

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ELC SUIT NO. 59 OF 2017
(FORMERLY KISUMU HCCC NO. 59 OF 2012)

JOHN MCTOUGH.....PLAINTIFF **ROBERT**
VERSUS
WILLIAM ROMAN MCTOUGH.....1ST
DEFENDANT
AIRPORT HOUSING COOPERATIVE SACCO.....2ND
DEFENDANT
COMMISSIONER OF LANDS.....3RD
DEFENDANT
COUNTY LAND REGISTRAR KISUMU.....4TH
DEFENDANT

RULING

The Plaintiff filed this suit on 27th March 2012 in the High Court through a plaint dated 19th March 2012. The suit was dismissed for non-attendance on 12th May 2016 and reinstated on 26th September 2018. On 10th December 2020, the Plaintiff was granted leave to amend the plaint. The plaint was amended on 12th April 2021. All the defendants entered an appearance and filed statements of defence. The parties complied with Order 11 of the Civil Procedure Rules, and the hearing of the suit commenced on 8th July 2024. The Plaintiff closed his case on 26th September 2024. The 1st and 2nd Defendants closed their

cases on 20th January 2025. The 3rd and 4th Defendants did not give evidence at the trial.

When the suit came up on 19th February 2025 for the hearing of the 3rd and 4th Defendant's case, if they wished to be heard, they did not appear for the hearing. Before the court closed the 3rd and 4th Defendants' case and gave directions for the filing of submissions, the Plaintiff's advocate informed the court that the Plaintiff wished to further amend its amended plaint. The court directed the Plaintiff to file a formal application for leave to further amend the plaint.

What is now before the court is the Plaintiff's Notice of Motion application dated 20th March 2025, seeking the following orders;

1. That the Plaintiff be granted leave to further amend its plaint dated 29th March 2021 in terms of the annexed draft further amended plaint.
2. That the draft further amended plaint annexed to the application be deemed duly filed upon payment of the requisite court fees.
3. That the costs of the application be provided for.

The application is premised on the grounds set out on the face thereof and on the supporting affidavit of the Plaintiff sworn on 20th June 2025. In summary, the Plaintiff has contended that the amended plaint is tainted with inadvertent defects which need to be corrected. The Plaintiff has contended that it is necessary to further amend the amended plaint to reflect the true facts in controversy between the parties. The Plaintiff has contended that the application has been brought in good faith and would not prejudice the Defendants if allowed. The Plaintiff has contended that the proposed amendments would help the court to determine the suit on its substantive merits rather than changing the character of the claim. The Plaintiff has averred that his advocates, upon investigation, had discovered that the property in dispute, Title No.Kisumu/Dago/234 (the suit property) had been subdivided and titles irregularly issued to other parties. The Plaintiff has averred that the information was not within his knowledge until he conducted a search on the suit property and the subdivisions. The Plaintiff has averred that it is necessary to further amend the plaint to plead the new facts. The Plaintiff has annexed to his affidavit in support of the application, copies of the extracts of the registers of the

subdivisions of the suit property, and a copy of the draft further amended plaint.

The application is opposed by the 1st and 2nd Defendants. The 1st Defendant opposed the application through a replying affidavit sworn by the 1st Defendant on 7th August 2025. The 1st Defendant has contended that the Plaintiff's application has been brought after an inordinate delay. The 1st Defendant has contended that the application has been brought late in the day, after the parties had given evidence and closed their respective cases. The 1st Defendant has averred that the Plaintiff has not given any explanation for the delay in bringing the application. The 1st Defendant has averred that the application, if allowed, would be prejudicial to him. The 1st Defendant has averred that the intended amendment would help the Plaintiff to fill gaps in its case, which had been highlighted by the 1st Defendant during the hearing. The Plaintiff has averred that the application, if allowed, would result in all the previous proceedings being set aside and the hearing of the suit starting afresh, as the Plaintiff intends to add new parties to the suit as defendants. The 1st Defendant has averred that the prejudice likely to be caused to him cannot be

compensated by an award of costs. The 1st Defendant has averred that the proposed amendment, if allowed, will change the character of the suit and delay the disposal of the same.

