



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA AT NAKURU**

**ELC NO 616 OF 2013**

**NICHOLAS KIPROP KOSIBEI & 49 OTHERS.....PLAINTIFFS**

**VERSUS**

**WILLIE KIPNGENO KOMEI & 33 OTHERS.....DEFENDANTS**

**RULING**

***(Application for amendment of plaint; leave denied as proposed amendment will in effect affect parties not proposed to be enjoined).***

1. What is before me is an application dated 26 September 2018 filed by the plaintiffs vide which they seek leave to amend their plaint pursuant to the provisions of Order 8 Rule 3 of the Civil Procedure Rules, 2010.
2. By way of background, this suit was commenced through a plaint which was filed on 18 December 2013. The first 49 plaintiffs are persons who are members of the 50<sup>th</sup> plaintiff (Kalenjin Enterprises Limited), a land buying company, whereas the first 33 defendants are members of the 34<sup>th</sup> defendant (Mwariki Company Limited), another land buying company. The plaintiffs averred that sometimes in the 1970s, the two land buying companies jointly purchased what was the former Rhonda Sisal Estate farms being LR Nos. 11094, 11095, 1021, 1022, 8894, and 6273. These land parcels were then subdivided so that Kalenjin Enterprises got 5,900 acres whereas Mwariki Company got 4,800 acres. The land parcels were merged and what was taken up by Kalenjin Enterprises became registered as LR Nos. 13105 and 6273, and on the other hand, what Mwariki Co. Limited got became LR No. 13106. A dispute however arose on how the subdivision was undertaken and the same was referred to the late President Jomo Kenyatta, who proposed how to subdivide the land based on a straight line that he drew on the map. The complaint of the plaintiffs is the contention that when Mwariki subdivided its land to its members, there was encroachment into their portion by about 83 acres and the plaintiffs have identified the parcel numbers which they allege encroached into their portion of land. These parcels are owned by the 1<sup>st</sup> to 33<sup>rd</sup> defendants. The plaintiffs thus seek to have a declaration that these parcels of land have encroached into what they should own, or alternatively, that they have acquired rights over these parcels of land through the doctrine of adverse possession. The suit is opposed by the defendants who have put the plaintiffs to strict proof.
3. In this application, the plaintiffs aver that they have come across some vital information and that it is in the best interests of all parties that the plaint be amended. There is annexed a draft amended plaint which puts across the amendments that are sought. The claim remains the same that the 50<sup>th</sup> plaintiff did not get its rightful share pursuant to the subdivision directed by the late President Jomo Kenyatta. The plaintiffs now propose to aver that the subdivision was done fraudulently. They have sought additional prayers for an order directing the District Surveyor Nakuru to undertake measurements of the land parcels LR No. 13106, 13105, and 6273 and ascertain whether they contain measurements of 4,080 and 5,900 acres respectively. They also wish to have an order directing the District Surveyor to undertake fresh and/or re-survey of the original land parcels Nos. 13106, 13105, and 6273 and to re-align them with the Presidential directive and the acreage of 4,080 and 5,900 respectively. The other claim for cancellation of the specific titles of the defendants still remains and so too the alternative claim for adverse possession for these titles.
4. The defendants did not oppose the application but since what the plaintiffs seek is a discretion of the court, I opted to have an independent assessment of the proposed amendments hence this ruling. I have considered the proposed amendments but I am not inclined to grant leave to amend in the manner proposed.
5. What the plaintiffs are now seeking in the two additional prayers that I have pointed out is radically different from what is sought in the original plaint such that to allow it would be to impose a completely new cause of action upon the defendant. Moreover, that is not a cause of action that can be sustained against them alone.
6. To explain my position, I have no evidence that the parcels of land LR Nos. 13106, 13105, and 6273 exist, since the impression that I have been given in this suit, is that these land parcels were subdivided to members of the two land buying companies and that is why you have individual titles which are now contested. It is not therefore possible to undertake a survey of LR Nos. 13106, 13105 and 6273 for these parcels of land do not exist as described. But let us assume that I am wrong in this and that these parcels of land can be surveyed and their acreages determined. What the plaintiffs are overlooking is the fact that because of subdivisions, these parcels of land are now owned by other people. If this court were to allow the prayer seeking to re-align the boundaries according to the alleged Presidential directive all persons who got land from Mwariki Co. Limited will be adversely affected, for they do own smaller titles within the original parcels of land.

Any such order will end up affected them yet they are not proposed in this amendment to be made parties to this suit. Even if I am to allow the plaintiff to amend, this would be superfluous, for at the end of the day, this court cannot make orders that are adverse to persons who are not before this court.

7. There is a reason why the rules prescribe that in order to amend after close of pleadings, leave of the court must be sought. That is to ensure that whatever is sought to be amended is in line with the cause of action before the court and such claim is sustainable against the parties before the court. The court does not give leave to amend as a matter of course, or for the sake of it, or just to make a party happy. The court must be persuaded that the amendments are in line with the cause of action before the court and that the amendments bring forth an action that may be sustained against the defendants. In the instance of this case, if the plaintiffs want leave to amend as they have proposed, they need to table the list of all titles that may be affected by the order of resurvey that has been sought and they must bring on board all persons that own these parcels of land or who may be affected by the order for resurvey. Without doing that, I am afraid that I cannot allow this application for amendment.

8. For the above reasons, the application for amendment of plaint is hereby disallowed. Since the defendants did not see any need to oppose it, I make no orders as to costs.

9. Orders accordingly.

**Dated, signed and delivered in open court at Nakuru this 6<sup>th</sup> day of March 2019.**

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**

**In presence of : -**

Mr. Okiro present for the plaintiffs/applicants.

Ms. Cheruto holding brief for Mrs. Ndeda for the defendants/respondents.

Court Assistant: Nelima Janepher .

**JUSTICE MUNYAO SILA**

**ENVIRONMENT & LAND COURT AT NAKURU**