



Kiguru & 2 others (Suing as the Registered Trustees of Africa Christian Church & Schools) v Macharia & 2 others (Environment & Land Case 162 of 2017) [2024] KEELC 106 (KLR) (23 January 2024) (Ruling)

Neutral citation: [2024] KEELC 106 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 162 OF 2017
MAO ODENY, J
JANUARY 23, 2024**

BETWEEN

**REV. JEREMIAH NGUMO KIGURU 1ST PLAINTIFF
REV. JULIUS KIMANI KINUTHIA 2ND PLAINTIFF
MRS EDITH WAITHIRA NGUGI 3RD PLAINTIFF
SUING AS THE REGISTERED TRUSTEES OF AFRICA CHRISTIAN CHURCH
& SCHOOLS**

AND

**RHODA N. MACHARIA 1ST DEFENDANT
PHILIP THUKU GITHAIGA 2ND DEFENDANT
LAND REGISTRAR, NAKURU 3RD DEFENDANT**

RULING

1. This ruling is in respect of a Notice of Motion dated June 19, 2023 by the plaintiff/Applicant seeking the following orders:
 - a. That the Plaintiff/Applicant be granted leave to further amend the plaint herein, and the further amended plaint herein attached to this application be properly filed and served after payment of the requisite filing fees.
 - b. That the defendants/respondents be given leave to amend their statement of defence if need be.
 - c. That the defendants/respondents be allowed to re-open the plaintiff's case and be given leave to cross-examine the plaintiff's witnesses who have testified in respect of the amended parts of the further amended plaint.



- d. That costs of this application be provided for.

Plaintiff's Case

2. The application was supported by the annexed affidavit of Rev. Julius Kimani Kinuthia sworn on June 19, 2023 where he deponed that during the hearing, he discovered that there was no specific prayer that the title deed for land parcel No. Molo South/Ikumbi Block 12 (Gacharage) that is held by the 2nd defendant be cancelled.
3. He further deponed that it is necessary to include the prayer to enable the court determine all the issues in controversy. He stated that the 1st Defendant fraudulently obtained the title deed to the suit land and later sold it to the 2nd defendant and that the defendants will not be prejudiced in any way if the application is allowed as they will be at liberty to file an amended statement of defence and if need be conduct further cross examination.
4. He urged the court to allow the application for further amendment of the Plaintiff.

2nd Defendant's Case

5. The 2nd defendant filed a replying affidavit on September 25, 2023 and deponed that the plaintiff had already prosecuted its case and closed it. He further deponed that allowing the said application would amount to an abuse of the court process.
6. He stated that under Order 2 Rule 3 of the *Civil Procedure Rules*, pleadings in a suit close within fourteen days after service of the reply or defence to counter-claim and further that Order 2 Rule 15 allows the court to strike out any pleadings that are scandalous, frivolous or vexatious that may delay the fair trial of an action and urged the court to strike out the plaintiff's application.

Plaintiff's Submissions

7. Counsel for the plaintiff submitted that the plaintiff at paragraph 15 of the plaint sought for the cancellation of the 2nd defendant's title deed but due to an oversight did not include it as a substantive prayer at the end of the pleadings. Counsel therefore submitted that the intended amendment is meant to correct an error on the face of the plaint.
8. Counsel relied on Order 8 Rule 3 of the *Civil Procedure Rules*, the cases of *Joseph Ochieng & 2 Others v First National Bank of Chicago* [1995] eKLR, *Daniel Ouma Okuku v Kenya Plantation and Agricultural Workers Union & another* [2019] eKLR and *Central Kenya Ltd v Trust Bank Kenya Ltd & others* [2000] 2EA 365 and urged the court to allow the application as prayed.

2nd Defendant's Submissions

9. Counsel for the 2nd defendant reiterated the contents of the 2nd defendant's replying affidavit and relied on the cases of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Ltd* [2013] eKLR and *Kassam v Bank of Baroda* [2002] eKLR. Counsel submitted that on 13th April 2023 the plaintiff amended its plaint and less than three months later it is now seeking for further amendment of its plaint.
10. It was counsel's submissions that the plaintiff has already closed its case and allowing it to amend its plaint would be delaying the determination of the matter. He relied on Order 8 Rules 3, 5 & 8 of the *Civil Procedure Rules* and submitted that even though the court is permitted to allow any party to amend their pleadings, the application must be made without undue delay. That the proposed amendment is immaterial and urged the court to dismiss the plaintiff's application.



Analysis And Determination

11. The issue for determination is whether leave should be granted to the plaintiff to amend its plaint.
12. Order 8 Rule 3(1) of the *Civil Procedure Rules* provides 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.”
13. Order 8 Rule 5(1) of the *Civil Procedure Rules* also provides as follows:
 - “5.
 - (1) 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.”
14. The Court of Appeal in the case of *Central Kenya Limited v Trust Bank limited* (2000)2 E.A 365 held as follows:
 - “A party is allowed to make such amendments as may be 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.”
15. The plaintiff is seeking to amend its plaint to include an order for cancellation of the registration of the 2nd defendant as the owner of the suit property and to have the suit property registered in the name of the plaintiff. The 2nd defendant opposed the said application on the ground it was an abuse of the court process.
16. The plaintiff has annexed to its application a draft further amended plaint which indicates that the proposed amendment at prayer (a) which seeks that the registration of the 1st defendant and subsequent transfer of the suit property to the 2nd defendant be cancelled and the land registered in the plaintiff's name.
17. The Plaintiff is not introducing a new cause of action but rectifying an error that occurred as an oversight. The claim appears in the body of the plaint but has not been included in the final orders sought. Courts do not dwell on technicalities to shut out litigants from the seat of justice. Courts are to ensure that justice is served to all parties that seek the intervention of the courts. The application was made without undue delay and if the court proceeds with the case as it is then the outcome will be an academic exercise.
18. I find that the amendment will not prejudice the defendants in any way as the court has unfettered jurisdiction to allow an amendment for the purposes of determining the real issues in controversy between the parties.



19. The application is hereby allowed to the extent that the Plaintiff can recall PW1 to testify on the issue of cancellation of the defendant's titles. Plaintiff to amend its plaint within 7 days from the date of this ruling and the Defendants are also granted leave to file an amended defence if need be within 7 days upon service of the amended Plaint. The costs of the application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 23RD DAY OF JANUARY 2024.

M. A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure

