

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND CURT OF KENYA

AT NAKURU

ELC NO. 1 OF 2023

CHRISTINE M ONDARI1ST

PLAINTIFF

GERALD BOB BOSIRE.....2ND

PLAINTIFF

MARY MWIKALI MUIA.....3RD

PLAINTIFF

VERSUS

SIMON NG'ANG'A WAIHARO1ST

DEFENDANT

THE HON. ATTORNEY GENERAL.....2ND

DEFENDANT

THE KENYA NATIONAL HIGHWAYS

AUTHORITY3RD

DEFENDANT

THE LAND REGISTRAR, NAKURU.....4TH

DEFENDANT

R U L I N G

The Application

Simon Ng'ang'a Waiharo, ***(hereinafter referred to as the applicant)*** has come to court praying for leave to amend the defence dated 25th October 2024. The application is based on grounds that the 1st Defendant seeks to plead that the Plaintiffs' suit is time barred by dint of Sections 4(1)(a) and 4(2) of the Limitation of Actions Act as read with Section 26 thereof for reasons that the plaintiffs initially separately approached the Nakuru Magistrate's Court vide Nakuru Chief Magistrate ELC NO. E013 of 2020 and Nakuru Chief Magistrate ELC NO. 145 of 2020. The Plaintiff's initial complaints before the Nakuru Magistrate's Court were filed on 19th October, 2020 and 18th August, 2020 respectively. On 24th September, 2021, the two (2) suits were consolidated and subsequently, vide a ruling of 7th December,

2022 in Nakuru ELC. MISC. Application No. E044 OF 2022 transferred to the Environment and Land Court.

The applicant states that vide an amended plaint dated 9th September 2024, the Plaintiffs' previously distinct but consolidated suits were collapsed into one suit and the 2nd, 3rd and 4th Defendants brought onboard. The background of the Plaintiffs' suit is that the 2nd and 3rd Plaintiffs as Purchasers and the 1st Defendant as a Vendor separately entered into agreements for sale of land in the years 2000 and 2002 respectively for sale and purchase of L.R. NO. Njoro/ Ngata Block 1/2654 (Kiamunyi) and L.R NO. Njoro (Ngata Block 1/2568 being subdivisions of the 1st Defendant's then L.R. NO. Njoro/Ngata Block 1/275. Upon transfer of the purchased subdivisions to the 3rd and 2nd Plaintiffs by the 1st Defendant, the 2nd Plaintiff transferred LR. NJORO/NGATA BLOCK 1/2568 to his spouse, Christine Monyenye Ondari, the 1st Plaintiff herein in 2004.

Everything allegedly appeared fine until sometimes in August 2012 when fiber optic cables were being laid in and/ or adjacent to the suit properties and upon inquiry, the Plaintiffs were all

informed that their parcels had encroached a road reserve owned by KENHA, the 3rd Defendant herein.

The causes of action pleaded by the Plaintiffs and particularized at Paragraphs 21, 22 and 23 of the Amended Plaint are fraud, misrepresentation, concealment of material facts and breach of contract, the first three being torts whilst the last is a cause of action founded on contract. .

The applicant contends that the Limitation of Actions Act provides that actions founded on tort may not be brought after the end of three (3) years from the date on which the cause of action accrued and that actions founded on contract may not be brought after the end of six (6) years from the date on which the cause of action accrued. According to the applicant, the Plaintiffs having filed witness statements and documents indicating that they only became aware of the alleged fraud at the core of the suit in August 2012, the 1st Defendant is entitled to plead in his defence that the Plaintiffs' suit is time-barred as the aforementioned periods of limitation started running in 2012 and the suit therefore ought to have been filed by August 2018 yet

the Plaintiffs filed their initial distinct suits in August 2020 and October, 2020.

The applicant argues that the issue of the limitation periods under Sections 4(1)(a) and of the Limitation of Actions Act as read with Section 26 thereof having lapsed presents a serious challenge to the competency of the Plaintiffs' suit and goes to the jurisdiction of the court in equal measure.

The amendment sought to be introduced is on a point of law that was reasonably expected to have been considered by the Plaintiffs before filing of their initial suits before the Magistrate's court.

The amendment does not introduce any new facts not known to the Plaintiffs and as such no conceivable prejudice would be suffered by grant of leave to amend the 1st Defendant's amended statement of defence as much, conversely, the 1st Defendant would suffer great prejudice if not allowed to further amend his amended statement of defence as he will be locked out of relying on a defence availed to him by law in a suit that

would potentially expose him to serious financial ramifications of nearly Kshs.40,000,000.