The 2nd Defendant has opposed the application through a replying affidavit of Benjamin Kibet Kisang sworn on 25th July 2025. The 2nd Defendant has averred that the Plaintiff has always been aware of the subdivision of the suit property. The 2nd Defendant has averred that the Plaintiff became aware of the subdivision as early as June 2024 when the 2nd Defendant filed its amended statement of defence in which it pleaded the subdivision of the property, and the transfer of the subdivided plots to its members following the dismissal of the Plaintiff's suit for non-attendance. The 2nd Defendant has contended that the application has been brought late in the day, after the parties have given evidence and closed their cases. The 2nd Defendant has averred that the proposed amendment would bring in more parties to the suit with different interests, thereby complicating the suit and also changing its character.

The Plaintiff filed a further affidavit sworn on 29th August 2025, in which he responded to the issues raised by the 1st and 2nd Defendants in their responses to the application. The

application was argued orally on 22nd September 2025, when Mr. Munuango appeared for the Plaintiff, Mr. Muma for the 1st Defendant and Mr. P.D.Onyango for the 2nd Defendant.

Analysis and Determination

I have considered the application together with the affidavits filed in support thereof. I have also considered the 1st and 2nd Defendants' replying affidavits in opposition to the application. Finally, I have considered the submissions by the advocates for the parties. The Plaintiff's application was principally brought under Order 8 Rule 5(1) of the Civil Procedure Rules, which provides as follows:

“5. (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.”

I am of the view that the Plaintiff's application, although brought as an application for amendment of the plaint, is actually an application for joinder of additional parties to the suit.

Joinder of parties is provided for in Order 1 Rule 10 of the Civil Procedure Rules. Order 1 rule 10 (2) and (4) of the Civil Procedure Rules provides as follows:

“(2 The court may at any stage of the proceedings,) either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

(4 Where a defendant is added or substituted, the) plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

In Bullen and Leake & Jacob’s Precedents of Pleading, 12th Edition, which was cited in Joseph Ochieng & 2 Others v. First National Bank of Chicago, Civil Appeal No. 149 of 1991, the authors stated as follows:

“...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 the 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...”

The power granted to the court to allow joinder of parties to an existing suit and amendment of pleadings is discretionary. In Patriotic Guards Ltd. v James Kipchirchir Sambu [2018] eKLR, the court stated as follows:

“It is settled law that whenever a court is called upon to exercise its discretion, it must do so judiciously and not on caprice, whim, likes or dislikes. Judicious because the discretion to be exercised is judicial power derived from the law and as opposed to a judge’s private affection or will. Being so, it must be exercised upon certain legal principles and according to the circumstances of each case and the paramount need by court to do real and substantial justice to the parties in a suit.”

I agree with the Plaintiff that applications for leave to amend pleadings should be freely allowed at any stage of the proceedings, provided that the amendment will not result in prejudice or injustice to the other party, which cannot be properly compensated for in costs. The same principle applies to applications for joinder of parties. The law on amendments is that parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits. This is on condition that no inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected, and that the amendment can be allowed without an injustice to the other side.

The burden was on the Plaintiff to satisfy the court that the joinder and amendment sought are necessary for the determination of real questions in controversy between the parties, and that the same would not cause any prejudice to the Defendants that cannot be compensated in costs. It is after discharging that burden that the duty shifts to the Defendants opposing the joinder and the amendment to show that the same would result in prejudice to them which cannot be

compensated in costs and/or that the same would introduce an inconsistent cause of action and/or that the same if allowed would take away interests or legal rights that have accrued to them and/or that the same would cause injustice to them.

I have perused the affidavits in support of the Plaintiff's application together with the draft further amended plaint annexed thereto. I am satisfied that the joinder of additional parties and the further amendment of the plaint sought by the Plaintiff would enable this court to effectually and completely adjudicate upon and settle all questions in controversy in this suit. I am, however, equally persuaded that the proposed joinder of the new parties to the suit and the amendment sought would prejudice the 1st and 2nd Defendants. The proposed joinder of the new parties to the suit is likely to subject the 1st and 2nd Defendants to great inconvenience and unnecessary costs. As I mentioned earlier in the ruling, this suit was filed on 27th March 2012, which is more than 13 years ago. The parties have been waiting for the conclusion of this dispute, pitting a brother against a brother, for that long. As submitted by the Defendants, the Plaintiff has not given a reasonable explanation for the delay in bringing the present

