



**Muchege v Nkungu (Environment and Land Appeal E016 of 2024)  
[2025] KEELC 6431 (KLR) (22 September 2025) (Judgment)**

Neutral citation: [2025] KEELC 6431 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT CHUKA  
ENVIRONMENT AND LAND APPEAL E016 OF 2024**

**BM EBOSO, J  
SEPTEMBER 22, 2025**

**BETWEEN**

**JULIA WANJA MUCHEGE ..... APPELLANT**

**AND**

**STEPHEN MUGAO NKUNGU ..... RESPONDENT**

*(An Appeal against the Ruling of the Principal Magistrate Court at Marimanti (Hon Mbayaki Wafula PM), rendered on 4/9/2024 in Marimanti PMC E & L Case No. E008 of 2021)*

**JUDGMENT**

**Introduction**

1. This is an interlocutory appeal through which the appellant challenges the ruling of the Principal Magistrate Court at Marimanti (Hon Mbayaki Wafula PM) dated 4/9/2024 in which the lower court declined to grant the appellant leave to amend her pleadings. In addition, the appellant is aggrieved by the lower court's decision to, suo motto, issue an interlocutory order restraining the parties to the suit against "any further dealings" on what the lower court described as "the locus in quo and the subdivisions." The two key issues that fall for determination in the appeal are:
  - (i) Whether the appellant's application dated 15/9/2023 met the criteria for granting leave to amend pleadings; and
  - (ii) Whether the lower court erred in, suo motto, issuing an order barring dealings in the suit land. I will briefly outline a brief background to the appeal and summarize the parties' submissions before I dispose the two issues.



## Background

2. On 20/4/2021, vide a plaint dated 20/4/2021, the appellant sued the respondent in the Principal Magistrate Court at Marimanti, seeking:
  - (i) a permanent injunction restraining the respondent against entering onto, working on, remaining on or doing any act that interferes with the appellant's right and use of land parcel number Tharaka/Rukurini/1529 (hereinafter referred to as "the suit land");
  - (ii) damages for loss of user and access to the suit land; and
  - (iii) costs of the suit.
3. The case of the appellant was that, she was the registered proprietor of the suit land. In October and November 2020, the respondent trespassed onto the suit land, fenced off part of the suit land, and started ploughing part of the suit land. On 7/4/2021, the respondent, in the company of his workmen, entered onto the suit land with oxen ploughs and started ploughing part of the suit land despite protests from the appellant. She added that the respondent, similarly, trespassed onto the suit land on 8/4/2021 after orchestrating her arrest by the Police and ploughed the land. It was her case that the respondent had no lawful cause for entering the suit land.
4. The respondent filed a defence dated 25/8/2021 and an amended defence and counterclaim dated 2/3/2022. He averred that the suit land was a subdivision illegally created by the appellant out of land parcel number Tharaka/ Rukurini/548 which belonged to the appellant's late husband, the late Zakayo Mucee Maingi (hereinafter referred to as "the deceased"). He contended that during his lifetime, vide two agreements dated 21/9/2010 and 11/10/2011, the deceased sold to him 6 acres out of parcel number Tharaka/Rukurini/548, adding that the appellant was a witness to one of the two agreements. He took possession of the 6 acres and built on the land two houses; one permanent and one semi-permanent. He added that upon the death of the deceased, the appellant fraudulently and illegally transferred parcel number Tharaka /Rukurini/548 into her name without any grant from the succession court and fraudulently created parcel numbers Tharaka/Rukurini/811-814 as subdivisions out of it. He contended that parcel number Tharaka /Rukurini/1529 was one of the parcels illegally created in a subsequent generation of subdivisions out of parcel number Tharaka/Rukurini/548. He denied being a trespasser on the suit land, contending that he was a lawful purchaser who had legitimately acquired 6 acres from the appellant's late husband during his lifetime.
5. By way of counterclaim, the respondent prayed for:
  - (i) an order cancelling all titles and subdivisions emanating from parcel number Tharaka/Rukurini/548;
  - (ii) an order directing the Land Registrar to "revert back the land to the original number"; and
  - (iii) a permanent injunction restraining the appellant against entering, selling or interfering with the 6 acres owned and occupied by him;
  - (iv) special damages; and
  - (v) costs of the suit and mesne profits.
6. Together with the plaint dated 20/4/2021, the appellant filed an application of even date, seeking an interlocutory injunction restraining the respondent against entering onto, cultivating, remaining on, or doing any act that interfered with her use and access to parcel number Tharaka /Rukurini/1529. On the same day, 20/4/2021, the court granted the appellant an *ex parte* interim injunction restraining the



