



**REPUBLIC OF KENYA**  
**IN THE ENVIRONMENT & LAND COURT AT NAIROBI**  
**ELC SUIT NO.346 OF 2002**

**MATHIA & OTHERS.....PLAINTIFFS**

**VERSUS**

**1. JOHN WAINAINA**

**2. JOHN GATHUMU**

**3. NZAU MWALIMU NZAU**

**4. ZIMMAN SETTLEMENT SCHEME.....DEFENDANTS**

**RULING**

1. This suit has been pending in court for the last 15 years. Prior to 16<sup>th</sup> May 2016 when the hearing of the suit commenced before me, the parties had engaged themselves in bringing one interlocutory application after the other. What I now have before are more interlocutory applications. The first application has been brought by Patrick Githinji and Robert Wamithi. The application was brought by way of Notice of Motion dated 10<sup>th</sup> June 2016. In the application, Patrick Githinji and Robert Wamithi (hereinafter referred to as “the applicants”) have sought an order that the legal representation of the plaintiff be severed so that the individual partners of Muigai& Others can appoint their own advocates to represent them in this matter. The application has been brought on the grounds that, at all material times, the plaintiff was a partnership comprising of 21 persons and was known as Muigai& Others. The applicants are among the 21 persons who made up the said partnership. The plaintiff purchased the parcel of land known as Nairobi/Block 123/1-279(formerly known as L.R No.57/26)(hereinafter referred to as “the suit property”) in the year 1977. The suit property was subsequently subdivided and separate titles issued to the individual partners. The applicants received their shares of the suit property and have titles for the same. The applicants were not aware of this suit and were not consulted when the same was being filed. The applicants did not also approve the appointment of the firm of T.M.Kuria and Co. Advocates to represent them in this suit. The applicants have contended that they have a right to be represented in this suit by an advocate of their choice. The applicants have annexed to the affidavit of Patrick Githinji filed in support of the application several certificates of lease in respect of the parcels of land which they claim to be their respective shares of the suit property which were transferred to them upon subdivision of the suit property. The application was opposed by the plaintiff. The plaintiff has contended that the applicants as partners in the plaintiff are already represented in this suit. The plaintiff has contended that the applicants cannot sever themselves from the plaintiff and that the application has been brought late in the day after the hearing of the suit has commenced.

2. The second application has been brought by the plaintiff by way of Notice of Motion dated 12<sup>th</sup> September 2016. The application seeks leave of the court to amend the plaint. The application has been

brought on the grounds that the plaintiff is the registered owner of the suit property having purchased the same from Kentiles Limited on 8<sup>th</sup> October 1977. The plaintiff has contended that through the Notice of Motion dated 10<sup>th</sup> June 2016 by the applicants, Patrick Githinji and Robert Wamithi, it came to its attention that the suit property has purportedly been subdivided and titles irregularly issued to among others the applicants. The plaintiff has contended that the purported subdivision and subsequent issuance of the said titles were not within its knowledge until the same was brought to its attention through the said application. The plaintiff has contended that in view of the foregoing, it has become necessary to amend the plaint to plead the new facts which have emerged. The plaintiff has annexed to its application a draft amended plaint in which it intends to challenge the purported subdivision of the suit properties and the titles issued to among others the applicants. The plaintiff's application was opposed by the 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party through a replying affidavit sworn by the 4<sup>th</sup> defendant on 8<sup>th</sup> November 2016 and grounds of opposition dated 21<sup>st</sup> November 2016. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party have contended that the subdivision of the suit property on which the plaintiff's application is based took place in the year 1993 and that the same was all along within the knowledge of the plaintiff. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party have contended that the plaintiff has not explained to the court why it has taken the plaintiff 24 years to bring the present application. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party have argued that the plaintiff is guilty of laches and that its application has been brought late in the day. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party have contended further that the application has been brought by a stranger namely, "Mathia & Others" instead of the real plaintiff, Muigai & Others. In response to the 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party's objection to the application, the plaintiff submitted that the plaintiff had changed its name with leave of the court to Mathia & Others. The plaintiff has also reiterated that it was not aware of the purported subdivision of the suit property until the filing of the application referred to above by the applicants.

3. The two applications before me are related. The plaintiff's application dated 12<sup>th</sup> September 2016 was prompted by the applicant's application dated 10<sup>th</sup> June 2016. I will therefore consider the two applications together starting with the plaintiff's application. The plaintiff's application dated 12<sup>th</sup> September 2016 was brought under order 8 rule 3 of the Civil Procedure Rules and section 3A and 63 of the Civil Procedure Act. I have considered the application together with the affidavit filed in support thereof. I have also considered the 4<sup>th</sup> defendant's replying affidavit and the grounds of opposition which were filed by the 3<sup>rd</sup> interested party in opposition to the application. The law on amendment of pleadings is now well settled. Applications for leave to amend should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs. See, the Court of Appeal cases of, Central Kenya Ltd. vs. Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No. 222 of 1998 and Robert Ombaso Nyareru & another vs. Beldina Mokaya, Court of Appeal at Kisumu, Civil Appeal No. 200 of 2011. The law on amendments as I understand it is that, parties should be allowed to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided, there has been no undue delay, no new or inconsistent cause of action is introduced and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side. The onus is upon the applicant for leave to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties or that it would avoid multiplicity of suits. Once this burden has been discharged by the applicant, it then becomes the duty of the party opposing the amendment sought to show that the same would result in prejudice to him in a manner that cannot be compensated in costs and/or that the amendment would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him.