application. As correctly submitted by the 2nd Defendant, the Plaintiff was aware as early as 28th June 2024, before the commencement of the hearing of this suit, that the suit property had been subdivided into 64 plots, namely, Kisumu/Dago/4650-4714. In fact, the Plaintiff in his evidence in chief on 8th July 2024 produced a copy of the extract of the register of the suit property, Kisumu/Dago/234 (P.EXH.2) in which the land registrar made entries numbers 8,9, and 10 in the proprietorship section which were to the effect that; the suit property was transferred to the 2nd Defendant on 3rd August 2017, the 2nd Defendant was issued with a title deed on the same date and on 6th October 2017, the title was closed upon subdivision of the property into Kisumu/Dago/4650-4714. The Plaintiff proceeded with the hearing of the suit and closed his case on 26th September 2024 with the full knowledge that the suit property had been subdivided and portions sold to third parties. It is not correct, as claimed by the Plaintiff, that it was not until the Plaintiff's advocate conducted what the Plaintiff referred to as a "Green Card Search" that he learnt of the subdivision of the suit property. At the time the Plaintiff brought the present application, the Plaintiff and the 1st and 2nd

Defendants had closed their cases. The Plaintiff is now seeking to add 32 new parties to the suit. Some of these parties are first purchasers of their portions of the suit property from the 2nd Defendant, while others are purchasers from the first purchasers. As correctly submitted by the Defendants, the new parties would raise various new defences to the Plaintiff's claim. Since they did not participate in the hearing of the Plaintiff's and the 1st and 2nd Defendants' cases, they would seek the hearing of the suit to start afresh. The result is that the court's and the parties' time and cost devoted to the hearing of the suit would be wasted, and this 13-year-old case would drag on for a few more years to the great prejudice of the Defendants. The law is settled that non-joinder or misjoinder of parties does not defeat a suit, and that in every case, the court would determine a suit as concerns only the parties before it. This court would therefore not make any orders against parties not before it, as feared by the Plaintiff.

The foregoing notwithstanding, I am of the view that disallowing the Plaintiff's application would effectively determine the Plaintiff's suit in favour of the Defendants purely on a technicality without considering the merit of the dispute.

In his amended plaint, the Plaintiff has sought orders in respect of Title No. Kisumu/Dago/234 (the suit property), which is non-existent following the subdivision thereof. The Plaintiff has sought the cancellation of the title for the property. That order cannot also be granted as it will affect parties who are now registered as the owners of the subdivisions arising from the title, who are not before the court.

In D.T. Dobie & Company (Kenya) Limited v. Joseph Mbaria Muchina & Another [1982] KLR 1 Madan JA. stated that:

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

I am of the view that the prejudice and the inconvenience likely to be suffered by the Defendants if the Plaintiff's

application is allowed can be compensated in costs. Since the hearing of the suit would start afresh, the Plaintiff must pay to the Defendants costs thrown away up to the time when the Plaintiff's and the 1st and 2nd Defendant's cases were closed, which I would assess at Kshs. 250,000/- for each of the Defendants who have defended the suit, having regard to the work done and the time spent on the matter for the last 13 years.

For the foregoing reasons, I find merit in the Plaintiff's Notice of Motion application dated 20th June 2025. The application is allowed on the following terms;

1. Subject to the order number 2 below, the Plaintiff is granted leave to further amend its plaint dated 29th March 2021 in terms of the draft further amended plaint annexed to the affidavit in support of the application.
2. The Plaintiff shall pay to the 1st and 2nd Defendants a sum of Kshs. 250,000/- each being thrown away costs within 45 days from the date hereof.
3. The Plaintiff shall file the further amended plaint within 15 days from the date of payment of the thrown away costs as ordered in order number 2 above.

4. If the Plaintiff fails to pay the thrown away costs to the 1st and 2nd Defendants within the prescribed time, the leave to further amend the plaint granted herein shall stand set aside, and the Plaintiff's Notice of Motion dated 20th June 2025 shall stand dismissed with costs to the 1st and 2nd Defendants.

**Delivered and signed at Kisumu this 17th day of
December 2025**

**S. OKONG'O
JUDGE**

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:

Ms. Raburu h/b for Mr. Omondi for the Plaintiff

Mr. Muma for the 1st Defendant

Mr. P.D.Onyango for the 2nd Defendant

N/A for the 3rd and 4th Defendants

Ms. J. Omondi-Court Assistant