



REPUBLIC OF KENYA



**Makazi (Suing as Attorney of Katana Mae Musha) v Abdulahi & 3 others (Environment & Land Case 191 of 2018) [2024] KEELC 311 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 311 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 191 OF 2018  
FM NJOROGE, J  
JANUARY 31, 2024**

**BETWEEN**

**HASHIM NGONGE LOMA MAKAZI (SUING AS ATTORNEY OF KATANA MAE MUSHA) ..... PLAINTIFF**

**AND**

**ABDIRAHMAN ABDULAHI ..... 1<sup>ST</sup> DEFENDANT**

**ALFRED M. OMWANCHA ..... 2<sup>ND</sup> DEFENDANT**

**NEEJUKA LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**REGISTRAR OF LANDS, LAMU ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application for consideration is the Plaintiff's Notice of Motion application dated 15<sup>th</sup> August 2023 brought under Section 1A, 3A and 63 (c) of the *Civil Procedure Act*. The Applicant seeks the following orders: -
  1. Spent.
  2. That the applicant be granted leave to amend its notice of motion dated 14<sup>th</sup> April 2023 as set out in the draft amended notice of motion annexed herein.
  3. That the Respondents be given leave to respond if need be.
  4. That costs of this application be provided for.
2. The Application is predicated on the grounds on the face of it and further supported by an Affidavit sworn on the even date by Hashim Ngonge Loma Makazi, the Applicant herein. He averred that he filed an application on 14<sup>th</sup> April 2023 to revive this suit wherein his advocate inadvertently left out



a major prayer hence the need to amend the said application. He annexed therein a copy of the draft amended notice of motion.

3. The 1<sup>st</sup> Defendant opposed the application. He filed grounds of opposition dated 15<sup>th</sup> September 2023 stating that the firm of Mkan & Company Advocates is yet to be granted leave to come on record for the Applicant; that the amendment being sought is in bad faith intended to cure a defect pointed out by the 1<sup>st</sup> Defendant in his grounds of opposition dated 17<sup>th</sup> June 2023; that the amendment is ambiguous and prejudicial to the 1<sup>st</sup> Defendant; it has been brought after an unreasonable delay; and that the test for amendment of pleadings has not been met.
4. Similarly, the 3<sup>rd</sup> Defendant filed grounds of opposition dated 21<sup>st</sup> August 2023. I have perused the said grounds which I find similar to those raised by the 1<sup>st</sup> Defendant. He added that the Applicant has not regularized his position in this suit as the legal representative of the deceased plaintiff therefore he lacks locus standi to lodge the application.
5. Mr. Ojwang holding brief for Mr. Lutta for the 4<sup>th</sup> Defendant stated in court that the 4<sup>th</sup> Defendant does not oppose the application. There was no response from the 2<sup>nd</sup> Defendant.
6. Parties agreed to canvass the application by way of written submissions. However, I note that only the Plaintiff and 1<sup>st</sup> Defendant had complied with these directions, as at the time of writing this ruling.

### **The Plaintiff's Submissions**

7. Counsel for the Plaintiff submitted that the overriding objectives of civil procedure rules is to facilitate the just, expeditious, proportionate and affordable resolution to civil disputes and that the court has the authority either on its own motion or on application by parties to order any document to be amended at any time before a case is closed, for the purpose of determining the real question in controversy. Counsel was guided by the provisions of Order 5 Rule 1 & 5 and Order 8 rule 3 & 5.
8. Counsel argued that the amendments sought by the Plaintiff fit the aforementioned description and purpose, and that no prejudice will be suffered if the application is allowed.
9. In relation to the issue of representation, counsel submitted that the firm of Mkan & Co. Advocates was granted leave to come on record for the Plaintiff, at the certificate stage, when they filed their application dated 14<sup>th</sup> April 2023.

### **1<sup>st</sup> Defendant's submissions**

10. Relying on Section 100 of the [Civil Procedure Act](#), Order 8 rule 5 of the Civil Procedure Rules and the case of Central Kenya Ltd V Trust Bank Ltd & 5 Others [2000] eKLR, counsel submitted that the guiding principle in applications for leave to amend pleadings is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment will not occasion prejudice or injustice to the other party.
11. Counsel added that upon dismissal of the suit, any change of advocates ought to first comply with Order 9 rule 9 of the Civil Procedure Rules. Failure by the applicant's current advocate to comply with the said rule was therefore fatal to the application. Counsel relied on the case of Stephen Mbogo Kariuki v K-Rep Bank Ltd [2018] eKLR to buttress this point.
12. Further, counsel submitted that the amendment as drafted introduces a cocktail of an order prejudicial to the 1<sup>st</sup> Defendant. Counsel argued that pleadings have to be precise so that a party can know what they are responding to. To her, the proposed amendment amounted to an omnibus application and



is thus incurably defective. To this end, counsel relied on the case of Pyaralalmhandbheru Rajput v Barclays Bank & others, Civil Case No. 38 of 2004.

