



Mibei (Suing as the Legal Representative of the Estate of Elizabeth Kilele) v Kiriimi (Sued as the Legal Representation of the Estate of Kiriimi M’Muna) & 4 others (Environment and Land Case 360 of 2018) [2025] KEELC 6625 (KLR) (2 October 2025) (Ruling)

Neutral citation: [2025] KEELC 6625 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 360 OF 2018
OA ANGOTE, J
OCTOBER 2, 2025**

BETWEEN

KENNETH KIPKIRUI MIBEI (SUING AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF ELIZABETH KILELE) PLAINTIFF

AND

FAITH NAITORE KIRIMI (SUED AS THE LEGAL REPRESENTATION OF THE ESTATE OF KIRIMI M’MUNA) 1ST DEFENDANT

MERCY MAKENA KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) MERCY MAKENA KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) 2ND DEFENDANT

NICHOLAS KIMATHI KIRIMI (SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF KIRIMI M’MUNA) 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

NAIROBI CITY COUNTY 5TH DEFENDANT

RULING

Introduction

1. Vide a Notice of Motion dated 13th March, 2025 anchored on the provisions of Order 8 Rule 3(1), 5, 7 and 8 of the Civil Procedure Rules, 2010, and Section 3A of the *Civil Procedure Act*, the Plaintiff/Applicant seeks the following reliefs:
 - i. The Plaintiff/Applicant be allowed to amend its plaint dated 17th August, 2018 as per the draft annexed hereto.



- ii. Leave be granted to the Plaintiff/Applicant be allowed to file additional documents and substitute witness statements.
 - iii. The Plaintiff's/Applicant's amended plaint annexed hereto be treated as the Plaintiff's amended plaint and that the same be deemed as having been duly filed and served upon payment of requisite fees.
 - iv. The costs of this application be costs in the cause.
2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Shadrack Kipkorir, an Advocate with the conduct of the matter on behalf of the Plaintiff/Applicant. He deponed that on the 7th November, 2023, he erroneously filed an amended Plaint in the belief that the court had granted him leave to do so and that vide its Ruling of 27th February, 2025, the court clarified that no such leave was sought nor granted and struck out the amended Plaint.
 3. Counsel Kipkorir states that the Plaintiff is desirous of amending his pleadings to allow it present all the facts and evidence fully in support of his case, and that the amended Plaint raises triable issues on the suit property being held in trust for the benefit of the beneficiaries and the amendments are intended to help the court adjudicate the real issues in controversy.
 4. He urges that the time allowed for amendment under the Civil Procedure Act and Rules has since expired hence the need to seek leave and that no prejudice will be occasioned to the Defendants by the amendments.
 5. In response to the Motion, Mercy Makena Kirimi, the 2nd Defendant, on her own behalf and on behalf of the 1st and 3rd Defendants/Respondents, swore a Replying Affidavit on the 8th April, 2025. She deponed that the Motion is an abuse of process as the amended Plaint seeks to re-introduce the issues already raised in the previous suit being ELC No 147 of 2019.
 6. It was deposed that in the aforesaid suit, the Plaintiff alleged that the deceased, Elizabeth Kilele, committed fraud by selling the parcel of land known as L.R 330/507, and that the aforesaid suit was dismissed for being time barred and there is a pending appeal before the Court of Appeal.
 7. According to Ms Kirimi, in September, 2015, the Plaintiff lodged a complaint with the Director of Criminal Investigations alleging that the deceased, Elizabeth Kilele sold the suit property without consulting him, and that the DCI conducted an investigation and concluded that the deceased genuinely sold the property to the late Kirimi M'muna.
 8. She asserts that a crystal clear conflict of interest exists as the deceased's position in this suit materially differs from that asserted by the Plaintiff; that the Plaintiff's confirmation that the deceased sold the property is consistent with their Defence that their late father, Mr Kirimi M'Muna, purchased the property vide Title Number L.R No 330/507 and that the titles represented as L. R 330/1360 are forgeries.
 9. The 1st Defendant noted that the Plaintiff is aware that the deceased, a holder of an Indenture dated 21st December, 1993 in her favour, subsequently conveyed the suit property by an Indenture dated 17th November, 2005 in favour of Kirimi M'muna(deceased) and that in light of the foregoing, the entire suit is compromised and should, together with the Motion be dismissed.
 10. The other Defendants did not participate in the Motion.



