

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ELC APPEAL NO. E085 OF 2024

HARRIET KARAMANA GITONGA.....1ST APPELLANT
BRILLIAN MWENDWA GITONGA(Suing through her next friend Harriet
Karamana Gitonga).....2ND APPELLANT
GITONGA GRACE KIRIMI((Suing through her next friend Harriet Karamana
Gitonga).....3RD APPELLANT
IVAN GITONGA MUNORU (Suing through her next friend Harriet Karamana
Gitonga).....4TH APPELLANT
SHARMINE PENDO GITONGA(Suing through her next friend Harriet
Karamana Gitonga).....5TH APPELLANT
JANE NJERI GITONGA (Suing through her next friend Harriet Karamana
Gitonga).....6TH APPELLANT
YVONNE NYAWIRA GITONGA (Suing through her next friend Harriet
Karamana Gitonga).....7TH APPELLANT

VERSUS

JACOB MUNORU..... 1ST RESPONDENT
MARY MUNORU.....2ND RESPONDENT
ZIPPORAH MUNORU.....3RD RESPONDENT
NKIROTE MUNORU.....4TH RESPONDENT

JUDGMENT

1. The facts surrounding the original suit which births the subject appeal are somehow disturbing. In addition, the circumstances that emanate from the manner in which the suit in the lower court has been conducted brings into question our preparedness as pertains to compliance with the provisions of **Article 159[2(b)] of the Constitution 2010**; as read together with **Sections 1A and 1B of the Civil Procedure Act , Chapter 21 Laws of Kenya.**

2. Additionally, the facts emanating from the proceedings in the law court also brings to mind the applicability of the maxim: *Justice delayed is justice denied*. Moreover, I am reminded of the observation of the Court of Appeal in the case of ***Said Sweilem Gheithan Saanun v Commissioner of Lands & 5 others [2015] eKLR (Civil Appeal 16 of 2015)***. The Court of Appeal stated as hereunder:

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the Civil Procedure Act are intended to facilitate the just, expeditious, proportionate and affordable resolution

of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the

*absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them. The warning of Madan JA in ***Belinda Murai & others v Amos Wainaina (1978) LLR 2784***, reigns true today. He said:*

“A mistake is a mistake. It is no less a mistake because it is unfortunate slip. It is no less pardonable because it is committed by senior counsel.

The door of justice is not closed because a mistake has been made by a lawyer of experience who ought to know better. The court may not condone it but it ought certainly to do whatever is necessary to rectify it if the interests of justice so dictate... [our emphasis].

We also reiterate Lord Griffith's words in **Ketterman v Hansel Properties Ltd** (1988) 4 All ER 769,

that;

“Legal business should be conducted efficiently. We can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.”

3. The observations alluded to in the preceding paragraphs shall come to pass presently. Nevertheless, it is apposite to return to the appeal beforehand.
4. The Appellants filed the Notice of Motion application dated 7th June 2024 and wherein same sought leave to file and serve an amended plaint. The application in question was premised on various grounds, including the contention that the Appellants had obtained evidence to show that the District Land Surveyor and the District Land Registrar- Igembe district [who were not parties to the suit] had colluded with the Respondents herein to alter the official map with the intention of [sic] stealing the Appellants land.

5. The said application was opposed by the Respondents. The Respondents filed a replying affidavit sworn on 4th July 2024 and wherein the Respondents raised various issues. The issues raised by the Respondents were; the suit in the subordinate court was heard and closed; the parties including the Appellants were directed to file and exchange written submission; the Appellants herein failed to file and serve written submissions; the Respondents were constrained to and filed written submissions without the benefit of the Appellants submissions; the failure by the Appellants to file written submissions subsisted between the 14th of September 2023 up to and including June 2024; the failure by the appellants to file written submissions was a deliberate scheme to defeat the finalization of the suit in the lower court.

6. Additionally, the Respondents posited that the conduct of the appellants in the lower court was wrought with mala-fides; want of diligence and constituted outright abuse of the due process of the court. Moreover, it was contended that the intended amendment was geared towards bringing forth a new cause of action; bringing on board new parties; changing the character/ texture of the suit; and same was intended to defeat the expeditious disposal of the suit. In this regard, the Respondents implored the trial court to dismiss the application.

7. The application for amendment was heard and disposed of *vide* ruling delivered on **14th November 2024**. The trial court found and held that the Appellants were seeking to bring on board a new cause of action; change the character of the suit and implead new parties. In addition, the trial magistrate also found that the application for amendment had been filed with unreasonable and inordinate delay. In any event, the trial court held

that the intended amendment would occasion prejudice and injustice, if same was allowed.

