



**Kilinda & 20 others ((Suing as Members of Ngao ya Kathatu Welfare Society)) v Njoroge & another (Environment & Land Case 564 of 2013) [2024] KEELC 232 (KLR) (29 January 2024) (Ruling)**

Neutral citation: [2024] KEELC 232 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 564 OF 2013  
EK WABWOTO, J  
JANUARY 29, 2024**

**BETWEEN**

**JULIUS M. KILINDA & 20 OTHERS ..... PLAINTIFF  
(SUING AS MEMBERS OF NGAO YA KATHATU WELFARE SOCIETY)**

**AND**

**PHARES MWANGI NJOROGE ..... 1<sup>ST</sup> DEFENDANT  
COUNTY GOVERNMENT OF NAIROBI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. Before me for determination is a Notion of Motion dated 1<sup>st</sup> November 2023 and accompanied by Supporting Affidavit sworn by Julius M. Kilinda. The Plaintiffs sought the following orders:
  - i. ....Spent.
  - ii. That the Plaintiffs/Applicants be granted leave to further amend their Plaint as per the attached draft Further Amended Plaint.
  - iii. That costs of this application be provided for.
2. The application was premised on the following grounds:
  - i. That on 1st July, 2013, this Honourable Court issued an Order directing the County Surveyor to file a report delineating the location of the suit property known as Soweto Ex-Gitau Village Scheme Plot number 5/258 and that of the property known as Soweto Ex-Gitau Village Scheme Plot number 4/313.
  - ii. That after several years of non-compliance with the orders of the Court, the 2nd Defendant/ Respondent has finally filed an undated and unsigned report that is largely not compliant with



the directions of the Court as it does not show where the Plaintiffs/Applicants' property is located or what has happened with it.

- iii. That the report and Maps as filed by the 2nd Respondent demonstrate clearly that the 2nd Respondent has changed the configuration and numbering of the properties with the intention to misrepresent that the property in dispute known as Plot number 5/258 is not adjacent to the other Applicants' property known as Soweto Ex-Gitau Village Scheme Plot number 5/259 as it had been before. Instead, in the place of Plot number 5/258, now there is Plot number 4/313 lying adjacent to Plot number 5/259.
  - iv. That it is unjustifiable and untenable that Plot number 5/258 and Plot number 5/259 can now be separate on the ground when they were adjacent to each other, sharing a common boundary at the time when the Plaintiffs purchased them.
  - v. That the 2nd Respondent has knowingly, deliberately, unlawfully, fraudulently and mischievously done this to defeat justice as the Applicants are now unable to trace the location of the suit property as per the 2nd Respondent's report.
  - vi. That in any event, there is no way the Plot numbers 5/258 and 5/259 can be separated on the ground since according to the prefix and numbering they ought to follow each other, and that is why the Plaintiffs had purchased the 2 plots together so as to have the 3 benefit of proper and maximum utility. Separating the 2 plots means the intended utility is lost and the Plaintiffs will suffer great loss and damage.
  - vii. That it is clear that the 2nd Defendant is colluding with the 1st Defendant in making all manner of misrepresentations through its report in an effort to take away the Plaintiff's property to the benefit of the 1st Defendant and to the detriment of the Plaintiffs.
  - viii. That in view of the circumstances, it is now necessary for the Applicants to be allowed to further amend their Plaint in order to not only raise the pertinent issues now affecting the suit property but to now, in the alternative, seek compensation and general damages and a refund of the land rent and rates they have been paying to the 2nd Respondent on account of the suit property to date. The total rates and rent paid as at 10th March, 2023 amount to about Sh.52, 340.
3. The application was opposed vide grounds of objection dated 22<sup>nd</sup> November 2023 by the 1<sup>st</sup> Defendant on several points of law and facts including:
- i. That the Plaintiffs application is titled to introduce and add new and inconsistent cause of action and claim which are not only time bad but will prejudice and cause injustice to the 1<sup>st</sup> Defendant/Respondent case.
  - ii. That equity aids the vigilant and not indolent.
  - iii. That it is trite law that he who alleges must proof and not the adverse party it's upon the Plaintiffs to avail material evidence in support of his case and not the Defendants.
  - iv. That the Plaintiffs have not availed what they alleged as true record if what the County Surveyor has provided is a mischievous distorted records to justify their claim.
  - v. That there has been inordinate delay in bringing this application.
  - vi. That the application should be dismissed with costs.



4. Pursuant to the directions issued by this court, the application was canvassed by way of written submissions. The Plaintiffs in their written submissions dated 10<sup>th</sup> November 2023 submitted that the report was marred in mischief and it necessary that the amendment does include prayers for compensation and damages. Relying on the case of *Central Kenya Limited v Trust Bank Limited* (2000)2 EA 365 and *St. Patricks Hill School Limited v Bank of Africa Kenya Limited [2018]*eKLR it was argued that the Plaintiff's had sought to bring the application before the hearing of the main suit and therefore the said amendment ought to be allowed.
5. Having considered the application, the issue for determination before this Court is whether the Plaintiffs should be granted leave to amend their plaint.
6. Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendment of pleadings with leave of court as follows: -
  - “(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.”
8. Further, Order 8, rule 5 gives the Court the general power to allow amendment of pleadings;
  - “5. 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”.
9. The Court of Appeal reiterated the principles governing amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013]* eKLR as follows: -
  - “...The powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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 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; 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.”
9. My perusal of the court proceedings confirm that it has indeed taken nearly 10 years for the 2<sup>nd</sup> Defendant to comply with orders of Mutungi J. given on 1<sup>st</sup> July 2013 in respect to submitting a report on the delineation of Plot No 5/528 and Plot No 4/313. Furthermore, I have considered the report (marked JK1), which is quite sketchy and does not offer an in-depth presentation as was directed by the court.
10. This court must also pronounce itself on whether the application has been brought in a timeous manner and in good faith. Firstly, this application was made after receiving the County surveyor's



report and prior to commencement of hearing. With regard to the question of good faith, my perusal of the Plaintiff's submissions confirms that they would be open to giving the Defendants a chance to file any amended Defences in response.

11. It is of paramount importance that this Court exercises its discretionary powers to ensure parties are not prejudiced in their pursuit for justice.
12. In the foregoing, the Court finds that the Application dated 1<sup>st</sup> November 2023 is merited and proceeds to allow the same in the following terms;
  - a. Leave is hereby granted to the Plaintiffs/Applicants to file and serve their Further Amended Plaintiff within 7 days hereof.
  - b. Upon service of the Further Amended Plaintiff, the Defendants are directed to file and serve their amended pleadings, if so required within 14 days.
  - c. Each party to bear its own costs of the application.

Orders accordingly.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 29<sup>TH</sup> DAY OF JANUARY 2024.**

**E. K. WABWOTO**

**JUDGE**

