Respondent proceeded to and filed Grounds of opposition and wherein same have adverted to the following grounds;
  - i. The subject application is contrary to and in contravention of the express provision of Order 1 Rule 10(2) of the Civil Procedure Rules 2010.
  - ii. The Application has been made with undue and/or inordinate delay and hence same ought not to be allowed.
  - iii. The Application is merely intended to delay, obstruct and/or defeat the expeditious hearing and disposal of the subject suit.
  - iv. The Application constitutes and/or amounts to an abuse of the Due Process of the Court.



13. On her part, the 3<sup>rd</sup> Defendant filed and relied on the Grounds of Opposition dated the 24<sup>th</sup> June 2022, wherein same has raised the following grounds;
  - i. There are no Orders flowing from the Reliefs sought in the Plaint to the Chief Land Registrar.
  - ii. The Application has not met the threshold for the grant of the orders sought.
    - a. There has been undue delay in bringing this application hence the Defendants will suffer prejudice.
    - b. The application is only aimed at delaying the hearing of the matter.
    - c. No prima facie case has been established to warrant the joinder of the Chief Land Registrar as a party to this suit.

**Submissions by the Parties:**

14. The subject matter was fixed and/or listed for further Defense hearing on the 28<sup>th</sup> June 2022, when it transpired that the Plaintiff herein had filed and/or lodged the Application dated the 16<sup>th</sup> May 2022.
15. Consequently, it became necessary for the Court to issue directions as to the manner and/or mode of proceedings as pertains to the Interlocutory application, which had been filed on the face of the intended/ scheduled Defense herein.
16. Be that as it may, the Parties herein agreed and/or covenanted that it would be expedient and/or appropriate to dispose of the Interlocutory application beforehand and thereafter take directions on the Defense hearing.
17. Premised on the foregoing, the application dated the 16<sup>th</sup> May 2022 was thereafter heard vide oral submissions rendered by and/or on behalf of the Parties.
18. On behalf of the Plaintiff/Applicant, it was submitted that the Chief Land Registrar had hitherto been joined and/or impleaded in the subject matter by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, who had filed a Counter-claim as against not only the Plaintiff, but also the Chief Land Registrar.
19. Further, it was submitted that on the 25<sup>th</sup> March 2022 the 1<sup>st</sup> and 2<sup>nd</sup> Defendants proceeded to and indeed withdrew the Counter-claim and the entire proceedings against the Chief Land Registrar and that the withdrawal proceedings were carried out without the knowledge and/or participation of the counsel for the Plaintiff.
20. On the other hand, it was similarly submitted that the withdrawal of the proceedings against the Chief Land Registrar, who is the custodian of the records pertaining to land is bound to prejudice or otherwise affect the Plaintiff's case.
21. Besides, counsel for the Plaintiff submitted that by virtue of being the custodian of the records pertaining to land in the Country and essentially with the city of Nairobi, the Chief Land Registrar is a necessary party to the subject proceedings and hence same ought to be joined in the subject matter, so as to help the court to unravel the mystery pertaining to and/or concerning the ownership rights over the suit property.
22. In addition, Counsel for the Plaintiff submitted that it was not necessary and/or paramount for there to a Cause of action as against the Chief Land Registrar, before same can be joined and/or included as a Necessary Party to the subject proceedings.



23. At any rate, counsel for the Plaintiff further submitted that having hitherto been joined as a Party in the subject proceedings, the intended joinder of the Chief Land Registrar, in respect of the subject matter, would therefore not prejudice and/or affect the rest of the Parties, in any manner whatsoever and howsoever.
24. In any event, counsel submitted that the Documents, if any, that the Chief Land Registrar would seek to rely on and/or the nature of evidence that is under the custody of the Chief Land Registrar have already been filed and placed before the court.
25. In the premises, counsel for the Plaintiff therefore submitted that it would be appropriate to join the Chief Land Registrar as a necessary party and therefore facilitate the effective and effectual determination of all the issues in dispute.
26. In support of the foregoing submissions, counsel for the Plaintiff relied on the case of *Kizito Lubano v KMRI Board of Management* [2016] eKLR and *Ammond versus Raphael & Sons* [1956] 1 ALL ER 273, to vindicate the position that the Chief Land Registrar ought to be joined and that such joinder can be made and/or ordered even where there is no cause of action against the proposed necessary Party.

