

**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT AND LAND COURT AT NAIROBI**  
**ELC CASE NO. 1468 OF 2013**

**SANJEET K. SHAH.....1<sup>ST</sup>**  
**PLAINTIFF/APPLICANT**  
**MANISHAH SHAH.....2<sup>ND</sup>**  
**PLAINTIFF/APPLICANT**

**VERSUS**

**SADRUDIN TARMOHAMED  
MULJI  
GOVANI.....DEFENDANT/RESPONDENT**

**AND**

**DR. KIBWANA ABDALLA ATHMAN JAFF.....THIRD  
PARTY**

**RULING**

**1.** Before this court is the notice of motion dated 30<sup>th</sup> May 2025, filed by the plaintiffs/applicants, and it is expressed to be brought under **Sections 1A,1B, 3A and 100** of the **Civil Procedure Act, Order 8 Rule 3, Order 51 Rule 1** of the **Civil Procedure Rules** and **Article 159** of the **Constitution** of Kenya seeking the following orders:-

- a. That the honourable court be pleased to grant leave to the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/applicants to amend their plaint as shown in the draft amended plaint.***
- b. That the applicants be granted 14 days to file and serve the amended plaint and related documents on the parties.***

***c. That the costs be in the cause.***

2. The application is premised on the grounds on its face. The application is further supported by the affidavit of the 1<sup>st</sup> plaintiff/applicant sworn on even date. He deposed that following discussions with his advocate, they have found it necessary to amend the plaint, specifically in light of the consolidation of this suit with ELC Case No. 595 of 2023. Further, that the amendment sought is in line with the existing cause of action in the matter and that it will enable the court to adjudicate the real issues in controversy between the parties. The 1<sup>st</sup> plaintiff/applicant deposed that the application is filed in good faith and does not prejudice the defendants/respondents.
  
3. The application was opposed vide the replying affidavit of Eric Sadrudin Govani, the defendant's/respondent's son sworn on 20<sup>th</sup> June, 2025. He deposed that the amendments sought in the draft amended plaint seek to radically alter the case by introducing new properties i.e. LR. No. 4242/44 and LR. No. 4242/45 which are not, and have never been part of the subject matter in both suits. Further, that it seeks to introduce a new cause of action against the third party by persons who are not parties to any of the suits and have no connection with the suit property that is LR No. 4242/46. Further, he deposed that the amendment seeks to introduce a new cause of action in relation to a claim of

encroachment of the third party as the proprietor of LR. No. 4242/44 allegedly encroaching on LR. No. 4242/45 which belongs to the proposed interested party.

4. The defendant/respondent deposed that the draft amended plaint amounts to a collateral attack on issues and parties not previously subject to these proceedings, and that it is clearly and abuse of the court process. Further, that the application does not provide sufficient explanation for the delay of over ten years in seeking to amend the plaint. In conclusion, he deposed that the proposed amendments are irregular, prejudicial and legally untenable.
5. The 3<sup>rd</sup> party filed his grounds of opposition dated 18<sup>th</sup> June, 2025 challenging the application on the following grounds:
  1. ***The application is misconceived, incompetent and amounts to an abuse of the court process.***
  2. ***The applicant seeks to join a party to the suit without seeking leave for the same contrary to the Civil Procedure Rules.***
6. The defendant/respondent filed a further replying affidavit sworn on 10<sup>th</sup> July, 2025. He deposed that the registered proprietors of LR. No. 4242/45 are Nabhan Swaleh Salim and Abdalla Mahmoud Salim.

7. In his supplementary affidavit sworn on 11<sup>th</sup> August, 2025, the 1<sup>st</sup> plaintiff/applicant deposed that the assertions by the defendants/respondents are unfounded and misleading, as the inclusion of LR. No. 4242/45 and 4242/44 is to ascertain the boundary between the said parcels and the suit property following the surveyor's report. He further deposed that the order for the re-establishment of the beacons on all the properties necessitate the inclusion of the interested parties, and that it is necessary to ascertain the boundaries thus eliminating any potential boundary disputes. The 1<sup>st</sup> plaintiff/applicant further deposed that the lapse of time in filing the application has been occasioned by the defendant/respondent through the appeal that was determined on 6<sup>th</sup> December, 2024.
8. The 1<sup>st</sup> plaintiff/applicant deposed that following the consolidation of the suit with ELC Case No. 595 of 2013 by Angote J, it has been only one month following the commencement of the new trial, and that the application is not made in bad faith, and does not constitute sufficient grounds to warrant a denial of the instant application. Further, that the amendment of the suit was necessary as the original pleading did not take into consideration an issue that has been created by case law in the intervening period.