- respondent against entering, cultivating or doing any act that would interfere with the appellant's use and access to parcel number Tharaka/Rukurini/1529. The court fixed the application for interpartes hearing on 4/5/2021. When the application came up for interpartes hearing on 4/5/2021, both the respondent and his advocate were absent. Consequently, the lower court heard the application ex-parte and rendered a ruling dated 4/5/2021 in which it granted the interlocutory injunctive order.
7. Prior to delivery of the above ruling, the appellant filed an application dated 28/4/2021, in which she sought an order detaining the respondent in prison for 6 months for breach and disobedience of the court order issued on the 20/4/2021. Vide a ruling dated 8/7/2021, the lower court granted the order and the respondent was subsequently sent to prison. He served the sentence.
  8. It does emerge that soon after the appellant obtained an order committing the respondent to jail, she undertook a subdivision of parcel number Tharaka/Rukurini/1529 into 19 parcels, namely Tharaka/Rukurini/1808-1826. The parcel register relating to Tharaka/Rukurini/1529 was closed on subdivision on 19/8/2021. It does also emerge from the record of appeal that two out of the 19 subdivisions (parcel numbers 1824 and 1825) were registered in the name of the appellant's advocate in the case, Cicilio Murango Mwenda. The record also shows that there are titles created by the appellant in subsequent generations of subdivisions. (See pages 271 – 301 of the record of appeal). Some of the subsequent titles are in the name of Kenkelvin Kimathi Mbaka.
  9. Subsequent to the above subdivisions, the respondent filed an application dated 22/8/2022 seeking an order striking out the appellant's suit on the ground that it did not disclose any reasonable cause of action against him in light of the subdivisions and closure of the parcel register. The application was rejected vide a ruling dated 8/6/2022.
  10. Against the above background of subdivisions, the appellant filed an application dated 15/9/2023, seeking leave to amend her plaint to reflect the suit land as N. Tharaka /Rukurini/1812 which measures 0.046 hectares. Her case was that since the date of filing suit, the suit land, which measured 4.70 hectares (11.6 acres) had been subdivided. She contended that the trespass (cause of action) affected only a small portion of the suit land which she had surveyed and titled out as parcel number N. Tharaka/Rukurini/1812, hence the need to amend her plaint to reflect the above parcel number.
  11. The respondent opposed the application through a replying affidavit dated 14/11/2023. He termed the application an abuse of the court process meant to delay the disposal of the case and brought in bad faith. He further contended that the amendments were introducing a new cause of action and were meant to defeat his interest in the suit land. He added that the 6 acres that he bought fell within what the appellant surveyed as parcel number N. Tharaka/Rukurini/1529 measuring 11.6 acres which she subsequently subdivided into parcel numbers 1808 to 1826. He urged the court to reject the application.
  12. Subsequent to the foregoing, vide an application dated 29/11/2023, the respondent sought an order disqualifying the firm of Murango Mwenda & Co. Advocates from representing the appellant on the ground that Cicilio Murango Mwenda was now the registered proprietor of two of the subdivisions created out of the suit land. The appellant opposed the application through grounds of opposition dated 20/6/2024.
  13. The appellant's application dated 15/9/2023 seeking leave to amend the plaint and the respondent's application dated 29/11/2023 seeking an order disqualifying the firm of Mwenda Murango & Co. Advocates were disposed through the impugned ruling, dated 4/9/2024. The plea for an order of disqualification was found merited and was granted. The plea for leave to amend the plaint was found unmerited and was rejected.



## Appeal

14. Aggrieved by the Lower Court's refusal to grant her leave to amend her pleadings, the appellant brought this appeal, advancing the following ten (10) verbatim grounds:
1. The Learned Magistrate misapprehended the nature of the amendment sought by the appellant, and the applicable law on amendment of pleadings and therefore erred in law and fact in dismissing the appellant's application thereby occasioning her a great miscarriage of justice.
  2. The Learned Magistrate erred in law and fact by failing to find that the amendment sought by the appellant was made in good faith and was justified and necessary to enable the court to determine the real question or issues in controversy between the parties.
  3. The Learned Magistrate erred in law and fact and misdirected himself in finding that the original cause of action no longer existed and that the respondent had no right to counterclaim in the event that the amendment was allowed when he indeed would be able to raise his defence as a purchaser since it was undisputed that the ground he claimed fell under the new land reference number sought to be introduced by the amendment.
  4. The Learned Magistrate erred in law and fact by failing to find that the set of facts giving rise to the cause of action in respect to the new parcel of land L.R No. Tharaka/Rukurini/1812 were the same set of facts as the pleadings sought to be amended, and the issues for determination after the amendment remained the same and therefore the appellant's application was well within the provisions of Order 8 rule 3
  5. The Learned Magistrate erred in law and fact in failing to find that the hearing of the main case had not yet commenced and therefore no party would be prejudiced by allowing the application for amendment.
  6. The Learned Magistrate erred in law and fact in failing to find that the appellant would be profoundly prejudiced by denial of the leave to amend her pleadings to the extent that she would lose the opportunity to plead the current status of the suit land and seek orders on the relevant parcel of land in dispute.
  7. The Learned Magistrate erred in law and fact in failing to appreciate that without the amendment sought by the plaintiff, the orders that may be made for or against either of the parties will not be capable of enforcement since the original suit land reference number L.R.No. Tharaka/Rukurini/1529 had changed by virtue of the subdivision thereof.
  8. The Learned Magistrate erred in law and fact in granting an order/relief that was neither pleaded nor prayed for by the parties.
  9. The Learned Magistrate erred in law and fact and contradicted himself in issuing a restriction on the suit land and the subdivisions thereof when he had found that the cause of action had changed and the plaintiff's only avenue was to file a fresh suit in pursuit of the new land reference Tharaka/Rukurini/1812.
  10. The decision of the Learned Magistrate was bad in law and in the eyes of a court of equity; went contrary to the rules of natural justice, the overriding objective and Article 50 (1) of *the Constitution* of Kenya 2010 and was therefore erroneous.



15. The appellant urged this court to set aside the ruling of the lower court and grant an order allowing the appellant's application dated 15/9/2023.

### **Appellant's Submissions**

16. The appeal was canvassed through written submissions dated 19/5/2025, filed by Makena Mbogo & Co Advocates. Counsel for the appellant identified the following as the four issues that fell for determination in the appeal:
- (i) Whether the trial court erred in law and fact by refusing the appellant's application to amend her plaint;
  - (ii) Whether the amendment would prejudice the respondent;
  - (iii) Whether denial of the amendment prejudice the appellant;
  - (iv) What the ends of justice demand.
17. On whether the lower court erred in refusing to grant the appellant leave to amend her plaint, counsel cited Order 8 rule 3 (1) of the Civil Procedure Rules which grants trial courts jurisdiction to allow amendments to pleadings at any stage of proceedings for the purpose of enabling a determination of the real questions in controversy. Counsel faulted the lower court for finding that the cause of action had changed merely because the reference number of the affected portion of the suit land had changed. Counsel contended that the portion of the suit land affected by the trespass remained the same, adding that the amendment was necessary for enabling proper enforcement of the ultimate decree. Counsel argued that the respondent's contention that the amendment would introduce a new cause of action was misplaced, emphasizing that the physical land remained the same and the cause of action (trespass) also remained the same.
18. On whether denial of the amendment would prejudice the respondent, counsel submitted that the lower court was wrong in holding that the respondent would not have the opportunity to raise a counterclaim, adding that the hearing of the case had not started. Counsel pointed out that the respondent did not dispute the fact that the reference number of the suit land had changed.
19. On whether denial of the amendment would prejudice the appellant, counsel submitted that the ruling of the lower court had the effect of blocking the appellant from obtaining a relief relating to the suit land. Counsel added that denying the appellant the opportunity to amend her pleadings violated the right to a fair hearing under Article 50 (1) of *the Constitution*, adding that the ruling of the lower court denied the appellant the right to pursue an enforceable relief.
20. On whether the lower court erred in granting a restriction suo motto, counsel faulted the lower court for granting the order suo motto after denying the appellant the opportunity to amend her pleadings. Counsel further faulted the lower court for issuing a restriction order without any application or any pleadings from either party. Counsel urged the court to allow the appeal with costs in the interest of justice.

### **Respondent's Submissions**

21. The respondent filed written submissions dated 20/6/2025 through M/s J. Nelima Associates & Co Advocates. Counsel cited Order 8 rule 3 (5) of the Civil Procedure rules and submitted that the jurisdiction to grant leave to amend pleadings is discretionary. Counsel argued that the plea for leave to amend the plaint was not made in good faith, adding that the amendments had the effect of denying the respondent a defence. Counsel argued that the appellant was malicious and ill-motivated in her action



of subdividing the suit land while the suit was pending, adding that the real motive for the subdivision was to remove from the suit the portion of the suit land which she had transferred to her advocate on record in the matter. Counsel argued that this was aimed at defeating the respondent's claim.

22. Counsel for the respondent further submitted that the appellant sought amendments after she realized her claim had become moot following the issues which the respondent raised in her application that sought an order striking out the suit for failure to disclose a cause of action. Counsel emphasized that the subdivision extinguished the appellant's cause of action.
23. On the lower court's decision to grant a relief that was not sought, counsel submitted that the jurisdiction of the court is not limited to granting reliefs based on specific prayers. Counsel added that there are exceptions when courts exercise inherent powers to grant orders in the interest of justice and in dealing with procedural matters to prevent abuse of the court process and to protect the sanity of the court. Counsel urged the court to reject the appeal.

### **Analysis and Determination**

24. I have read and considered the original record of the lower court; the record filed in this appeal; the grounds of appeal; and the parties' respective submissions in the appeal. I have also considered the relevant legal frameworks and jurisprudence. As pointed out in the introductory part of this judgment, the two key issues that fall for determination in the appeal are:
  - (i) Whether the appellant's application dated 15/9/2023 met the criteria for granting leave to amend pleadings; and
  - (ii) Whether the lower court erred in, suo motto, issuing orders barring further dealings in the suit land. Before I analyse and dispose the two issues, I will briefly outline the principle that guides this court when exercising appellate jurisdiction. I will also outline the law on amendment of pleadings.
25. The task of a first appellate court was summarized by the Court of Appeal in the case of *Susan Munyi v Keshar Shiani* (2013) eKLR as follows:

“As a first appellate court our duty of course is to approach the whole of the evidence on record from a fresh perspective and with an open mind. We are to analyze, evaluate, assess, weigh, interrogate and scrutinize all of the evidence and arrive at our own independent conclusions.”
26. The principle was similarly outlined in *Abok James Odera t/a A. J Odera & Associates v John Patrick Machira t/a Machira & Co Advocates* [2013] eKLR as follows:

“This being a first appeal, we are reminded of our primary role as a first appellate court, namely, to re-evaluate, re-assess and re-analyse the extracts on the record and then determine whether the conclusions reached by the learned trial judge are to stand or not and give reasons either way.”
27. Civil courts exercising jurisdiction under the *Civil Procedure Act* have discretionary power to grant leave to a party to amend pleadings. The discretionary jurisdiction is granted by Order 8 rule 3 of the Civil Procedure Rules which provides as follows:
  - “(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.”

28. The prevailing jurisprudence on amendment of pleadings is that, unless it is demonstrated that the opposite side will be prejudiced by the amendments or suffer injustice which cannot be compensated by an award of costs, a plea to amend pleadings before commencement of trial should be allowed. Indeed, the Court of Appeal echoed this principle in *Central Kenya Ltd v Trust Bank Ltd & 5 others* (2000) eKLR in the following words:

“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.”

29. The application which gave rise to the impugned ruling was brought prior to commencement of trial hearing. The reasons which informed the lower court’s refusal to grant the appellant leave to amend her plaint were captured by the court as hereunder:

“Court is now chasing after shadows with the plaintiff’s conduct of subdividing the locus in quo into multiple portions of land. The big question may at the end be whether the orders that may be made for or against the plaintiff or defendant will be capable of enforcement or they will be moot having been overtaken by events.