#### **A. Submissions by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants'**

27. On their part, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that the subject application is not one for amendments of pleadings, but for a Joinder of a Party. Consequently, it was submitted that before a Party can be joined into existing proceedings, it must be shown and/or established that the Proposed Party, on whose behalf the application for joinder is made, is truly and Interested Party in the matter.
28. Secondly, it was submitted that before a Party is joined as an Interested and/or Necessary Party, it must be similarly shown and/or proved that the proposed Party has an identifiable stake and/or claim in respect of the suit or the property in dispute.
29. Nevertheless, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants submitted that in respect of the subject matter, no identifiable interest and/or claim has been tendered and/or availed to the Court, to warrant a finding that indeed the Chief Land Registrar is such a necessary/interested Party.
30. Thirdly, it was submitted that the application herein has been made with undue and inordinate delay and consequently, same ought not to be allowed and/or granted, either in the manner sought or at all.
31. Fourthly, it was argued that the subject application is likely and/or otherwise calculated to delay, obstruct and or defeat the expeditious hearing and disposal of the suit/proceedings.
32. Other than the foregoing, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have similarly submitted that same shall suffer undue prejudice and/or disadvantage if the subject application is allowed and the name of the Chief Land Registrar is joined to the subject suit.
33. Based on the foregoing, it has also been submitted that the proposed amendments and/or joinder, will also alter and/or distort the character of the suit herein and hence the adverse Parties shall be disposed to and/or suffer grave injustice, not compensable in monetary terms.
34. Finally, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants have submitted that the application herein is also replete with mala fides and bad faith. In this regard, the court was urged to find and hold that the application therefore amounts to an abuse of the Due process of the court.
35. In support of the foregoing submissions, counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants relied in the case of *Zephir Holdings Ltd v Nimoso Plantations Ltd* [2014] eKLR and *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd* [2013] eKLR.



## **B. Response by the 3<sup>rd</sup> Defendant Respondent**

36. On her part, counsel for the 3<sup>rd</sup> Respondent contended that the subject application has been filed and/or mounted with unreasonable and inordinate delay and hence the application constitutes an attempt to defeat and/or otherwise obstruct the expeditious hearing and/or conclusion of the subject matter.
37. Secondly, it was submitted that the joinder of the Land Registrar in the subject matter would culminate into rolling back the time, including affecting the pleadings that have since been filed by the Parties and upon which the evidence has since been tendered or adduced on.
38. At any rate, it was also submitted that the joinder of the Chief Land Registrar will also be an exercise in futility, insofar as no reliefs have been or are being sought as against the said the Chief Land Registrar, who is sought to be joined in the said proceedings.
39. Fourthly, it was submitted that the proposed joinder would give rise to and/or culminate in the creation of a cause of action which is inconsistent with the initial claim mounted and/or lodged by the Plaintiff herein.
40. Further, the 3<sup>rd</sup> Defendants' counsel has submitted that the application for the proposed joinder is also another tactic which the Plaintiff is seeking to rely on and hence to delay the expeditious disposal of the suit.
41. Finally, counsel for the 3<sup>rd</sup> Defendant has submitted that the current application has been mounted in bad faith and that same is neither geared towards achieving a just Cause nor is same intended to facilitate the Expeditious Disposal of the matter.
42. In the premises, counsel for the 3<sup>rd</sup> Defendant has therefore implored the court to find and hold that the subject application is misconceived, an abuse of the Court process and/or otherwise legally untenable.
43. In support of the foregoing submissions, counsel for the 3<sup>rd</sup> Defendant relied in the cases, namely, *Elijah King'eno Arap Bii v Kenya Commercial Bank (2013)eKLR* and *Catherine Koriko & 3 Others v Evaline Rosa (2020)eKLR*, respectively.

## **Issues for Determination**

44. Having reviewed the Application dated the 16<sup>th</sup> May 2022, the Affidavit in support thereof, the Grounds of opposition filed thereto and the oral submissions rendered by and/or on behalf of the Parties, the following issues do arise and are thus germane for determination;
  - i. Whether the Withdrawal of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim against the Chief Land Registrar vide Notice of withdrawal dated the 3<sup>rd</sup> march 2022 was illegal and/or unlawful.
  - ii. Whether the Chief Land Registrar is a Necessary/Interested arty in the subject matter and hence deserving of being joined.
  - iii. Whether the proposed joinder would culminate into the creation of a New cause of action inconsistent with the claim at the foot of the Plaintiff.
  - iv. Whether the subject Application ought to be granted.



