

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. E300 OF 2022

SADAFF SHOKATALI GULAM HUSSEIN HABIB .. 1ST

PLAINTIFF

SABAHATT SHOKATALI HABIB 2ND

PLAINTIFF

PARAGON PROPERTY CONSULTANTS LIMITED ... 3RD

PLAINTIFF

THE ESTATE OF SHOKAT ALI GULAM HUSSEIN HABIB

alias **SHOKATALI GULAM HUSSEIN HABIB 4TH**

PLAINTIFF

VERSUS

ABDISALAN ADAN HUSSEIN 1ST

DEFENDANT

JOHN MWAURA 2ND

DEFENDANT

THE LAND REGISTRAR,

ELC CASE NO. E300 OF 2022

Ruling

NAIROBI LANDS REGISTRY 3RD

DEFENDANT

THE HONOURABLE ATTORNEY GENERAL 4TH

DEFENDANT

RULING

1. What is before the Court for determination is the Plaintiffs' Notice of Motion application dated 5th May 2025 where they seek the following Orders:

a) Spent.

b) That the Honourable Court be pleased to grant the Plaintiffs/Applicants leave to amend their further amended plaint dated 25th July 2023 and respond to the 1st Defendant's statement of defence dated 14th May 2024 together with the 2nd Defendant's statement of defence and counterclaim dated 2nd October 2024 and file any other relevant documents pending the hearing of the main cause.

c) That costs of this application be in the cause.

ELC CASE NO. E300 OF 2022

Ruling

d) That the Honourable Court be pleased to grant any other order as it deems fit and just.

2. The application is premised on grounds on its face and on the supporting Affidavit of Kepha Oguttu, property agent of the 3rd Plaintiff. He avers that while the Plaintiffs have filed a further amended plaint dated 27th February 2023, they mistakenly omitted some crucial orders that are vital for a fair and just determination of the suit. Further, that they also need to file a reply to the 1st Defendant's statement of defence dated 14th May 2024 as well as the 2nd Defendant's statement of defence and counterclaim dated 2nd October 2024. He avers that the said parties will not suffer any prejudice as they will have an opportunity to file a reply to the further amended plaint/file additional documents if need be.

3. The application is opposed by the 1st Defendant who filed a replying affidavit. He avers that there has been inordinate delay on the part of the Plaintiffs as the amendments are

sought more than three (3) years after filing suit and two (2) years after the last amendment. Further, that the suit has never progressed to hearing due to the Plaintiff's repeated interlocutory applications. He contends that the amendments are reactive and opportunistic, meant to fill gaps and will alter the nature and character of the suit and that the Defendants will be prejudiced since they have filed their defenses and documents in readiness for hearing.

4. The 2nd Defendant is also opposed to the application on grounds that mirror those of the 1st Defendant.
5. The 3rd and 4th Defendants did not file responses.
6. In response to the 1st and 2nd Defendants replying affidavits, the Plaintiff filed a supplementary affidavit sworn by Kepha Ogutu. He attributes the delay in seeking amendments to the time taken to gather crucial additional evidence and information that allegedly came to light only after the 1st and 2nd Defendants filed their defenses. He asserts that the

proposed amendments do not introduce a new cause of action or alter the character of the suit but seek to clarify and include omitted crucial prayers and particulars that were inadvertently left out in the further amended plaint dated 27th February 2023. Further, that it will enable the Court to determine the real questions in controversy between the parties. He annexed the Plaintiffs' proposed further further amended plaint.

7. The application was canvassed by way of written submissions.

Submissions

8. The Plaintiffs submit that the proposed amendments are necessary so that the real matters in dispute can be fully decided and that this court has discretion to permit amendments to pleadings at any stage of the proceedings, for the attainment of substantive justice rather than being defeated on account of inadvertent errors in pleadings.

9. While they acknowledge that a period of time has elapsed since the filing of the further amended Plaint in February 2023, the Plaintiffs submit that the delay is both explained and justified, in that the proposed amendments are necessary to rectify inadvertent errors and to incorporate material particulars that emerged following the filing of the defences in the matter. Further, that they do not introduce a new or inconsistent cause of action but instead clarify and strengthen the existing claim and the Defendants will suffer no prejudice incapable of being remedied whereas refusal of the application would impede the Court's ability to effectively determine the real issues in controversy.

10. They reiterate that the application is not brought as an afterthought since at the directions hearing held on 18th March 2025, they expressly raised the issue of amendment, and the Court directed that a formal application be filed.

11. To buttress their averments, the Plaintiffs relied on the following decisions: **Nyakongo t/a HR Ganjee & Sons v ELC CASE NO. E300 OF 2022** **Ruling**

County Government of Kwale & another (Civil Suit 96 of 2015) [2025] KEHC 12345 (KLR) (31 July 2025), Sadera & 2 others v Kerema & 7 others (Civil Appeal 89 of 2019) [2025] KECA 458 (KLR) (7 March 2025) and Shah & another v Govani; Jaff (Third party) (Environment and Land Case 1468 of 2013) [2025] KEELC 7989 (KLR) (19 November 2025).