4. I have looked at the draft amended plaint which the plaintiff is seeking leave to file. The plaintiff intends to plead the fact that the suit property has purportedly been subdivided without its knowledge and titles for the subdivisions issued irregularly to third parties. The plaintiff intends to seek an order for the cancellation of the said titles which were issued through the said purported subdivision of the suit property. It is the plaintiff's contention that these amendments will not prejudice the defendants and that the same would serve the interest of justice. As I have stated earlier in this ruling, the 4<sup>th</sup> defendant and the

3<sup>rd</sup> interested party have opposed the plaintiff's application on various grounds. Having considered the matter, I am satisfied that the intended amendments if allowed would enable this court to avoid multiplicity of suits and also to determine the real issues in dispute between the parties herein. It is not disputed that the applicants, Patrick Githinji and Robert Wamithi hold titles which are said to have resulted from the subdivision of the suit property. The particulars of these titles are set out in the documents annexed to the affidavit attached to the applicants' application referred to above. In the plaint sought to be amended, the plaintiff had pleaded that the defendants had trespassed on the suit property and were committing waste thereon. The plaintiff had also pleaded that the defendants had purported to dispose of portions of the suit property to third parties. The particulars of these portions of the suit property were not given in the plaint. The plaintiff has contended that it was not aware that the suit property had been subdivided until it was served with the application which was filed herein by the applicants. From the material on record, I have no reason to doubt the plaintiff's contention that it was not aware of the titles being held in the names of the applicants and other third parties. A copy of the search certificate annexed to the 4<sup>th</sup> defendant's affidavit does not show that the subdivision of the suit property actually took place after the title thereof was surrendered to the government. Even if it is assumed that the subdivision actually took place, the particulars of the resultant plots and the beneficiaries thereof are not given in the said certificate. I am of the view that if the plaintiff is denied leave to amend the plaint, the plaintiff would have to file a separate suit against the applicants herein and other third parties who have acquired portions of the suit property pursuant to the subdivision being challenged by the plaintiff. The intended amendment would no doubt prevent multiplicity of suits. It will also enable the courts to once and for all determine all disputes relating to the suit property as between the parties before it and those not before the court but who have acquired portions of the suit property.

5. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party have not convinced me that the intended amendments would cause them prejudice or that they would suffer injustice as a result thereof. The court has power to allow amendment of pleadings at any time. I am not satisfied that the plaintiff's application has been brought after inordinate delay. As I have stated above, I am not persuaded that the plaintiff was aware prior to 10<sup>th</sup> June 2016 that the applicants had titles in their names in respect of portions of the suit property. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party's contention that the plaintiff is guilty of laches has no basis. There was also a contention that the plaintiff's application has been brought by a stranger namely Mathia & Others. Again I can see no merit in this contention. I have noted from the record that by a ruling dated 8<sup>th</sup> May 2015, Mutungi J. allowed the substitution of one of the partners in Muigai & Others, James Muigai, deceased by his son and legal representative, Josephat Mathia Muigai. It is following this ruling that the plaintiff's name changed to Mathia & others. The 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party's contention that "Mathia & others" is a stranger, is not made in good faith. For the foregoing reasons, all the grounds put forward by the 4<sup>th</sup> defendant and the 3<sup>rd</sup> interested party in opposition to the plaintiffs' application for leave to amend the plaint have no merit. The application is well founded and is for granting.

6. The disposal of the plaintiff's application takes me to the applicants' application. For the reasons that I have given above, the applicants' application must also be allowed. As I have stated above, the plaintiff's application was prompted by the applicant's application under consideration. In the intended amended plaint, the plaintiff intends to challenge the titles held by the applicants. I am of the view that in the circumstances, the applicants' position as plaintiffs is untenable. The applicants cannot litigate against themselves. Now that the other partners in the plaintiff want to have the titles held by them which are alleged to have been illegally and irregularly acquired from the suit property revoked, the applicants must be afforded their constitutional right to defend themselves.

7. Due to the foregoing, I am satisfied that the two applications before me have merit. Consequently, I hereby make the following orders;

(a) The Plaintiff is granted leave to amend the plaint within 14 days from the date hereof.

(b) Patrick Githinji Mwangi and Robert Wamithi Mutahiare struck out henceforth as plaintiffs in this suit and are joined in the suit as 6<sup>th</sup> and 7<sup>th</sup> defendants.

(c) The amendment of the plaint by the plaintiff pursuant to the leave granted above shall reflect this joinder.

(d) The joinder of Patrick Githinji Mwangi and Robert Wamithi Mutahi as defendants in the suit shall in no way prejudice the proceedings which have been undertaken herein while they participated in the suit as plaintiffs and in that regard, no pleadings, affidavits or documents executed by them in their previous capacity in the suit shall be voided.

(e) Patrick Githinji Mwangi and Robert Wamithi Mutahi shall file their statements of defence, detailed witness statements and paginated bundle of documents within 30 days from the date of service upon them of the amended plaint.

(f) The costs of the two applications shall be in the cause.

**Dated and Signed at Nairobi this 17<sup>th</sup> day of February, 2017.**

**S. OKONG'O,**

**JUDGE.**

**In the presence of:-**

N/A	for the plaintiff
Mr. Wamuganda	for applicants
N/A	for the 1 <sup>st</sup> defendant
N/A	for the 2 <sup>nd</sup> defendant
N/A	for the 3 <sup>rd</sup> defendant
Mr. Mwangi h/b for Kenyatta	for the 4 <sup>th</sup> defendant
Mr. Odhiambo	for the 5 <sup>th</sup> defendant
Kajuju	Court Clerk.