Submissions

11. The Plaintiff/Applicant filed submissions on 15th April, 2025. Counsel submitted that amendment of pleadings is governed by Section 100 of the Civil Procedure Act as read with Order 8 Rule 3(1) and (5) of the Civil Procedure Rules, all of which affirm that the court has jurisdiction to allow amendments at any time, notwithstanding that the amendment may have the effect of adding or substituting a new cause of action provided it arises out of the same facts or substantially the same facts as a cause of action in respect of which a relief has been sought.
12. Reliance in this regard was placed on the case of St Patrick's Hill School Limited vs Bank of Africa Kenya Limited[2018]KEHC 2539 (KLR).
13. It was submitted that the amendment herein seeks to preserve the cause of action while articulating all the matters in issue which the Plaintiff is mandated to do pursuant to Order 24 Rule 3 of the Civil Procedure Rules, and that the amendments seek to bring out the fundamental un procedural disposal of the suit property, and the existence of the trust and beneficiaries herein.
14. According to Counsel, the amended Plaintiff is not in consonance with the Defence and in any event, it is only upon delving into the merits of the case will the court be able to determine whether the issues are similar; that ELC Case No 147 of 2019 was dismissed for being statute barred and the dismissal not being one on merits, as explained in SRM vs JMM[2021]eKLR, the plea of res judicata cannot arise.
15. The 1st-3rd Defendants filed submissions on the 27th May, 2025. Counsel submitted that the amendment sought by the Plaintiff is a departure from the deceased's cause of action as the claim for trust is as against the deceased Plaintiff and yet the current Plaintiff is the legal representative.
16. Consequently, it was submitted, the Applicant is not a proper party to substitute the deceased as he may commit perjury and that Order 24 Rule 3 of the Civil Procedure Rules does not anticipate a situation where a legal representative abandons the deceased's Plaintiff's suit as is the case herein.
17. Counsel submitted that further, the amendment raises similar issues as in ELC 147 of 2019, to wit, the question of trust and that the matter is pending at the Court of Appeal and should the court allow the amendments, it would be sitting on appeal of a decision of a court of concurrent jurisdiction.
18. Further, it was submitted, the amendments will suffer the same fate as in ELC 147 of 2019 being that a Preliminary Objection shall be raised that the issues are time barred. It is urged that the amendments sought are similarly time barred and should be dismissed.

Analysis and Determination

19. Having analysed the pleadings and submissions by the parties, the sole issue for determination is whether the Plaintiff/Applicant's Application for amendment is merited?
20. The general power of the court to amend pleadings is drawn from Section 100 of the Civil Procedure Act, Cap 21 which provides as follows:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”



21. Further guidance is found in Order 8 Rule 3(1), (2) and (5) of the Civil Procedure Rules, 2010 which provides:

- “(3) 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.
- (1) 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 to do.
- (2) 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.”

22. Whereas Order 8 Rule 5(1) provides:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.”

23. The principles upon which a court acts in an application to amend pleadings were set out by the Court of Appeal in *Central Kenya Limited vs Trust Bank limited* (2000) eKLR which referred to commentaries on the Indian Civil Procedure Code by Chittaley and Rao where the learned authors stated as follows with regards to the rule to amendment of pleadings:

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol. 2, 6th Ed. at P. 2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state: 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.”

24. The Court of Appeal in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] KECA 345 (KLR) affirmed that the law applicable to amendment of pleadings is as stated in *Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition* and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No. 149 of 1991 thus:

“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.”

25. The Court of Appeal in *Coffee Board of Kenya vs Thika Coffee Mills Limited & 2 others* [2014] KECA 409 (KLR) similarly opined:

“Mulla, *The Code of Civil Procedure*, 18th Ed, Vol.2 at pages 1751-1752:- has also set out the following which are also a useful guide when dealing with amendments of pleadings:-

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

All amendments should be allowed which are necessary for determination of the real controversies in the suit;

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;

Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;

Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;

Amendment of a claim or relief barred by time should not be allowed;

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;

No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;

The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;

Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”

26. It is apparent that the courts’ discretion to amend pleadings at any stage of the proceedings is wide and unfettered, except that it should be exercised judicially and upon the defined principles so as to bring out the real issues in controversy between the parties and on such terms as to costs as may be just.
27. By way of brief background, the Plaintiff instituted this suit on the 17th August, 2018 seeking inter-alia, a declaration that she is the legitimate owner of L.R 330/1360 (formerly L.R 330/507), a declaration that the Indenture dated 17th November, 2005 purporting to confer interest on the Estate of Kirimi M’mina is fraudulent, permanent injunctive orders restraining the Defendants from interfering with the property and mandatory injunctive orders.