### **Analysis and Determination**

13. The 1<sup>st</sup> Defendant raised an important issue on representation which I must first address at this point. When this suit was instituted by the deceased plaintiff, the firm of Obara & Obara Advocates was on record for the Plaintiff. There is no dispute that the suit abated on 21<sup>st</sup> August 2020 upon the demise of the deceased on 21<sup>st</sup> August 2019. No notice of change of advocates was filed until on 14<sup>th</sup> April 2023 when the firm of Mkan & Co. Advocates filed an application seeking orders inter alia that leave be granted for them to come on record in place of the firm of Obara & Obara Advocates. That application is yet to be determined. It is the same one that the applicant now wants to amend.
14. Order 9 Rule 9 of the Civil Procedure Rules, 2010 provides for change of Advocates to be effected by order of Court or consent of parties to wit:

When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the Court —

  - a. upon an application with notice to all the parties; or
  - b. upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”

Order 9 rule 5 also provides as follows: -

A party suing or defending by an advocate shall be at liberty to change his advocate in any cause or matter, without an order for that purpose, but unless and until notice of any change of advocate is filed in the court in which such cause or matter is proceeding and served in accordance with rule 6, the former advocate shall, subject to rules 12 and 13 be considered the advocate of the party until the final conclusion of the cause or matter, including any review or appeal.”

15. Clearly the provisions of Order 9 Rule 9 above make it mandatory that for any change of Advocates after judgment to be effected, then there must be an order of the Court upon application with notice to all parties or upon a consent filed between the outgoing Advocate and the proposed incoming Advocate. The reasoning behind this rule was well articulated in the case of S. K. Tarwadi vs Veronica Muehlmann [2019] eKLR where it was observed as follows:

“...In my view, the essence of the Order 9 Rule 9 of the CPR was to protect advocates from the mischievous clients who will wait until a judgment is delivered and then sack the advocate and either replace him....”
16. It is also clear that the said rule 9 envisages a situation where a party was previously represented by an Advocate and either wants to change that Advocate or to represent himself or herself in person after judgment is passed. My interpretation of the phrase ‘judgment has been passed,’ and I believe that is what the drafters of the said rule intended, is that judgment in this case means a final decision given at the end of a matter or in finalization of a suit. The end could in my view also be a dismissal or abatement.
17. I say so because the effect of abatement as I deduce it from Order 24 rule 7 (1) is that it is similar as to that of a judgment. The said rule provides that where a suit abates or is dismissed under this Order, no



fresh suit shall be brought on the same cause of action. In the same breadth, there is no doubt that a judgment once delivered, no fresh suit can be brought on the same cause of action.

18. It follows therefore, that the applicant's advocates had to first obtain an order of the court under Order 9 rule 9 of the Civil Procedure Rules prior to filing the present application. The applicant has sought such an order in the application which he seeks to amend. However, contrary to what was submitted by Plaintiff's counsel, I have perused the proceedings of this court for 17<sup>th</sup> April 2023 when the application was before my brother Hon Makori J for hearing of the certificate of urgency, that prayer for leave to come on record for the Plaintiff was not granted.
19. I am alive to the fact that the Applicant has a Constitutional right to be represented. That notwithstanding, where there are clear provisions of the law regulating the procedure of such representation, the same should be adhered to. The procedure set out under Order 9 Rule 9 above is mandatory and thus cannot be termed as a mere technicality. However, the prayer that Mkan & Co Advocate be allowed to come on record in place of the firm of Obara & Obara advocates was included as the second prayer in the motion dated 14/4/2023 which application is yet to be argued. It is not purely the fault of the applicant that that prayer has not been granted. I note that when the matter came up for hearing before Hon Odeny J on 21/6/23 she ordered that the application be heard by way of written submissions and gave time frames for the process. The matter then came up again before the same court and Mr. Mkan stated that he had filed submissions on behalf of the applicant regarding the application dated 14/4/23. Mr Mkan had therefore asked the court to allow him come on record in his submissions. All that remained then was the determination by this court of that application on its merits, which could have included a grant of prayer no.2. Mr. Mkan however also added that he had filed an application to amend the prayers sought in the main application dated 14/4/2023. I deem the second application to be merely supportive and supplementary to the first one, and in any event the same application could have been made orally and further a court can suo moto order any proceeding or pleading to be amended as it deems fit.
20. In the circumstances, I would hardly blame the applicant for having failed to obtain leave of the court. Equity deems as done that which ought to have been done. In any event, it matters not at what stage the prayer allowing an advocate to come on record is granted, and all that matters is that it is in the application. It may therefore be granted on a preliminary basis or together with the other prayers sought in the same application as long as it is sought in priority to the other prayers as was done by the applicant in this case. For those reasons and in the interests of justice, I find that the firm of Mkan & Co. Advocates should be allowed at this juncture to come on record for the Plaintiff in this matter. Secondly, I allow the prayer no. 2 in the motion dated 15<sup>th</sup> August 2023 as prayed. The Respondent is at liberty to respond to the amended notice of motion if need be and must do so within 7 days from the date herein. The costs of the application shall be in the cause.

**DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 31<sup>ST</sup> DAY OF JANUARY 2024.**

**MWANGI NJOROGE**

**JUDGE, ELC MALINDI.**