The applicant states that this Honorable court in its site visit of 18th July, 2025 appreciated the extent of the problem pertaining road reserve measurements in a more than five (5) kilometers stretch which includes the Plaintiffs' and even the 1st Defendant's and their neighbours' parcels of land. The applicant further states that the application for leave to further amend the 1st Defendant's amended statement of defence is made in good faith.

It is trite that a court of law is enjoined to consider whether it has jurisdiction to determine a suit before anything else and as such, it is only proper and in the interest of justice that the amendment sought be granted to allow the court determine the question of jurisdiction as an issue flowing from the parties' pleadings. This Honorable court is clothed with the inherent power to make such orders as may be necessary for the ends of justice. The supporting affidavit has reiterated the grounds in the supporting affidavit.

The Responce

The plaintiffs oppose the application in its entirety as unwarranted frivolous, and instituted solely to delay the fair and expeditious determination of this suit. The plaintiffs contend that the 1st Defendant/Applicant, through his counsel on record since the inception of this matter, has had ample opportunity to amend pleadings or raise preliminary issues, now advances this belated application in bad faith, clearly intended to obstruct the just and timely conclusion of the proceedings.

The Applicant's assertion that this suit is time barred under Sections 4(1) (a) and 4(2) of the Limitation of Actions Act is misconceived, as those provisions are expressly subject to Section 26, which suspends the running of time in instance of fraud, mistake, or concealment of material facts to the point of disclosure; accordingly, the limitation period commenced only upon the Plaintiffs' discovery of the defendant's fraudulent acts and concealment of boundaries, as detailed herein..

Following registration of the suit properties, all appeared in order until around August 2012 when fiber optic cables were being laid

and Kenya National Highways Authority (KENHA), the 3rd defendant/Respondent herein, identified portions of the Plaintiffs' land as encroaching onto road reserve, necessitating clarification from the Land Registry and KENHA regarding the true boundary positions.

The 1st Plaintiff/Respondent states that he initially approached the Area Chief to resolve the boundary issue; upon failing to obtain satisfactory response she made repeated efforts to engage 3rd Defendant/Respondent including a personal visit and correspondence, notably letters dated 16th September 2015 and 23rd December 2019, seeking clarification on the boundary position and extent of the alleged encroachment. Through the said engagement, the Plaintiff/Respondents were informed by 3rd Defendant/Respondent, via letter dated 26th May' 2020, that, the suit properties encroached onto the road reserve by 14.6 metres and 14.5 metres on either side, with cadastral map FP/No. 6420 confirming the road reserve along the Nakuru—Kabarak Road (B17) as 60 metres wider following which they promptly instituted their respective suits.

The respondent states that the respective suits were instituted within the period prescribed under the Limitation of Actions Act, as time commenced only upon the Plaintiffs' discovery of the Defendant's fraudulent conduct and this area from 3rd Defendant/Respondents official confirmation of the encroachment on the road reserve.

Following the court-ordered consolidation of the suits on 9th September 2024 it is no longer tenable for the 1st Defendant/Applicant to amend his defense, as such amendment would prejudice the Plaintiffs/Respondents and disrupt the orderly progression of the trial.

The 1st Defendant/Applicant, during the subdivision of Njoro/Ngata Block 1/275 deliberately altered the boundary lines to unlawfully increase his acreage resulting in Plot No. 2652 being shown in two separate positions, one abutting the road reserve and another extending into it, thereby concealing from the Plaintiffs/Respondents the true boundary position and the fact that the suit properties encroached onto the road reserves.

Following the Court's site visit on 18th July 2025 the parties were granted time to file additional documents, which the 1st Defendant/Applicant failed to do. His present attempt to amend the defense is belated, unjustified, and purely intended to delay the fair conclusion of this matter which has already proceeded to hearing and in which the 1st Plaintiff/Respondent has testified. The 1st Defendant/Applicant has been indolent in prosecuting his case, and equity does not aid those who sleep on their rights.

The respondent contends that the 1st Defendant/Applicants continued delay gravely prejudices the Plaintiffs/Respondents whose subdivisions, Njoro/Ngata Block 1/2658 and 1/2654, valued at Kshs. 25,000,000 and Kshs. 13,500,000 respectively, remain in uncertainty due to his unlawful boundary alterations and concealment. Unless this matter is resolved expeditiously, the Plaintiffs/Respondents will continue to suffer financial loss and injustice.

In view of the foregoing, the respondent prays that the 1st Defendant/Applicant's Application be dismissed with costs to the

Plaintiffs/Respondents, and that this Honorable Court directs that the matter proceed to full hearing on the existing pleadings.