9. The application was canvassed by way of written submissions. The plaintiffs/applicants filed their written submissions dated 11<sup>th</sup> August, 2025 where they raised two issues for determination as listed below:

- a. ***Whether the court ought to grant the 1<sup>st</sup> and 2<sup>nd</sup> plaintiffs/applicants leave to amend their plaint as per the draft amended plaint; and***
- b. ***Whether there was delay, if any in filing the present application seeking leave to amend pleadings.***

10. On the first issue, and while relying on the cited provisions of the law and the case of **Freight Forwarders Kenya Limited v Aya Investments Uganda Limited [2014] eKLR**, the plaintiffs/applicants submitted that justice demands that leave be granted to enable them incorporate their legal redress against all parties in these proceedings. That in addition, **Order 8 Rule 5** of the **Civil Procedure Rules** confers upon the court the general discretion to amend pleadings or to allow amendments to enable the determination of the real question in controversy between the parties. The plaintiffs/applicants further relied on the cases of **Central Kenya Limited v Trust Bank Limited & 5 Others [2002] eKLR** and **K.K. Lodgit Limited v Geminia Insurance Company Ltd & another [2021] eKLR**.

11. On the second issue, the plaintiffs/applicants submitted that on 29<sup>th</sup> April, 2025 this suit was set down to commence *de novo* before this court, and for this reason, the instant application has been filed without delay. To buttress on this issue, they relied on the case of **Ocean Foods Limited v Osotpa Company Limited & 2 Others [2020] eKLR**.
12. The defendant/respondent filed his written submissions dated 5<sup>th</sup> September, 2025 and he raised the following issues for determination: -
- a. ***Whether the amended plaint alters the character of the suits;***
  - b. ***Whether the application to amend the plaint was filed without undue delay; and***
  - c. ***Whether the defendant will suffer prejudice should this application be allowed.***
13. On the first issue, the defendant/respondent submitted that the instant application offends both **Order 8 Rule 3(5)** of the **Civil Procedure Rules** and the principles enunciated in the Joseph Ochieng case. It was submitted that the proposed amendments would fundamentally alter the nature and scope of the present dispute, and transform the suits into actions of a substantially different character. He relied on the cases of **Makindu Motors**

**Limited v Subati Group Limited & another (Environment & Land Case E032 of 2022) [2023] KEELC 21505 (KLR) (8 November 2023) (Ruling), Law Society of Kenya v Centre for Human Rights & Democracy & 12 others [2014] eKLR, Francis Karioko Muruatetu & another v Republic & 5 Others [2016] eKLR, and Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others [2013] eKLR.**

14. On the second issue, the defendant/respondent submitted that the court record shows that the suit was consolidated in 2015, and that the plaintiffs/applicants failed to prosecute the matter until 2019 when they chose to proceed despite the express directions on consolidation. To further buttress on this issue, he relied on the case of **Harrison C. Kariuki v Blue Shield Insurance Co. Ltd [2006] KEHC 3291 (KLR)**. Further, he submitted that he will suffer prejudice by being forced to answer to claims it never anticipated and against parties who should not be before the court in the first place. He relied on the case of **Onyuna v Anyango [2024] KEELC 6390 (KLR)**.
15. The third party filed his written submissions dated 7<sup>th</sup> October, 2025. He submitted that the application fails pursuant to **Order 8 Rule 3 (5)** of the **Civil Procedure Rules**. Further, that it seeks to alter the character of the suit and seeks pre-judgment

execution which are prejudicial and amount to grave injustice. He relied on the cases of **Eastern Bakery v Castelino [1958] EA 461** and **Auto Garage v Motokov [1971] EA 514**.

16. The third party further submitted that the proposed interested parties have no legal or equitable interest and their joinder is misconceived as they are not the registered owners of LR. No. 4244/45. Reliance was placed in the case of **Communications Commission of Kenya & 5 others v Royal Media Service & 5 others [2014] eKLR**. In conclusion, the third party submitted that the application is an attempt to use the amendment process not to clarify issues but to fundamentally change the landscape of the litigation to his prejudice, and that he would be forced to defend a suit that is radically different from the one they initially responded to requiring new evidence, and new witnesses.
17. I have considered the application, the replies thereof and the written submissions filed by all the parties. I am of the view that the issue for determination is *whether this court ought to allow for amendment of the plaint as sought by the plaintiffs/applicants*.
18. **Section 100 of the Civil Procedure Act**, 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”*

**19. Order 8, Rules 3 and 5 of the Civil Procedure Rules, provide 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.***

***(2) 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.***

***(3) ...***

***(4) ...***

***(5) 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.”***

**20.** Further, **Order 8, Rule 5** of the **Civil Procedure Rules** provides:-

***“(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of 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.***

***(2) This rule shall not have effect in relation to a judgment or order.”***

**21.** My reading of the above provisions show that indeed an amendment may be allowed at any time of the suit. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. Having said that, it is preferable that applications to amend come early in the

proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

22. In the case of **Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] KEHC 2227 (KLR), Justice Odunga** (as he then was) held as follows: -