- 12.** On his part, the 1st Defendant submits that amendments sought after inordinate delay, particularly where they introduce a substantially different case ought not to be allowed. He points out that the proposed further further amended plaint alters the substratum of the suit, including the identity and description of the suit property, the root of title, and the scope of reliefs sought, introducing expanded prayers such as mesne profits, mandatory and prohibitory injunctions, rectification and reconstruction of the land register, and enhanced claims against the Land Registrar and the Attorney General.

13. He submits that the prejudice the Defendants will suffer are not compensable by an award of costs, as they strip them of accrued procedural rights, require re-pleading, re-framing of defences and counterclaims, and effectively restart the litigation, adding that Article 159(2)(d) of the Constitution cannot be invoked to sanitize procedural indolence or tactical litigation.

14. To buttress his averments, the 1st Defendant relied on the following decisions: **Central Kenya Ltd v Trust Bank Ltd & 4 Others [2000] eKLR** and **Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR** **Nicholas Kiptoo Arap Korir Salat v IEBC & 7 Others [2014] eKLR.**

15. The 2nd Defendant did not file submissions.

Analysis and Determination

- 16.** Upon consideration of the instant Notice of Motion application including the respective affidavits and rivalling submissions, the only issue for determination is whether the Plaintiffs should be granted leave to amend the further amended Plaintiff and respond to the 1st and 2nd Defendants' Defences.
- 17.** The Plaintiffs seeks leave to amend their further amended plaintiff dated 25th July 2023 and to respond to the 1st Defendant's statement of defence dated 14th May 2024 together with the 2nd Defendant's statement of defence and counterclaim dated 2nd October 2024.
- 18.** On their part, the 1st and 2nd Defendants contend that the amendments are sought late in the day and that they seek a substantive reengineering of the Plaintiffs' case thus the Plaintiffs have failed to meet the legal threshold for grant of leave to amend.

19. The Plaintiffs contend that their amendments are not sought to fill gaps but to incorporate vital omitted reliefs that ensure a comprehensive adjudication of the dispute over the suit property.

20. The legal framework on amendment of pleadings is contained in Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure Rules.

21. Order 8 Rule 1 (1) of the Civil Procedure Rules provides for amendments without leave of court before pleadings are closed. Where pleadings have closed, a party has to seek leave of Court to effect any amendments. This, is per provisions of Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules which states that:

“(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 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.”

22. Order 8 Rule 5 (1) of the Civil Procedure Rules provides as follows:

“(1) For purposes of determining the real question in controversy between the parties, or of correcting any defector 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.”

23. In the case of **Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago**

[1995] eKLR the Court of Appeal set out the principles for granting amendment of pleadings and stated thus:

“.....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 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 facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

24. In **Tarmohamed v Mariakani Holdings Limited & another [2022] KECA 122 (KLR)**, the Court of Appeal stated that:

“...rules that apply to amendment of pleadings will apply, namely that amendments should be liberally allowed, if they can be made without injustice to the other side, or where such injustice can be compensated by costs.”

25. On perusal of the Court record, I note the matter has not proceeded for hearing. Further, I note the fulcrum of the dispute in the proposed further further amended Plaintiff still revolves around ownership of the suit properties. I opine that the amendments sought are not going to substitute a new cause of action as claimed by the 1st Defendant but only includes certain reliefs over the suit property that will enable the Court appreciate the facts in respect to the root of the Plaintiffs’ title as well as other issues revolving around the dispute over the said property. Further, the Defendants have not demonstrated any prejudice they will suffer if the

amendment sought are granted. On a keen reading of the legal provisions cited, I note the Court is granted discretion to allow amendments for purposes of determining the real question in controversy between the parties. To my mind, the Defendants will also be allowed to amend their Defences including Counterclaim and since pleadings will reopen, parties can also file further witness statements to support their respective claims.

26. In the foregoing while associating myself with the decisions cited, I will allow the Plaintiffs to amend their further amended Plaintiff and file a reply to Defence including Defence to Counterclaim. I will also grant the Defendants leave to amend their respective Defences and Counterclaim if need be.

27. In the circumstances, I find the instant Notice of Motion application
merited and will allow it.

28. I grant the Plaintiffs leave of fourteen (14) days to file and serve their further further Amended Plaintiff including reply to Defences as well as Defence to Counterclaim. Upon service, I grant the Defendants leave of fourteen (14) days to file and serve their respective amended Pleadings.

29. Costs will be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 3RD
DAY OF MARCH, 2026**

**CHRISTINE OCHIENG
JUDGE**

In the presence of:

Ms Sultani holding brief for Macharia for Plaintiffs

Anyango for 2nd Defendant

Kiamba holding brief for Mbalu Mutava for 1st Defendant

Court Assistant: Joan