

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT EMBU
ELC CASE NO. 30 OF 2021 (OS)

**NDWIGA
GATUMU**

.....**PLAINTIFF/APPLICANT**

VERSUS

**LUCY MUTHANJI MUNGE1ST
DEFENDANT/RESPONDENT**

**POLLY WAMBETI MUTIITHI2ND
DEFENDANT/RESPONDENT**

R U L I N G

INTRODUCTION

Before this Court is a Notice of Motion dated 24th October 2025 filed by the Plaintiff/Applicant, Ndwiga Gatumu, seeking the following orders:

- i. That the Plaintiff be granted leave to amend his Originating Summons out of time, in terms of the draft amended Originating Summons.
- ii. That the draft amended Originating Summons be deemed as duly filed upon payment of the requisite fees.
- iii. That costs of the application be provided for.

The Application is supported by the affidavit of the Plaintiff/Applicant sworn on 24th October 2025. The 1st

Respondent, acting on her own behalf and on behalf of the 2nd Respondent, filed a Replying Affidavit in opposition sworn on 26th January 2026. Both parties filed written submissions, the Respondents on 6th February 2026 and the Applicant on 11th February 2026.

This matter arose from an Originating Summons filed on 29th July 2021, in which the Plaintiff claims an interest in Land Parcel No. NGANDORI/NGUVIU/1708 based on alleged adverse possession and trust. The Defendants are the administrators of the estate of Njogu Mwendamwea alias Njogu Mwenda Mwea alias Njogu M'Mwea, appointed under Succession Cause No. 65 of 2019. The 1st Respondent is the widow of the deceased, and the 2nd Respondent is their daughter. The Plaintiff is a cousin of the deceased and resides on the adjacent Land Parcel No. NGANDORI/NGUVIU/1707.

The proposed amendments seek to: (a) clarify the trust-based cause of action already pleaded in the original Originating Summons to specifically plead a constructive trust; (b) introduce new paragraphs 5 and 6; and (c) introduce a new Order 2 seeking dissolution of the alleged constructive trust and transfer of title in the Plaintiff's favour.

ISSUES FOR DETERMINATION

This Court identifies the following issues for determination:

- i. Whether the application meets the legal threshold for leave to amend pleadings under Order 8 of the Civil Procedure Rules, 2010.
- ii. Whether the proposed amendments introduce new causes of action or merely particularise existing ones.
- iii. Whether the Respondents will suffer prejudice that cannot be compensated by an award of costs.

The legal basis for amendment of pleadings is found in Order 8 Rules 3 and 5 of the Civil Procedure Rules, 2010. Order 8 Rule 3(1) provides that:

"The Court may at any stage of the proceedings allow either party to alter or amend his pleadings in such manner and on such terms as may be just, and all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties."

Order 8 Rule 5 further provides that where a party applies for leave to amend after the period of limitation, the Court shall consider whether the amendment is necessary for the determination of the real question in controversy and whether such amendment will occasion any prejudice to the other party which cannot be compensated in costs.

The overarching guiding principle in this jurisdiction is that the Court's discretion to allow amendments should be exercised liberally, provided the amendment serves the ends of justice.

In *Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, the Court held that:

"...the general rule is that amendments ought to be allowed however late they may be made if they can be made without injustice to the other side and the rule is that the Court should consider whether the amendment will enable the Court to determine the real controversy between the parties."

This principle finds resonance in the wider common law tradition. In *Clarapede & Co v Commercial Union Association* (1883) 32 WR 262, Brett MR stated the seminal proposition that however negligent or careless a party may have been, and however late the proposed change, an amendment should be allowed if it can be made without injustice to the other side.

In the celebrated case of *Cropper v Smith* (1884) 26 Ch D 700, Bowen LJ articulated the foundational philosophy thus: "It is a well established principle that the object of courts is to decide the rights of the parties, and not to punish them for mistakes they make in the conduct of their cases." This principle has been faithfully adopted by Kenyan courts.

Further, in *Omboto & 3 Others v Board of Trustees, National Social Security Fund & 6 Others* [2024] KEELC 5283 (KLR), the Court reaffirmed that amendments should generally be allowed to enable the Court to adjudicate on the merits of the

controversy, so long as they do not occasion irreparable prejudice to the opposing party.

The constitutional dimension must also be considered. Article 159(2)(d) of the Constitution of Kenya, 2010 enjoins courts to administer justice without undue regard to procedural technicalities. Section 1A of the Civil Procedure Act similarly requires the Court to facilitate just, expeditious, proportionate, and affordable resolution of disputes. These provisions fortify the liberal approach to amendments.

ANALYSIS AND DETERMINATION

The Respondents strenuously oppose the amendments on the ground that the introduction of a constructive trust claim, together with new paragraphs 5, 6 and Order 2, constitutes entirely new causes of action that were never part of the original pleadings.