“The original cause of action no longer exists, and the defendant has no right to counterclaim. To grant leave to amend without a corollary opportunity for the defendant to counterclaim on the new cause of action will not breath any life into the oxygen principle.”

30. The displeasure of the lower court is clearly discernible from the opening sentence in the above quoted excerpt. This court has considered the grounds outlined by the lower court in declining the plea for leave to amend the plaint. Refusal to grant leave on the above grounds would not resolve the problem created by the appellant in her endeavor to remove the suit land from the reach of the respondent. Secondly, refusal to allow amendments would, effectively, make it impossible to adjudicate and settle the questions raised in the cause. Why does this court say so? The respondent has a counterclaim. This factual positon escaped the attention of the lower court. One of the subject matters of the counterclaim is Tharaka/Rukurini/1529, a subdivision out of parcel number Tharaka/Rukurini/548. The counterclaim targets all the subdivisions created out of Tharaka/Rukurini/548. As observed, some of the subdivisions are now in the names of people who are not parties to the counterclaim. Like the appellant, the respondent, too, needs to amend his counterclaim for the sake of effectual adjudication of the key questions in the dispute and for enforceability of any ultimate decree. Without amendments to the parties’ pleadings to articulate the correct factual positons relating identities of the affected parcels and the registered proprietors of those parcels, the key question in dispute will not be adjudicated effectually.
31. Secondly, the respondent had the opportunity to move the court and obtain orders preserving the relevant land registers. He did not do that. The respondent having elected to do nothing in terms of moving the court to preserve the suit land, the court’s displeasure at the appellant was not fully justified.
32. Given the above circumstances, this court takes the view that amendment of pleadings by both parties was necessary for the purpose of enabling the court to effectually adjudicate and settle all the questions involved in the dispute. It was an error on part of the lower court when it declined to grant the appellant leave to amend her plaint. My finding on the first issue is that the lower court erred.



33. Did the lower court err in, suo motto, issuing an interlocutory order barring dealings in the suit land? Kenya's civil legal system is an adversarial one. Courts are generally expected to avoid aiding one litigant against the other. They are not at liberty, to suo motto, issue injunctive or restraining orders in suits that come before them. They are supposed to be moved through formal applications before they issue injunctive/ restraining orders.
34. As earlier stated, it was the responsibility of the respondent to formally move the court for orders preserving the suit land and the land registers relating to the suit land. The respondent having elected not to do so, it was clearly an error on part of the lower court when it, suo motto, issued the restraining order. It is not lost to this court that some of the registered proprietors who were barred by the unsolicited order, such as Cicilio Murango Mwenda and Ken Kelvin Kimathi Mbaka, were not and are not parties to the suit in the lower court. They were condemned unheard. This was an error.
35. Lastly, the grounds of appeal did not challenge the order of the lower court disqualifying the firm of Murango Mwenda & Co. Advocates. I will not disturb the finding and order of the lower court on that issue.
36. In the relief part of the memorandum of appeal, the appellant sought an order setting aside the entire ruling of the lower court. I will not grant that relief. I will instead grant a relief that only focuses on the lower court's refusal to grant the appellant leave to amend her plaint and on the unsolicited restraining order.
37. On costs, the errors giving rise to this appeal were committed by the lower court. Consequently, parties will bear their respective costs of the appeal.

### **Disposal Orders**

38. For the above reasons, the appeal herein is partially allowed to the following extent:
  - a. The order of the lower court made on 4/9/2024 declining the appellant's plea for leave to amend her pleadings is set aside and is replaced with an order granting the appellant leave to amend her pleadings. The lower court will be at liberty to set timelines.
  - b. The respondent shall have corresponding leave to amend his pleadings (both the defence and the counterclaim).
  - c. The order made suo motto on 4/9/2024 barring dealings in what the lower court described as "the locus-in-quo and the subdivisions" is hereby set aside.
  - d. Parties shall bear their respective costs of this appeal.

**DATED, SIGNED AND DELIVERED AT CHUKA THIS 22ND DAY OF SEPTEMBER, 2025.**

**B M EBOSO [MR]**

**JUDGE**

In the Presence of:

Ms. Mbogo for the Appellant

Respondent - Absent

Court Assistant – Mr. Mwangi