8. Premised on the foregoing finding, the Learned Trial Magistrate dismissed the application for amendment. It is the said ruling and the consequential order which has aggrieved the Appellants and thus provoking the subject appeal.

9. The subject appeal is anchored on the memorandum of appeal dated 22nd **November 2024**. The grounds alluded to are:

- i. The Learned Trial Magistrate erred in law and in fact in finding that the appellant had failed to prove that there were sufficient grounds to reopen the suit and allow the applicant amend their pleadings, hence arriving at a wrongful decision.*
- ii. The Learned Trial Magistrate erred in law and in fact in that he rejected and or failed to consider the evidence of the Appellants hence arriving at a wrongful decision.*
- iii. The Learned Trial Magistrate erred in law and in fact in that he failed to appreciate that the scene visit conducted by court on 24^{05.2023} clearly showed that there was interference and or alteration of the maps used to conduct the survey and the occupation of the parties on the ground, thereby leading to discovery of fraud that formed the basis of the whole suit and the real issues therein hence the need for amendment of pleadings but the Learned Trial*

Magistrate rejected the said application hence arriving at a wrongful decision.

iv. The Learned Trial Magistrate erred in law and in fact in that he failed to consider the relevant principles while his discretion and as such he arrived at a wrongful decision.

v. The ruling of the Learned Trial Magistrate is bad in law.

10. The appeal came up for directions on the **28th January 2026**; whereupon the advocate for the Appellants intimated to the court that same had filed and served the record of appeal. In addition, it was posited that the record of appeal was complete. Learned counsel for the appellants thereafter sought directions as pertaining to the hearing and disposal of the appeal. Moreover, learned counsel for the appellant proposed to have the appeal canvassed by way of written submissions.

11. With the concurrence of learned counsel for the Respondents, the court proceeded to and issued directions. The directions were; the appeal shall be heard before one judge sitting at Meru; the appeal shall be canvassed by way of written submissions; the appellant shall file and serve written submissions within 14 days from the date of the directions; and the Respondents shall file and serve written submission within 14 Day[s] from the date of service by the appellants.

12. The Appellants filed written submissions dated 30th January 2026. The Appellants have raised and canvassed four salient issues. The issues

canvassed by the Appellants are; the application for amendment was not actuated/ inspired by bad faith; the application was not mounted with unreasonable and inordinate delay; the Respondents shall not be disposed to suffer any prejudice or injustice; the intended amendment shall not introduce new cause of action or new parties. Moreover, learned counsel for the Appellants has also contended that the Respondents herein had themselves filed an amended statement of defence and counterclaim alleging trespass and hence the respondents ought not to be heard protesting the issue of introduction of a new cause of action and new parties.

13.Regarding the first issue, learned counsel for the Appellants has submitted that the application for leave to amend the plaint was necessitated by the discovery of critical evidence which came to light on the 24th May 2023 during the second site visit. In particular, it has been submitted that it is during the said visit that the Appellants discovered that the district land registrar and the district surveyor- Igembe district were using different maps from the ones which had previously been supplied and used during the proceedings.

14. Additionally, it has been submitted that the time for filing the intended amendment can only be computed from the date when the Appellants discovered the new evidence and not from the date when the suit was filed. In this regard, it has been submitted that the application for amendment was made promptly and in good faith.

15.With regard to the second issue, learned counsel for the Appellants has submitted that the law on amendments allows amendments to be sought

for and where appropriate to be undertaken irrespective of the stage where the suit has reached. Furthermore, it has been submitted that an amendment can be taken even when the parties have closed their respective cases.

16. Learned counsel for the Appellants has ventured forward and submitted the fact that the parties had both closed their respective case[s] does not oust or fetter the discretion of the court to grant leave to amend. To this end, counsel has cited and referenced the provision of **Order 8 Rule 5 of the Civil Procedure Rules.**

17. The third issue that that been argued by learned counsel for the Appellants touches on and concerns prejudice or injustice [if any] that may arise. It has been submitted that the Respondents did not demonstrate any prejudice or injustice that shall occur if amendment was granted. In any event, it was contended that the Respondents would be at liberty to file amended pleadings; tender evidence and cross examine the witnesses in accordance to the law.

18. On the other hand, it was also submitted that whatever prejudice or injustice [if any] that could arise could be compensated by an award of costs.