Rival Submissions

The applicant relies on **Order 8, Rule 3(1) and Order 8, Rule 5 (1) of the Civil Procedure Rules, 2010** regarding amendment of pleadings with leave and the court's general power to order amendment of any document respectively that provides as follows:-

“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.

"For the purpose of determining the real questions 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."

He acknowledges that the 1st Plaintiff in this matter partly testified on 12th March 2025 on which date she was stood down during cross-examination. The court however retains the discretion to allow amendment of pleadings at any stage of the proceedings. He cites the case of Joseph Ochieng & 2 Others Trading As Aquiline Agencies V First National Bank Of Chicago (1995) KECA 31 (KLR) the Court of Appeal observed as follows:

“as a general rule however late the amendment! sought to made it should be allowed if made in good faith provided costs, can compensate the other side; that (the) exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and court; that adjournment should be given to the other side if necessary if an amendment is Co be allowed; that if the court is not satisfied as to the truth

and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiffs claim as originally framed is unsupported an amendment which would leave the claim equally unsupportable will not be allowed ; 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of the current period of Limitation: that the court has powers even (in special

circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the Fame which relies has already been claimed in the action by the a party applying for leave to seek the amendment.”

The applicant argues that the object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and (finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

The applicants submit that the application dated 22nd October, 2025 was made in good faith/without undue delay. It has been observed by our courts that the test of good faith in applications for leave to amend pleadings is whether the amendment is sought at an early opportune moment having regard to the

progress of the case and where appropriate, whether the amendment seeks to set up a substantial cause of action/ ground of defence. The applicants argue that the instant application has been made timeously, having been filed before full cross-examination and re-examination of the Plaintiffs' first witness (PWI), the 1st Plaintiff herein. The Plaintiffs are therefore more than far from closing their case seeing that they are all intent on testifying. The applicant relies on the decisions in *Ali & Others V Kimani & 8 Others* and *Noorany V Premier Flour Mills Limited & Another* (Civil Suit 26 Of 2020) 120231 KEHC 18140 (KLR) where the courts found that amendments to statements of defence would not prejudice the aggrieved parties who had already testified and even closed their cases unlike in the instant case where the hearing is in its nascence.

The applicant contends that the amendment sought does not also seek to set up a new substantial ground of defence as the intended averment that the plaintiff's suit is time-barred is firstly, purely on a point of law, which the 1st Defendant contends ought to have been reasonably considered by the Plaintiffs before the

filing of their initially distinct suits and secondly, is anchored on the Plaintiffs' own witness statements and documents and as such, they will not be faced with any conceivable difficulty in addressing the intended averment despite one of them having partly testified.

The applicant submits that the exact nature of the proposed amendment has been formulated and sent to the plaintiffs and the court and therefore the 1st Defendant having exhibited in his supporting affidavit, his draft further amended statement of defence that reveals that the proposed amendment and that the truth and substantiality of the proposed amendment have been demonstrated.

The applicant submits that the proposed amendment does not introduce a new ground of defence that would change the suit into one of a substantially different character which could more conveniently be made the subject of a fresh action. The nature of the provisions of the Limitation of Actions Act sought to be relied on by the 1st Defendant is that they can only be used as shields and not swords unlike say, Section 7 of the Limitation of Actions

Act which can be used to institute a claim for adverse possession or defend a claim for recovery of land. By dint of Order 2, Rule 4 reproduced above, the ground that the suit is time-bared sought to be relied on can only be pleaded through the 1st Defendant's statement of defence and if it is not pleaded, the 1st Defendant would be greatly prejudiced as he may be barred from relying on the same further down the line on account of the principle of specificity of pleadings.

Plaintiffs' Submissions

The first issue raised by the plaintiffs is whether the suit is time barred or lawfully instituted within the limitation period upon discovery of the defendant/applicant's fraudulent conduct. The plaintiffs contend that the claim that the Plaintiffs/Respondents' suit is time-barred under Sections 4(1)(a) and 4(2) of the Limitation of Actions Act is legally unsustainable and factually misplaced. This dispute arises from deliberate fraudulent boundary lines and concealment of encroachment onto the road reserve during the subdivision of Njoro/Ngata Block 1/275. The Plaintiffs/Respondents, acting in good faith, relied on authentic

title deeds and cadastral maps, and the fraudulent encroachment was only revealed following KENHA's verification in 2012 and official confirmation in 2020. The cause of action, therefore, accrued upon discovery of the fraud, not at registration, rendering reliance on the limitation premature.

The Plaintiffs/Respondents submit that under Section 26 of the Limitation of Actions Act, where an action arises from fraud, mistake, or concealment, the limitation period commences from the date of discovery or when the fraud could have been discovered with reasonable diligence. In the case before me, the Plaintiffs/Respondents acted promptly upon confirmation of the encroachment in 2020, instituting their suit well within the statutory period. Any reliance by the Defendant/Applicant on limitation, given their alleged role as the architect of the fraud, constitutes an abuse of process and an attempt to evade legal accountability.

The Plaintiffs/Respondents rely on the decision in the case of **Joseph Mwaniki Muchira v Godfrey Muchangi [2018] KEHC 1130 (KLR)**, where the Court reaffirmed that limitation cannot be

invoked to shield fraud and that time does not run against a party alleging fraud until its discovery or when it could, with reasonable diligence, have been discovered. In the proceedings, the Plaintiffs/Respondents only became aware of the Defendant/Applicant's manipulation of survey sketches and boundaries upon verification by the Kenya National Highways Authority in 2020. Until then, official records reflected lawful boundaries. The suit was therefore filed within the statutory period and is not barred by limitation.

The plaintiffs further rely on the case of **Justus Tutaeti v Republic & Another [2021] KEI-IC 178 (I".R)**, in which the Court held that where a cause of action arises from fraud, the limitation period does not commence until the aggrieved party discovers the deceit or could with reasonable diligence have done so. The Court emphasized that fraud inherently involves concealment, and it would be inequitable to allow a wrongdoer to benefit by invoking the limitation period. In this case, the Defendant/Applicant deliberately manipulated subdivision sketches and concealed the altered boundaries, preventing the Plaintiffs/Respondents from discovering the encroachment. The

limitation period was therefore commenced in 2020, when the Plaintiffs first became aware of the fraudulent conduct through KENHA's verification process. In the present matter, the Defendant/Applicant's deliberate manipulation of subdivision sketches and concealment of the altered boundaries directly prevented the Plaintiffs/Respondents from discovering the encroachment until 2020. These actions constitute a continuing concealment of material facts, and as such, the limitation period could not lawfully begin to run until the Plaintiffs became aware of the fraud. It is clear that the Plaintiffs acted with reasonable diligence upon discovering the wrongdoing and promptly instituted their suit, ensuring that their claim falls squarely within the statutory period. This underscores that any reliance on limitation by the Defendant/Applicant is procedurally and substantively misplaced and cannot be permitted to defeat a bona fide claim.

The plaintiffs further rely on the dictum in the case of *Chemitei Kandagor v Job Kipnandi Chebon & 4 Others* [2021] eKLR, where the Court held that where a claim arises from fraud or irregularity in land registration, the limitation period does not run until the

fraud is discovered or could have been discovered with reasonable diligence. The Court emphasized that fraud vitiates every transaction known to law. In the matter at hand, the Defendant/Applicant's deliberate falsification of boundary lines, suppression of survey records, and misrepresentation to the Plaintiffs mirrors the conduct condemned in Chemitei Kandagor. Reliance on limitation is therefore a bad faith attempt to use procedure to evade substantive accountability.

In light of the foregoing authorities and Section 26 of the Limitation of Actions Act, it is clear that the Plaintiffs' suit is not time-barred. The cause of action arose only upon KENHA's 2020 confirmation of the fraudulent encroachment. The Defendant/Applicant's reliance on limitation is a technical attempt to frustrate justice. The Plaintiffs acted promptly and diligently, supported by clear evidence of fraud and concealment. Their action is fully consistent with the law and established jurisprudence. The application is therefore misconceived, constitutes an abuse of process, and should be dismissed with costs. The plaintiff ultimately argues that the defendant/applicant's intention to amend the defence at this

advanced stage of proceedings after part-hearing and closure of significant evidence is not merited and constitutes an abuse of court process. The Defendant/Applicant's motion for leave to amend the defense is both procedurally and substantively misconceived. It is filed at an advanced stage of the proceedings, after part-heard evidence is already on record. The application is therefore not aimed at clarifying issues or rectifying inadvertent errors. Still, it constitutes a belated attempt to delay the fair resolution of this suit and revisit matters already settled in the pleadings. The timing and circumstances reveal the motion as a tactical maneuver rather than a bona fide exercise of the Court's discretion. While the Court has broad discretion to allow amendments, such discretion must be exercised judiciously and in good faith. Amendments should only be permitted where they cause no injustice or prejudice to the other party.

The plaintiff relies on the case of **Kiambuthi v Gitonga & Others [2023] KEELC789** where the Court held that the power to amend pleadings, though available at any stage, must ^{(Civi} not unfairly disadvantage the opposing party. In this matter, the proposed amendment seeks to introduce a limitation defense and

new factual averments after the 1st Plaintiff/Respondent has testified and a site visit has been completed, compelling the Plaintiffs/Respondents to reopen evidence and restructure their case. This would cause manifest prejudice and undue delay. The application should therefore be refused.

The Defendant/Applicant's conduct in bringing this application belatedly further disentitles him to the equitable discretion of the Court. Equity aids the Suit 2 of 2017) [2022] KEHC 13075 (I"R), the Court reiterated that a party who sleeps on its rights cannot subsequently invoke equitable relief. The Defendant/Applicant's prolonged inaction and lack of diligence, despite full knowledge of the pleadings and evidence from the outset, demonstrates indolence inconsistent with equitable principles and disentitles him from relying on the Court's equitable discretion.

The plaintiff submits that it is trite that litigation must come to an end. Courts have consistently decried procedural tactics intended to prolong proceedings or reintroduce issues already crystallized in pleadings. The Defendant/Applicant's application, if allowed,

would undermine judicial economy, frustrate the expeditious disposal of the suit, and unfairly burden the Plaintiffs/Respondents, who have diligently prosecuted their claim within the law and timelines prescribed by the Civil Procedure Rules.

Moreover, the application offends the overriding objectives enshrined in Sections 1A and 1B of the Civil Procedure Act, which obligate courts to ensure the just, proportionate, and timely resolution of civil disputes. The Court's discretion cannot be exercised to aid a litigant who seeks to subvert these objectives or to reward procedural indiscipline. The Defendant/Applicant's attempt to reopen pleadings at this stage is therefore inimical to the principles of fairness and efficiency that underpin civil adjudication.

In the totality of the circumstances, the Defendant/Applicant's motion to amend the defense is devoid of merit, amounts to an abuse of the court process, and is contrary to both procedural justice and equitable principle. The Court is respectfully urged to dismiss the application with costs to the Plaintiffs/Respondents,

both to vindicate the Respondents' diligence and to deter similar attempts to delay the administration of justice.

The Plaintiffs submit that they are entitled to the costs of this application, having been compelled to respond to a baseless, ill-conceived, and dilatory motion brought by the 1st Defendant/Applicant. The application is devoid of merit both in fact and in law, and was filed purely to delay the fair hearing and determination of the main suit. The law is settled that costs follow the event, and a successful party should not be burdened with the expense of defending frivolous proceedings.

Analysis And Determination

This court has considered the provisions of order 8 Rule 3(1) and Order 8 Rule 5 of the Civil Procedure Rules that grants it the discretion to allow amendment of pleadings at any stage of proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct as long as no prejudice

shall be suffered by the other party and do find that the application is properly before this court.

The Court of Appeal's verdict in Joseph Ochieng & 2 Others Trading As Aquiline Agencies V First National Bank Of Chicago [19951 KECA 31 (KLR), the Court of Appeal was as follows:

“...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) exact nature of proposed amendment sought ought to be formulated and be submitted to the other necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiffs claim as originally framed is unsupportable an amendment which would leave the claim equally

unsupportable will not be allowed ; 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 afresh 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even(in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same which relief has already been claimed in the action by the party applying for leave to seek the amendment."

In *Institute For Social Accountability & Another V Parliament Of Kenya & 2 Others; Commission For The Implementation Of The Constitution (Interested Party)* [2014] 1 KeHC 7356 (KLR), a three-judge bench held as follows:

"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings. "

I do find that the amendment sought does not seek to raise a new cause of action but raises a substantial issue of limitation of time which must be pleaded and proved through evidence. It is trite law that the limitation period on a cause of action based on fraud

begins running when the fraud is discovered. The plaintiff will be given an opportunity to amend the plaint to state clearly when they discovered that the 1st defendant had sold them part of a road reserve. The amendment is basically anchored on the jurisdiction of the court to entertain time barred action. I do find the application merited and the same is allowed as prayed. The 1st defendant to amend its defence within 10 days. The plaintiffs to file a replying to amended defence within 10 days of service. Matter to be mentioned before the incoming judge on 2nd March 2025 for further directions.

**RULING DATES SIGNED AND DELIVERED ELECTRONICALLY
THIS 3RD DAY OF DECEMBER 2025**

**A. O. OMBWAYO
JUDGE**