



REPUBLIC OF KENYA



**Otim v Gitari & 2 others (Civil Case E667 of 2021)  
[2024] KEHC 3039 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)**

Neutral citation: [2024] KEHC 3039 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E667 OF 2021  
A MABEYA, J  
MARCH 15, 2024**

**BETWEEN**

**BENNY BEN OTIM ..... PLAINTIFF**

**AND**

**JOSEPH BRADELY GITARI ..... 1<sup>ST</sup> DEFENDANT**

**KEISHA WANJIRU GITARI ..... 2<sup>ND</sup> DEFENDANT**

**KENNA RANCHING COMPANY ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling determines the plaintiff's application dated 29/10/2021. The application was brought under section 3A of the *Civil Procedure Act* (Cap 21 Laws of Kenya) order 8 rules 3(1), (2), (5) of the *Civil Procedure Rules* 2010, Article 159 of *the Constitution* of Kenya.
2. The application sought orders for the amendment of the plaint dated 24/6/2021 to include more information and evidence and for the amended plaint to be deemed to be duly filed with leave.
3. The application was supported by the grounds on the face of it and the supporting affidavit of Benny Ben Otim sworn on 29/10/2021. It was averred that the plaint was filed simultaneously with an application for stay and it is upon consideration of the defendant's pleadings that the plaintiff noted that the defendant had committed forgeries.
4. That the 1<sup>st</sup> defendant had forged the signature of the 2<sup>nd</sup> defendant and there was an issue with the official transfer form. That based on these facts, the amendment would assist the Court in determination of the real issues in controversy and the other parties would not be prejudiced by the same.



5. The 1<sup>st</sup> 2<sup>nd</sup> and 3<sup>rd</sup> defendant opposed the application vide grounds of opposition dated 21/1/2022. It was contended that the application for amendment did not contain a specific substantive order for amendment and the court lacked jurisdiction to entertain the orders sought in the annexed amended plaint. That the issue on ownership of the property known as Kajiado/Kisaju/7947 was also an issue before ELC Case No 833/2015 where the plaintiff, 1<sup>st</sup> and 3<sup>rd</sup> defendant were parties.
6. The application was canvassed by way of written submissions which I have considered. In its written submissions the applicant reiterated the facts laid out in the supporting affidavit. It was submitted that the amendment was to add facts that were discovered after the defendant filed its defence and the replying affidavit. That leave should be granted to allow all the relevant documents to be put on record. That it will prejudice no one.
7. The respondent submitted that the plaintiffs 2<sup>nd</sup> prayer as framed did not seek an amendment of the plaint but rather to include documents in the pleadings. That the Court lacked jurisdiction to entertain the amended plaint since the issue of ownership of the property LR No Kajiado/Kisaju/7947 was already subject to ELC No 833 of 2015 Kajiado.
8. I have considered the pleadings and the submissions on record. The main issue for determination is whether the plaintiff should be granted leave to amend the plaint to include new evidence. Section 100 of the *Civil Procedure Act* and Order 8 rule 3 of the *Civil Procedure Rules*, 2010, gives the Court discretion to allow amendment of pleadings.
9. Order 8 rule 3 provides: -
  - “(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 sub-rule (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 sub-rule if it thinks just so to do.
  - (3) An amendment to correct the name of a party may be allowed under sub-rule (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 sub-rule (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 sub-rule (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.”

10. In the present case, the plaintiff instituted the suit against the defendant vide a plaint dated 24/6/2021. Simultaneously with the plaint, the plaintiff filed an application for stay. The plaintiff’s contention was that upon perusal of the 1<sup>st</sup> defendant’s replying affidavit to the application for stay, he noted that the 1<sup>st</sup> defendant had made some forgeries and it is on this basis that the amendment is sought to include the new information.
11. On their part, the defendants contended that the plaintiff intended to amend the plaint to include a prayer concerning the ownership of land title No Kajiado/Kisaju /7947 which the Court has no jurisdiction to preside over and that is the subject of another suit in the Environment and Land Court.
12. In *Joseph Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 (UR) cited in *St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR, the Court of Appeal set out the principles for granting amendment of pleadings: -
  - a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b) the amendments should be timeously applied for;
  - c) power to amend can be exercised by the court at any stage of the proceedings;
  - d) 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;
  - e) 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 Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.”
13. In *K. K. Lodgit Limited v Geminia Insurance Company Ltd & another* (2021) eKLR the court held that: -

“... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party’s case.”
14. In view of the foregoing, courts will not unnecessarily fetter their discretion in allowing amendment to pleadings. It may however be fettered where an amendment seeks to introduce a new cause of action or for good reason. However, the application should be brought within a reasonable time and should not affect an accrued legal right.
15. I have considered the proposed amendment and I note that the amendment does not seek to introduce any new cause of action. It is not correct that it will introduce a cause of action on which the Court has no jurisdiction.
16. In the premises, I find that the application is meritorious and I allow the same on the following terms: -



- a) That the applicant be and is hereby granted leave to amend his plaint in terms of the draft amended plaint annexed to the application.
- b) The amended plaint be filed and served within 14 days of the date hereof.
- c) Upon service, the defendants be at liberty to file and serve an amended defence within 14 days of service.
- d) A reply to defence, if any, be filed and served within 7 days of service of the amended defence.
- e) Costs to the defendants in any event.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 15<sup>TH</sup> DAY OF MARCH, 2024.**

**A. MABEYA, FCI Arb**

**JUDGE**