19. Lastly, it has been submitted that the contention by the Respondents that the intended amendment would introduce a new cause of action and bring foth new parties, is based on misapprehension. In any event, it was submitted that the Respondents cannot be heard to raise the contention of

a new cause of action, yet they [Respondents] filed an amended statement of defence and counterclaim and which brought forth new issues/ introduced a new cause of action.

20. Flowing from the foregoing, learned counsel for the appellants has therefore invited the court to find and hold that the impugned ruling is based on misapprehension of the facts surrounding the subject matter and the applicable law. The court has been invited to set aside the ruling; allow the appeal and grant leave to file and serve an amended plaint.

21. The Respondents filed written submissions dated 26th January 2026; and wherein the Respondents have raised/ canvassed four [4] key issues. The issues canvassed by / on behalf of the Respondents are: the discretion to grant leave to amend pleadings is not absolute; the application for leave to amend was filed with unreasonable and inordinate delay; the application for leave to amend was informed by ulterior motives and mala fides; and the intended amendment was geared towards introducing a new cause of action and bringing on board new parties.

22. Learned counsel for the Respondents has thereafter highlighted the foregoing issues by contending that the Appellants herein had hatched a plot to delay, obstruct and or defeat the expeditious hearing and determination of the suit in the lower court. In particular, it was contended that the Appellants had engaged in conduct that was clearly intended to circumvent the preparation and delivery of the judgment.

23. Additionally, it has been submitted that the application for leave to amend was brought with unreasonable and inordinate delay. In particular, it was submitted that the application was filed long after all the parties had closed their respective cases and the matter was scheduled for filing and exchange of the Final written submissions. To this end, it was submitted that the timing of the application is critical in determining whether same was made in good faith or otherwise.

24. With regard to the introduction of a new cause of action and new parties, it has been submitted that the proposed amendment is geared towards impleading a cause of action of [sic] fraud , which had never been raised and or captured in the previous pleadings. It has been posited that the introduction of fraud will not only change the character of the suit, but will entail the filing of fresh pleadings by the parties.

25. In addition, it has also been submitted that the Appellants also seek to bring on board the District Land Registrar and the District Surveyor [who were not parties to the suit] and who are now said to have colluded with the Respondents in manufacturing registry index map. It has been contended that the introduction of new parties will affect the entire matter and take the suit outside the parameters of amendment.

26. Learned counsel for the Respondents has submitted that the intended amendment if allowed shall occasion undue prejudice and injustice to the Respondents. Moreover, it has been submitted that the extent of prejudice and injustice to be suffered by the Respondents shall not be indemnified by an award of cost.

27. *In a nutshell*, learned counsel for the Respondents has invited the court to find and hold that the application for amendment was inspired by ulterior motives and that the Learned Trial Magistrate correctly appreciated and applied the principles underpinning exercise of discretion as pertains to amendments. The court has been invited to dismiss the appeal with costs.

28. Having reviewed the record of appeal; the Notice of motion application dated 7th June 2024; the replying affidavit in opposition thereto and upon taking into account the written submissions filed by / on behalf of the parties, two [2] key issues crystalize for consideration and determination. The issues are: Whether the Appellants met/ satisfied the threshold for the grant of leave to amend the plaint or otherwise; and Whether the learned magistrate correctly appreciated and applied the principles underpinning amendment of pleadings or otherwise.

29. Before venturing to address the thematic issues, which I have isolated in the preceding paragraph, it is important to highlight that what is before me is a first appeal. In addition, it is apposite to state that the appeal concerns exercise of discretion by the Learned Trial Magistrate while dealing with an application for leave to amend pleadings.

30. The jurisdiction of the first appellate court while handling and dealing with an appeal from the court of first instance arising from exercise of discretion is circumscribed. Though the court is called upon to undertake exhaustive review, scrutiny and evaluation of facts and evidence that was presented before the lower court, the court must nevertheless defer to the factual finding[s] and conclusion of the lower court.

31. Nevertheless, there is no gainsaying that the appellate court is enjoined to interfere with or depart from the finding[s] and conclusion of the lower court where it is shown: That the findings of the lower court are based on misapprehension of the evidence tendered; based on no evidence; the findings are perverse to the evidence on record; or the discretion is wrought with errors of principles which negate the findings and conclusions.

32. The court shall also be called upon to interfere with exercise of discretion where its shown that the lower court took into account irrelevant/ extraneous issues ; or failed to take into account relevant matters.