This Court has carefully examined the original Originating Summons and the draft amended Originating Summons. The original Originating Summons at paragraphs 5 and Prayer 2 already invoked the concept of trust as a basis for the Plaintiff's claim. The proposed amendment does not introduce an entirely foreign or unrelated legal theory; rather, it seeks to particularise the nature of that trust as a constructive trust. In *Seldon v Davidson* [1968] 2 All ER 755, it was held that an amendment which amplifies or clarifies an existing pleading without fundamentally altering the nature of the claim is permissible. The same principle applies here.

The distinction between introducing a new cause of action and refining an existing one is pivotal. A constructive trust is a species of trust; it is not an entirely new remedy. Where the original pleadings already raised trust as a cause of action, specifying the type of trust does not amount to a new cause of action but rather a clarification that enables the Court and the Respondents to understand and meet the case. This Court therefore finds that the proposed amendments do not introduce a wholly new cause of action, but rather expand and particularise the existing trust claim to provide greater clarity.

That said, new Order 2, seeking dissolution of the alleged trust and transfer of title, goes further than mere clarification. However, this relief flows logically and directly from the amended trust claim. It is the natural consequential relief flowing from a finding that a constructive trust exists over the land. As such, it cannot be said to be so fundamentally different in character as to prejudice the Respondents beyond what costs can remedy.

The Respondents correctly draw the Court's attention to the requirement under Order 8 Rule 5 that where amendments are sought out of time, an explanation for the delay must be furnished. The Applicant's affidavit is brief in this regard, stating only that his advocates have advised that the amendment is necessary to properly frame the case. No particularised reason for the delay has been given.

This Court notes with concern that the application was made after a hearing date had been fixed, and the matter was, by all accounts, ripe for hearing. The failure to proffer a cogent explanation for the delay is a factor that this Court cannot ignore. Courts have repeatedly emphasized that amendments ought to be sought at the earliest opportunity: see *Kuloba v Oduol* [2001] KEHC 818 (KLR), where it was observed that a party seeking to amend must do so timeously and with candor regarding the reasons for any delay.

However, the absence of a detailed explanation for delay does not in itself defeat an application to amend, particularly where the amendment serves to determine the real controversy between the parties and the prejudice to the opposing party can be remedied by costs: see *Patel v EA Cargo Handling Services Ltd* [1974] EA 75. This Court is mindful that the overriding objective demands that cases be decided on their merits. The failure to give a detailed justification for the delay is accordingly a factor to be weighed against the Applicant when considering costs, but it is not a standalone basis for refusing the amendment.

The Respondents contend that they will be prejudiced because they have already filed their Replying Affidavit and witness statement in response to the original Originating Summons, and will now be required to address new claims, potentially call additional witnesses, and incur additional costs.

This Court accepts that there will be some inconvenience to the Respondents. However, the test is not mere inconvenience or the fact that additional preparation will be required. The test is whether the prejudice is of a nature that cannot be compensated by an award of costs. As was held in *Butt v Khan* [1981] KLR 349, the Court must consider whether an appropriate order as to costs can adequately compensate the opposing party for any disruption occasioned by a late amendment.

In this case, the matter has not yet proceeded to full hearing. No oral evidence has been taken. The Respondents have not yet had their witnesses subjected to cross-examination on the basis of the existing pleadings, such that a change in those pleadings would undermine evidence already led. The prejudice, while real, is of a kind that an appropriate costs order can adequately address. Specifically, the Respondents will be granted sufficient time to file a further replying affidavit addressing the amended claims, and costs of this application and any wasted costs shall be borne by the Applicant.

To refuse the amendment at this stage risks shutting out the real controversy between the parties and would be inconsistent with the constitutional imperative under Article 159(2)(d) of the Constitution to do substantive justice. Courts exist to determine disputes on their merits, not to visit the consequences of procedural imperfection upon litigants in a

manner that forecloses a just resolution of the underlying controversy.

FINAL ORDERS

Having carefully considered the pleadings, affidavits, submissions, and applicable law, this Court makes the following Orders:

1. The application for leave to amend the Originating Summons out of time is hereby ALLOWED.
2. The draft amended Originating Summons annexed to the application as Exhibit NG-1 shall be deemed duly filed and served upon payment of the requisite Court fees within fourteen (14) days of this Ruling.
3. The Respondents shall be at liberty to file a Further Replying Affidavit in response to the amended Originating Summons within fourteen (14) days of service of the amended Originating Summons upon them.
4. In recognition of the delay occasioned by this late amendment and the additional burden placed on the Respondents, the costs of this application shall be borne by the Plaintiff/Applicant in any event

It is so ordered

**DATED, DELIVERED AND SIGNED AT EMBU THIS 14TH
DAY OF MAY, 2026**

HON. E.C CHERONO

JUDGE
ENVIRONMENT AND LAND COURT, EMBU

In the presence of;

1. M/S Mukami for the plaintiff/Applicant
2. M/S Wanjiku H/B for Njiru Mbogo for the Petitioners
3. M/S Ruth C/A