## Analysis and Determination

### **Issue number 1 - Whether the withdrawal of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants claim against the Chief Land Registrar vide Notice of withdrawal dated the 3<sup>rd</sup> march 2022 was illegal and/or unlawful.**

45. Before venturing to deal with and/or address the issue outlined herein, it is appropriate to recall that upon the filing of the subject suit, the Defendants herein and more particularly the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, found it appropriate, expedient and just to implead the Chief Land Registrar as a Defendant to the counterclaim, which same had filed before the court.
46. Upon the joinder of the Chief Land Registrar as the 2<sup>nd</sup> Defendant to the counterclaim, the Chief Land Registrar indeed retained and/or engaged the service of the Attorney General and who thereafter entered appearance for and/or on behalf of the Chief Land Registrar.
47. Other than the entry of appearance, the office of the Attorney General also proceeded to and filed a Statement of Defense, as well as Witness Statements, pertaining to and/or concerning the status of registration and ownership of the suit property.
48. Perhaps, for completeness, the Chief Land Registrar also filed and/or lodged before the court a bundle of documents pertaining to and/or concerning the ownership of the suit property.
49. Be that as it may, on the 25<sup>th</sup> March 2022, the counsel for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants deemed it wise to file and or lodge a Notice of withdrawal of the suit, that is, portion of the counterclaim against the Chief Land Registrar.
50. Consequent to the filing of the said Notice of withdrawal, the court proceeded to and endorsed the withdrawal and in this regard, the suit as against the 2<sup>nd</sup> Defendant to the counterclaim, namely, the Chief Land Registrar, was duly marked as withdrawn.
51. Even though counsel for the Plaintiff has contended that the withdrawal of a segment of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' counterclaim against the 2<sup>nd</sup> Defendant to the counter-claim, that is the Chief Land Registrar, was illegal, it is appropriate to note that it is the 1<sup>st</sup> and 2<sup>nd</sup> Defendants who had impleaded the Chief Land Registrar and therefore same were at liberty to withdraw their claim against same, without any hindrance or otherwise.
52. To my mind, a Party who has hitherto filed a suit or legal proceedings against another, is at liberty to withdraw the suit and/or a portion thereof and such withdrawal cannot be objected to and/or opposed by the adverse Party or at all.
53. Contrarily, a Party who has hitherto been sued and/or joined in the proceedings, which proceedings are thereafter sought to be withdrawn, is at liberty seek for and/or procure an appropriate order for costs and not otherwise.
- 52B. To vindicate the foregoing observation, it is expedient to take cognizance of the holding and decision vide the case of *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR, where the Supreme Court of Kenya held as hereunder;

“A party’s right to withdraw a matter before the court cannot be taken away. A court cannot bar a party from withdrawing his matter. All that the court can do is to make an order as to costs where it is deemed appropriate. Recently, a single judge of this Court in *John O.*



Ochanda v Telkom Kenya Limited, Motion No. 25 of 2014, in granting an application for withdrawal of a Notice of Appeal, stated inter alia:

“I do hold the view that a prospective Appellant is at liberty to withdrawal a Notice of Appeal at any time before the Appeal has been lodged and any further steps taken. No proceedings have commenced strictly. I am also of the view that just like under the Civil Procedure Rules or Court of Appeal Rules, the right to withdraw or discontinue proceedings or withdraw a Notice of Appeal respectively ought to be allowed as a matter of right subject to any issue of costs which can be claimed by the respondents if any.” (Emphasis provided)

54. Based on the foregoing, the contention by and/or on behalf of the Plaintiff's counsel that the adoption of the Notice of withdrawal and by extension the withdrawal of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants' case against the Chief Land Registrar was illegal and/or unlawful, is without any basis and/or substance.
55. Simply put, the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had a legitimate and Constitutional right to withdraw their claim against the Chief Land Registrar and that the only order that the adverse Party could accrue, seek for and/ or obtain was an order for costs.

**Issue Number 2 - Whether the Chief Land Registrar is a Necessary/Interested Party in the subject matter and hence deserving of being joined.**

56. Suffice it to recall that the Chief Land Registrar was hitherto sued and/or impleaded in the subject matter as a Defendant to the counterclaim filed by and/or on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants herein.
57. Nevertheless, on the 25<sup>th</sup> March 2022 the claim against the Chief Land Registrar was withdrawn by and/or on behalf of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants.
58. Having withdrawn the suit and/or segment of the counterclaim against the Chief Land Registrar, the Plaintiff is now keen to implead and/or join the Chief Land Registrar into the subject matter, not as a principal party, but as a Necessary/Interested Party, on the basis that his/her presence would be of great assistance to the court in resolving the issues in dispute and/or controversy.
59. Be that as it may, this attempt by and/or on behalf of the Plaintiff has been met with opposition from the Defendants, who contend that the Chief Land Registrar has no identifiable interest and/or stake in the subject matter.
60. True, the Chief Land Registrar is a public officer, whose principal role includes inter-alia, receipt of the transfer/conveyance instruments, registration of same and issuance of the requisite title documents, where appropriate.
61. Essentially, his involvement and participation in the registration process, is in execution and/or performance of his/her official duties and/or responsibilities. Consequently, same would ordinarily have no identifiable stake and/or claim in a dispute pertaining to ownership of land.
62. Suffice it to point out, that even in suits where the Chief Land Registrar or any Land Registrar, is not impleaded, same are however obligated to comply with and/or adhere to the terms and tenor of the orders that are issued by the courts.
63. In the premises, it is appropriate to point out that the joinder of the Chief Land Registrar or non-joinder of same, does not negate and/or affect the rights and/or interests of either Party in the dispute.



64. At any rate, it is imperative to take cognizance of the fact that a non-joinder or miss-joinder of a Party, is not fatal to the suit. For clarity, the court, dealing with the suit under reference, can still proceed and render appropriate orders and same shall be complied with.
65. To vindicate the foregoing observation, it is expedient to adopt and reproduce the provisions of Order 1 Rule 9 of the Civil Procedure Rules 2010, which provides as hereunder;
9. Misjoinder and non-joinder [Order 1, rule 9.]
- No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.
66. Notwithstanding the foregoing, even though the non-joinder of the Chief Land Registrar will not non-suit the Plaintiff herein, it is also worthy to note that the 1<sup>st</sup> and 2<sup>nd</sup> Defendants had hitherto considered and believed that the Chief Land Registrar was indeed a necessary party and hence same was impleaded as a Defendant to the counterclaim.
67. To my mind, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant created an impression that the involvement of the Chief Land Registrar was essential and/or paramount, in the determination of the Issues in Dispute.
68. Having created the impression of a legitimate expectation, it is therefore appropriate to find and hold that the Plaintiff herein would be entitled to have the Chief Land Registrar as a Party, even if for Nominal or superficial reasons and/or purpose.
69. In the premises, even though I have found and held that the Chief Land Registrar does not have any identifiable stake and/or claim in the subject dispute, but having hitherto been joined, before same was removed from the proceedings at the instance of the 1<sup>st</sup> and 2<sup>nd</sup> Defendants, it is my humble consideration that his presence, would be necessary and expedient in the matter.
70. Perhaps, the presence of the Chief Land Registrar in respect of the subject proceedings may mirror that of an Amicus curie/ Friend of the court, but it will help the court to dissect the various ownership documents placed before the court, by clarifying, which of the disputed documents is legitimate.
71. In the premises, I find and hold that the Chief Land Registrar is indeed a Necessary Party and/or friend of the court and therefore worthy of joinder, albeit for a limited purpose of giving evidence only in the matter.
72. To buttress the foregoing position, I adopt and rely in the holding of the Supreme Court of Kenya in the case of Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others [2014] eKLR, where the court stated as hereunder;

[18] Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way.

Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause. On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the



interest of justice and the public expectation. As a 'friend' of the Court, his cause is to ensure that a legal and legitimate decision is achieved.