28. It is the Plaintiff's case that she is the legitimate owner of the suit property which she leased to the late Kirimi M'muna to use by leasing it to third parties. Pursuant to their agreement in this regard, it was averred in the Plaintiff's case that the late Kirimi M'muna was obligated to pay outstanding land rates and pay her Kshs 2,000,000.
29. According to the Plaintiff, she later discovered that the property's title had been changed into the name of Kirimi M'muna. She asserted that she never sold the suit property to the late Kirimi M'muna and that the Indenture of Conveyance in that respect is fraudulent.
30. The initial Plaintiff is since deceased and has been substituted by Kenneth Kipkirui Mibei, the Administrator to her Estate. He seeks to amend the Plaintiff's case aforesaid. Vide the proposed amendments, the Plaintiff has added the beneficiaries of the Estate of Kirimi M'muna as Defendants. It is contended that Elizabeth Kilele held the property in trust for the estate of the late Joseph Kimibei. The particulars of trust are set out therein.
31. The proposed amendments are also to the effect that the illegal transfer of the suit property has the effect of disinheriting the beneficiaries of the late Joseph Kimibei. The proposed amendments further set out the current value of the suit property and provided that the Indenture conveying the property from Elizabeth Kilele to Kirimi M'muna is contra the law of contract and the law of trusts, no consent having been granted for the transfer.
32. The amendments have additional reliefs, which include the addition of a relief that the suit property was held by Elizabeth Kilele in trust for her estate and that of Joseph Kibimey and a declaration that the Plaintiff is entitled to trace the property on behalf of the beneficiaries.
33. The 1st-3rd Defendants have urged the court to reject the proposed amendments. Their objection is primarily on the issue of trust. This issue, it is asserted, advances a different cause from that set forth by the original Plaintiff. Further, that the same was an issue in ELC 147 of 2019 which was dismissed for being statute barred and which dismissal is pending appeal in ELCA No E242 of 2020. Allowing the same, it is urged, will be tantamount to re-litigation of the issue.
34. Beginning with whether the amendment introduces a new cause of action, and is as such unsustainable, it is noted that the original Plaintiff's case in this matter was filed by the now-deceased Plaintiff, Elizabeth Kilele, who asserted proprietary rights over the suit property in her own personal capacity. She claimed that she was the lawful owner of the property and sought declaratory and injunctive reliefs on that basis. The original Plaintiff asserted that the transfer of the suit property to the late Kirimi M'muna was fraudulent.
35. Vide the proposed amendments, the Plaintiff now asserts that Elizabeth Kilele held the property in trust for the late Joseph Kibimey. In effect, the Plaintiff now claims that the suit property forms part of not only the original Plaintiff's estate but that of Joseph Kibimey. The amended claim thus rests on an entirely new legal foundation, that of breach of trust.
36. Order 8 Rule 5 of the Civil Procedure Rules allows the court to grant leave to amend pleadings, even where the effect of the amendment is to add or substitute a new cause of action. Nevertheless, the discretion to allow amendments is not absolute. It has been held that amendments that are contrary to the original pleadings are for rejection.



37. The Court of Appeal in Catherine Koriko & 3 others vs Evaline Rosa [2020] eKLR speaking to this noted:

“In Abdul Karim Khan –v- Mohamed Roshan (1965) EA.289, this Court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and which entirely alters the nature of the defence or plaint.”

38. The Ugandan High Court in Fred Kananura vs George Tibemanya HCT-05-CV-MA-0178-2022 echoed this position, holding that courts must reject amendments that introduce a new cause of action which is inconsistent with the earlier pleadings.

39. Further still, in Mulla, The Code of Civil Procedure, 18th Ed., Vol. 2 at pages 1751–1752, cited by the Court of Appeal in Coffee Board (supra) some of the guiding principles that should guide the court in motions for amendment include:

“...That amendments should not result in the substitution of the original cause of action... That mutually destructive, contradictory, or inconsistent allegations that negate earlier admitted facts should not be permitted.”

40. Indeed, it cannot be that an Administrator, stepping into the shoes of the deceased for purposes of continuing an action under Order 24 Rule 3 of the Civil Procedure Rules, is at liberty to recast the cause of action. The administrator is bound to proceed with the suit as it stood at the time of the deceased's death and cannot introduce a different legal theory or claim inconsistent with the original pleadings. The court agrees that this is not what Order 24 Rule 3 of the Civil Procedure Rules contemplates.

41. Ultimately, the court finds that the amendments introducing the aspect of ownership of the suit property by Elizabeth Kilele in trust for Joseph Kibimei are improper as they seek to introduce issues inconsistent with the original pleadings.

42. Having found that the amendments introducing the issue of trust are unsustainable, the issue of whether the same breached the rule against res judicata is moot.

43. Apart from the amendments introducing trust, the proposed amendments also seek to include the 4th to 7th Defendants as additional parties to the suit. These individuals are described as beneficiaries of the Estate of the late Kirimi Mmuna, and the registered owners of the suit property having acquired the same by way of transmission. The court finds no legal impediment to their inclusion through the proposed amendments.

44. For those reasons, the Motion partially succeeds and the court grants the following orders:

- a. The proposed amendments that introduce a claim that the late Elizabeth Kilele held the suit property in trust for the late Joseph Kibimei and all consequential averments are disallowed and struck out.
- b. The Plaintiff is granted leave to file and serve an amended Plaintiff, and witness statements incorporating only those parts of the proposed amendment that do not relate to the trust claim within 14 days from the date hereof.
- c. Costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2ND DAY OF OCTOBER, 2025.



O. A. ANGOTE

JUDGE

In the presence of;

Ms Maina for Mr. Muturi for Applicant

Mr. Njeru 1st – 3rd Defendants/Respondents

Court Assistant: Tracy