***“63. The principles guiding the grant of application to amend pleadings are now trite and the same can be summarized as follows:-***

***1. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide, or that, by his blunder, he has done some injury to his opponent which could not be compensated for by costs or otherwise. See Tidelsay vs. Harpic [1878] 10 CH.D. 393 at 396.***

***2. The Court of Appeal will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or a wrong principle. See Eastern Bakery vs. Castellino [1958] EA 461.***

3. ***The court knows no case where an application to amend pleadings before trial has been refused on grounds of election and cannot envisage a refusal on such a ground except in the plainest of cases. Whether or not there is an election is a matter which ought to be decided at the hearing of the case after evidence is called. See British India General Insurance Co. Ltd vs. G.M. Parmar [1966] EA 172***
4. ***The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g. 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 and no injustice caused if the other side can be compensated by costs. See British India General Insurance Case (Supra).***

23. The plaintiffs/applicants sought the amendment of the plaint following discussions with their advocate, and they found it necessary to amend the plaint, specifically in light of the consolidation of this suit with ELC Case No. 595 of 2023. The application for amendment of the plaint was denied and opposed on various grounds including that it seeks to fundamentally alter and radically change the cause of action by introducing a new party and another property that was not in the main suit. Further, the defendant/respondent and the third party contended that there has been delay in filing this application, and more so they will be forced to defend a suit which they had not anticipated.

24. As stated earlier, amendment of pleadings can be allowed at any stage of the proceedings. However, in allowing the said amendments, the court ought to ensure that the other party does not suffer injustice.

25. I have looked at the draft amended plaint and the same seeks to introduce an interested party by the names of Mukeshi L. Khetani and Vinod L. Khetani. The reason for their joinder is that following a survey report, they were found to have encroached on the suit property, and there is need for re-establishment of the boundaries. Equally so, the plaintiffs/applicants have sought to include allegations of encroachment on the suit property which was not in the plaint dated 27<sup>th</sup> November, 2013. Having raised this issue, they have sought additional prayers which has the potential of effectively altering the main suit. I find the proposed amendment untenable for the following reasons: it has sought to join a party who was not a party in the main suit without the leave of the court, there is a new cause of action i.e. encroachment sought that was not formerly in the suit which has resulted in more prayers which are different from the earlier suit. Also, a new property has been introduced which was not in the main suit.

26. While the plaintiffs/argued that the amendment is necessary more so following the consolidation of the suits, I find this explanation lame and an afterthought for the reason that on 23<sup>rd</sup> April 2015, Onguto, J gave the following directions:-

***"I have read both pleadings in ELC 595/13 and ELC 1468/2013. It is apparent that the dispute herein concern and touch on the same suit***

**property namely LR No. 4242/44. The parties are also substantially the same with the defendant in ELC 595 of 2013 enjoined as the said party in ELC 1468/2013. The issues are also quite related. It would be appropriate if the two suits were consolidated and determined together. I would consequently direct as follows:-**

- i. The two suits be and are hereby consolidated.**
- ii. The pending application by the defendant in ELC 595 for amendment of defence and counter claim be heard as a matter of priority.**
- iii. The plaintiffs application in ELC 1468 of 2013 be allowed in terms of prayers no. 2 and 3 i.e. consolidation of the suits and hearing of the claim.**
- iv. The pilot file shall be ELC 595/2013 incase all court proceedings will be recorded hence.**
- v. All parties to immediately exchange their required pleadings and this matter be listed for further directions and pretrial conference once the application dated 14.10.2014 has been disposed of"**

27. From the above, it is evident that this suit was consolidated in the year 2015, and the plaintiffs/applicants have had sufficient time to make any changes to the plaint. Allowing the application would cause injustice to the other parties, and inhibit the efficient disposal of the suit. Also, I find the application to have been made in bad faith and it should fail.
28. The notice of motion dated 30<sup>th</sup> May, 2025 lacks merit and it is hereby dismissed with costs to the defendant/respondent and the third party assessed at Kshs.50,000/- each.

Orders accordingly.

**DATED, SIGNED & DELIVERED VIRTUALLY  
THIS 19<sup>TH</sup> DAY OF NOVEMBER, 2025.**

**HON. MBOGO C.G.  
JUDGE  
19/11/2025.**

**In the presence of:**

*Mr. Benson Agungo - Court assistant  
Ms. Muthoni holding brief for Mr. Michuki for the  
Plaintiff/Applicant  
Ms. Muchoki for the 3<sup>rd</sup> Party  
Ms. Salim and Ms. Moka for the Defendant*