**Issue Number 3 - Whether the proposed joinder would culminate into the creation of a new cause of action inconsistent with the claim at the foot of the Plaintiff.**

73. The Defendants herein have vehemently opposed the subject application on the basis that if the application is allowed, the proposed joinder shall culminate into the ventilation of a cause of action that is inconsistent with the cause of action currently reflected and/or contained at the foot of the Plaintiff.
74. Even though the Defendants have made the foregoing submissions, it is also not lost on the court that the same Defendants has also stated in their grounds of opposition that the joinder is unnecessary and inconsequential, insofar as no relief has been claimed and/or sought as against the Chief Land Registrar.
75. On the other hand, it is common ground that the Plaintiff is merely seeking to join the Chief Land Registrar, not as a Principal party, but as a Necessary Party, whose presence is said to be important to enable the court to determine all the issues in controversy.
76. Suffice it to point out, that no claim and/or relief can be made and/or sought for as against an Interested and/or Necessary Party and in this regard, the Plaintiff is within his right to have sought no relief as against the proposed Necessary Party.
77. To vindicate the legal position that no relief can be sought for against an Interested and/or Necessary Party, (as opposed to the Principal Parties), it is paramount to take cognizance of the decision vide Francis Kariuki Muruatetu & another v Republic & 5 others [2016] eKLR, where the Supreme Court of Kenya court held as hereunder;

[42] Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues, or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court.

78. Based on the foregoing, it is difficult to discern and/or appreciate the gravamen of the Defendants objection that the admission of the Chief Land Registrar as a necessary Party, shall culminate into the generation of a cause of action, which is contradictory to and inconsistent with the cause of action, currently reflected at the foot of the Plaintiff.
79. Conversely, there would be no new and/or inconsistent cause of action that shall arise and/or be laid out, either as against the Necessary Party or by the Necessary Party or at all.
80. Simply put, the cause of action shall remain the ones currently reflected and contained at the foot of the pleadings by the Primary Parties herein and the only adjustment shall be the evidence tendered by the Necessary Party, which shall help the court to illuminate the issues in Controversy and/ or in dispute.
81. In the premises, I am unable to agree with the submissions by the Defendants that the admission of the Chief Land Registrar shall culminate into and/or occasion an inconsistent cause of action, which would prejudice the Defendants herein or at all.



82. Consequently and in view of the foregoing, the decision in the case of *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, is not wholly relevant and applicable to the instant situation. For coherence, the Court of Appeal stated as hereunder;

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 v 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.” (underline supplied)

#### **Issue Number 4 - Whether the subject application ought to be granted.**

83. Having considered the dispute between the parties herein and taking into account that the Chief Land Registrar is generally the custodian of all the records pertaining the landed properties within the city of Nairobi and coupled with the fact that the suit herein touches on ownership of the suit property, it is expedient to observe that the presence of the Chief Land Registrar would illuminate some of the issues in dispute.
84. At any rate, the presence of the Chief Land Registrar, merely in a peripheral capacity as a Necessary party, who shall not be filling any pleadings, shall not prejudice and/or occasion injustice to either Party.
85. Be that as it may, it is the duty and/or mandate of the court to render justice and therefore the court ought not to shut its eyes and forsake its Constitutional mandate, where it is said that some Evidence, somewhere may be of great assistance to the Court in the discharge of her mandate.
86. In the circumstances, I am of the considered opinion that the subject application ought to be allowed and the Chief Land Registrar be admitted, albeit as a necessary party, for purposes of adduction of evidence only.

#### **Final Disposition**

87. Having dealt with and/or evaluated the issues for determination, I come to the inescapable conclusion that the presence of the proposed necessary Party, shall be essential and/or paramount to the effective and effectual determination of the issues in controversy.
88. In the premises, I am minded to allow the subject application, albeit on condition that the Chief Land Registrar is hereby admitted into the proceedings as a Necessary Party only.



89. Besides, the Chief Land Registrar's participation and/or involvement in the subject proceedings, shall be limited and/or circumscribed to attending court, either by himself or such other designated officer and for adduction of evidence only.
90. For clarity, as a Necessary Party, the Chief Land Registrar shall not file any pleadings in the matter or at all. However, same is at Liberty to file and serve Witness Statement(s), if any and such Statements, shall be filed and served prior to the return Date, which shall be agreed upon after the rendition of the subject Ruling.
91. Nevertheless, Costs of the application shall abide the outcome of the suit.
92. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 7TH DAY OF JULY 2022.**

**HON. JUSTICE OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Ashford Murioki for the Plaintiff/Applicant

Mr. King'ati Ndirangu for the 1st Defendant/Respondent

Ms. Karano for the 3rd Defendant/Respondent\*\*