33. The jurisdictional remit of the first appellate court while dealing with an appeal touching on exercise of discretion by the lower court was expounded in the case of ***Mbogo v Shah (1968) EA 93***.

34. The Court of Appeal for Eastern Africa [EACA] stated thus:-

“A Court of Appeal should not interfere with the exercise of the discretion of a judge unless it is satisfied that he misdirected himself in some matter and as a result arrived at a wrong decision, or unless it is manifest from the case as a whole that the judge was clearly wrong in the exercise of his discretion and that as a result there has been misjustice.”

35. Back to the thematic issues. The Appellants filed the application dated **7th June 2024**; and wherein same sought leave of the court to file and serve an amended plaint. The purpose for seeking leave was to enable the

Appellants to implead a cause of action of fraud. In addition, the Appellants sought to bring on board the district land surveyor and the district land registrar- Igembe district; who were[sic] contended to have colluded with the Respondents to alter the official maps in an endeavour to aid the Respondents in stealing the Appellants land.

36. Additionally, it is common ground that by the time the Appellants filed the application for leave to amend, all the parties had canvassed their respective cases and the hearing had been closed. Furthermore, there is no gainsaying that the matter in the lower court had been set down for filing and exchange for final submissions.

37. Equally, the record shows that the Appellants herein had been given timelines to file and serve written submissions. The directions on filing and exchange of submissions were issued on 31st July 2023. The Appellants ought to have filed their submissions on or before the 21st August 2023. The submissions were never filed.

38. Additionally, the record shows that the Appellants' counsel was granted several indulges to be able to file and serve submissions but same failed, neglected and or refused to file submissions. To this end, learned counsel for the Respondents was constrained to and indeed filed their written submissions albeit without the benefit of the appellants.

39. On the 7th of June 2024, [*approximately eleven months*] from the date when directions on submissions were given] the Appellants counsel filed the application seeking leave to amend. It is not lost on me that the

application for leave to amend was being filed long after the parties had closed their respective cases. It was equally being filed after a duration of eleven months of failure by the Appellants to file their final submission.

40. Moreover, it is important to recall and reiterate that the purport of the intended amendment was to introduce a new cause of action, namely; fraud. In addition, the Appellants also sought to bring on board two new parties; the district land registrar and the district surveyor. This were persons who had never been mentioned in the suit that was filed in 2020.

41. The bottom line is that the Appellants application for leave to amend was filed with unreasonable and inordinate delay; inspired by mala fides; calculated to delay, obstruct and defeat the crafting of the judgment by the lower court; intended to bring on board a new/ fresh cause of action; change character of the suit and introduce new parties. Furthermore, the purport of the intended amendment was clearly calculated to occasion prejudice and injustice to the Respondents.

42. Moreover, it is not lost on me that the introduction of a new cause of action and the change of the character of the suit, was being introduced at the tail end of the proceedings. Where such application for amendment is made at the tail end, the court is called upon to tread with care; caution; and circumspection.

43. It suffices to highlight that an amendment, like the one that was intended by the Appellants was certainly bound to have a ripple effect. The

amendment was to culminate in the parties filing new pleadings; filing fresh list and bundles of documents; further list of witnesses; and additional witness statements. Quiet clearly, the intended amendment was meant to undo all the proceedings; and the efforts that had been undertaken in the suit before the trial court.

44.To my mind, the Appellants herein did not meet and or satisfy the threshold for leave to amend. The circumstances that surrounded the application for amendment militated against the exercise of discretion in favour of amendment. Notably, the exercise of discretion to amend is not intended to assist a party who is keen to delay justice.

45.In the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] KECA 367 (KLR)* the Court of Appeal highlighted the principles governing amendment. The Court stated thus:

The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.

And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written

statement of defence must be allowed. This is an interlocutory appeal in which the appellant challenges the exercise of discretionary jurisdiction of the trial court.

*It is trite law that an appellate court will not lightly interfere with the exercise of a court's discretion unless it is satisfied that the discretion was wrongly exercised or there is an error in principle. It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, *Beoco Ltd v. Alfa Laval Co. Ltd* [1994]4 ALL ER. 464).*

46. The position that a party cannot seek to introduce a new cause of action; alter the character of the suit; and essentially bring on board new parties by way of amendment was re-visited in the case of *Catherine Koriko & 3 others v Evaline Rosa* [2020] KECA 534 (KLR). The Court of Appeal stated thus:

The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would,

almost certainly have involved the calling of a witness who had not been called.

47. The court went further and stated thus:-

I note that the learned judge aptly stated that if the amendment were to be allowed, it would change the character of the suit and the respondent would be prejudiced as she had battled claims in the Succession Cause and now in the instant suit. In this context, I am inclined to adopt the dicta by this Court in Rubina Ahmed & 3 others v Guardian Bank Ltd, (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR where the Court declined to interfere with the discretion of the trial judge to refuse amendment of pleadings. This Court observed:

In our view, in considering the various factors he did, the learned Judge was simply balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

48. In my humble view, the Appellants neither established nor satisfied the threshold for the grant of leave to file an amended plaint. Moreover, the application by the Appellants was defeated by *Latches*.

49. The next issue for consideration relates to whether the Learned Trial Magistrate appreciated the principles applicable in an application for amendment and thereafter correctly applied same. I have reviewed the ruling of the Learned Trial Magistrate and I have found that the Learned

Trial Magistrate addressed various perspectives. The perspectives which were addressed are; the application for amendment was filed too late in the day; the application was filed long after all the parties had closed their respective cases; the application was bound to occasion serious prejudice and injustice to the Respondents; the amendment was intended to introduce a new cause of action of fraud; the amendment was also geared to introduce new parties; the application for amendment was inspired by mala fides; and no basis had been offered to warrant the grant of the Leave of Court.

50. Furthermore, the Learned Trial Magistrate also considered the antecedent conduct of the Appellants and their counsel. In particular, the Learned Trial Magistrate took into account the lapse of time between the 31st July 2023 when the Appellants were ordered to file their final submissions up to the 7th June 2024; when the application of amendment was filed. The trial court then observed that the Appellants were not acting in good faith.

51. I have reviewed the salient features that underpin the impugned ruling. I am satisfied that the Learned Trial Magistrate correctly appreciated the principles and thereafter took same into account while exercising his discretion. The discretion was judiciously exercised.

52. On the contrary, I have not seen any injudicious / improper exercise of discretion. Quite clearly, the Learned Trial Magistrate applied his mind to the law and thereafter, came to the correct conclusion.

53. Before concluding on this issue, it is apposite to reference the holding in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] KECA 345 (KLR)*. The Court of Appeal highlighted the fact that the discretion must be exercised rationally.

54. The court stated thus:-

The learned judge in rejecting the application for amendment was no doubt exercising a judicial discretion which must be exercised rationally.

Conclusion:

55. The Appellants had sought to impeach the exercise of discretion by the learned chief magistrate. It was incumbent upon the appellants to demonstrate injudicious or improper exercise of discretion. No scintilla of improper exercise of discretion was highlighted.

56. On the other hand, it is the Appellants who had themselves sought discretion to file an amended pleading. The Appellants were therefore enjoined to satisfy the threshold for exercise for discretion. The Appellants failed the test. Moreover, it is not lost on me that exercise of discretion is not based on sympathy or empathy. Notably, same is guided by reason; objectivity; and bona fides in the conduct of the claimant.

57. Furthermore, where a party does not act in good faith, the court is enjoined to take that conduct into account. Condonation cannot be procured on the basis of slovenliness; or lethargy.

58. Additionally, there is need to highlight the obligation of parties and their legal counsel in an endeavour to help courts to achieve the overriding objectives. Sight must never be lost of the provisions of **Sections 1A and**

1B of the Civil Procedure Act, Chapter 21, Laws of Kenya. Similarly, court process must be anchored on the need to expedite justice. Pertinently, **Article 159(2)(b) of the Constitution, 2010;** must not remain an aspiration.

59. The conduct of the Appellants fell short of equity. It would have been inequitable; and an improper exercise of discretion to dignify the Appellants with the Leave sought.

Final Orders:

60. From the foregoing analysis, the Final orders of the court are:

- i. The Appeal be and is hereby Dismissed.*
- ii. The Ruling of the Learned Trial Magistrate dated 14th November 2024; and the consequential order arising therefrom be and are hereby affirmed.*
- iii. Cost of the Appeal be and are hereby awarded to the Respondents.*
- iv. The Costs in terms of [iii] shall be agreed upon; and in default be taxed in the conventional manner.*

61. It is so ordered.

DATED, SIGNED AND DELIVERED AT MERU THIS 27th DAY OF FEBRUARY, 2026.

OGUTTU MBOYA, FCI Arb; CPM [MTI-EA].

JUDGE

In the presence of:

Naserian – Court Assistant

Ms Asuma holding brief for Mr Mutembei for the Respondents

N/A for the Appellants.