



**Chege (Suing as the Personal Representative of the Estate of Julius Chege Kiongo - Deceased) v Amaingu (Environment and Land Appeal 108 of 2016) [2022] KEELC 14571 (KLR) (3 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14571 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT AND LAND APPEAL 108 OF 2016  
FO NYAGAKA, J  
NOVEMBER 3, 2022**

**BETWEEN**

**ESTHER NJERI CHEGE ..... PLAINTIFF  
SUING AS THE PERSONAL REPRESENTATIVE OF THE ESTATE OF JULIUS  
CHEGE KIONGO - DECEASED**

**AND**

**JAMEN KIYAGI AMAINGU ..... DEFENDANT**

**RULING**

\*\*\*ARGUMENTS

**The Application**

1. Relying on section 3, 3A and 100 of the *Civil Procedure Act* and order 8, rules 3 and 5 and order 51, rule 1 of the *Civil Procedure Rules*, the plaintiff filed the instant motion by notice dated June 27, 2022 on July 6, 2022. He sought the following reliefs:
  1. That the plaintiff be granted leave to amend her plaint herein as per the draft annexed hereto.
  2. That costs of this application be in the cause.
2. The grounds in support of the application were captured on the face of the motion and the affidavit of the plaintiff. The fundament of the application was that the plaintiff had since discovered new issues pointing to fraudulent acts, upon being served with the defendant's supplementary list of documents. Her intention was to enjoin other parties as defendants and file an additional list and bundle of documents to assist this court determine the real issues in controversy. The draft amended plaint was annexed to the application and marked EC1.



3. In justification for the application, the plaintiff stated that the proposed amendments were consistent with the claim as they arose from the same chain of transactions forming the basis of the claim. She added that the application was timeous and this court is vested with discretion to allow amendments at any stage of the proceedings before judgment. Citing that the amendments would occasion no prejudice upon the defendant, the plaintiff proposed that it was in the interest of justice that the orders sought be granted.

### **The Response**

4. The defendant filed his grounds of opposition dated July 20, 2022. Firstly, he cited falsified depositions by the plaintiff because to him the plaintiff purported to depose that she was an adult male. Secondly, he challenged that no particulars of fraud had been delineated by the plaintiff to necessitate the amendment of the plaint; and raised wariness as to the time the application is being invoked being when the plaintiff was about to be cross-examined. Thirdly, he impugned that the additional parties and issues intent on being introduced as well as the particulars of fraud did not establish that they would determine the real issues in controversy. Finally, he opposed the application on grounds that the alleged new fraud discovered related to events that occurred in 1965 when the defendant had no interest over the suit land.

### **Submissions**

5. Parties extended their arguments by relying on their respective rival written submissions. The plaintiff filed hers on October 13, 2022 while the defendant filed his on October 18, 2022.

### **Analysis and Determination**

6. I have carefully considered the application, the affidavits and the submissions filed by the respective parties. Substantively, the general power to amend pleadings is to be found in section 100 of the *Civil Procedure Act*. It provides that the power to amend pleadings is available at any stage of the proceedings for the purpose of determining the real issue or question raised. This provision is repeated in order 8, rule 5 of the *Civil Procedure Rules, 2010*. Order 8, rule 3 of the *Civil Procedures Rules* gives this court discretion to order amendment of pleadings. Under sub-rule 5, an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the same arises out of the same facts.
7. The law on amendment of pleadings is not as grey as it may deem to be painted. The principles on amendment of pleadings are now settled. The *Halsbury's Laws of England*, 4<sup>th</sup> ed (re-issue), vol 36(1) at paragraph 76, state the following on amendment of pleadings:

“...The purpose of the amendment is to facilitate` the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”
8. Since the power to grant or refuse such a prayer is discretionary, I am guided by a number of decisions of courts regarding amendments. The same are reproduced in the paragraphs hereunder.



9. The Court of Appeal in the case of *Central Kenya Limited vs Trust Bank Limited* (2000)2 EA 365 held that:

“That a party is allowed to make such amendments as may be 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.”

10. In *Eastern Bakery vs Castelino* (1958) 1 EA 461 (CAK) the court held:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

11. The Court of Appeal in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR held as follows:

“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 - 12<sup>th</sup> 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.”

12. Thus, guided by the above, I now turn to the draft amended plaint annexed to the plaintiff’s application. I observe that the plaintiff proposes to introduce new parties, new facts and new prayers.



In my ruling of May 11, 2022 in ELC No 34 of 2019, I granted the parties in ELC No 108 of 2016 leave to amend their pleadings if the amendments in ELC No 34 of 2019 would touch on the present case.

13. Looking at the draft proposed amendments, it appears to me that the plaintiff is intent on extending compliance with those orders. A keen perusal and analysis of the draft amended plaint shows that the same is a mirror reflection of the averments, parties and some of the prayers captured in ELC No 34 of 2019, which matter is to be heard with the instant suit. They are basically an import of ELC No 34 of 2019.
14. In my view, they do not thus change the character of the suit or cause of action to a substantially new one. I further find no prejudice that will be occasioned on the defendant who will equally have leave to amend his defence upon service of the amended plaint if need be. Consequently, I allow the notice of motion dated June 27, 2022 in the following terms:
  1. The plaintiff shall file and serve on all parties her amended plaint as per the draft annexed to her application and any documents not served on any or the added parties by way of amendment within seven (7) days from the date of this order.
  2. The defendant shall have fourteen (14) days to file and serve his amended statement of defence from the date of service.
  3. The matter shall be mentioned on December 5, 2022 to confirm compliance and take further directions.
  4. The costs of the application shall abide by the outcome of the suit.

Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL THIS 3<sup>RD</sup>  
DAY OF NOVEMBER, 2022**

**HON DR. *IUR* FRED NYAGAKA**

**JUDGE, ELC KITALE**

