**Sadera & 2 others v Kerema & 7 others (Civil Appeal 89 of 2019)**
**[2025] KECA 458 (KLR) (7 March 2025) (Judgment)**

Neutral citation: [2025] KECA 458 (KLR)

**REPUBLIC OF KENYA**

**IN THE COURT OF APPEAL AT NAKURU**

**CIVIL APPEAL 89 OF 2019**

**MA WARSAME, JM MATIVO & PM GACHOKA, JJA**

**MARCH 7, 2025**

**BETWEEN**

**JOHNSON KASAINE OLE SADERA ..... 1ST APPELLANT**

**MBOYA OLE SADERA ..... 2ND APPELLANT**

**HARUN LEMPAKA ..... 3RD APPELLANT**

**AND**

**PASAYE OLE KEREMA ..... 1ST RESPONDENT**

**SIMON OLE NCHOE ..... 2ND RESPONDENT**

**NAMEYOKI OLE NCHOE ..... 3RD RESPONDENT**

**SIME OLE NKOYO ..... 4TH RESPONDENT**

**OLOISHURO OLE NDIHOE ..... 5TH RESPONDENT**

**JOSEPH MUKIRE OLE PARTOIP ..... 6TH RESPONDENT**

**D. SALONIK OLE NCHOE ..... 7TH RESPONDENT**

**JOSEPH NDERITU T/A GATONYE & ASSOCIATES ..... 8TH RESPONDENT**

***(Being an appeal against the ruling and orders of the Environment & Land Court of Kenya at Narok (M. Kullow, J.) dated 31st October, 2018 in ELC Suit No. 10 of 2017)***

## JUDGMENT

1. The litigation between the parties that yielded the ruling dated 31st October 2018, the subject of this appeal has a long history in the corridors of justice traversing to a quarter century. The appellants initially sued the respondents at the High Court in Nairobi in Civil Suit No. 246 of 2000. In 2009, nine years later, the suit was transferred to Environment and Land Court (the ELC), Nakuru where

it was allocated number ELC No. 80 of 2009. After 8 years it was transferred to Narok ELC were it was registered as No. 10 of 2017. This appeal was filed in 2019, meaning, it has been pending in this Court for close to 6 years. Despite the many years it has been before the trial courts, the suit is yet to be determined on merits. The record is awash with numerous interlocutory applications. This kind of trial delay, unless checked, translates into the bane of our otherwise hallowed justice system.

2. A glimpse of this long history is useful so as to provide context to the application which yielded the ruling the subject of this appeal. The gist of the dispute is captured in the appellant's amended plaint dated 15th February 2000 which was replaced by yet another amended plaint dated 25th July 2012 in which the appellants claim that the 1st to the 7th appellants and their late father Mr. Shena Ole Sadera and the 1st to the 7th respondents were members of Olopito Group Ranch. It is averred that the said Group Ranch owned all that parcel of land known as Narok/Cis-Mara/1 measuring 6280 hectares or thereabouts, and that the group ranch agreed that the said land be sub-divided into various parcels of land as more particularly listed at paragraph 7 of the later amended plaint. It is contended that all the requisite approvals for the subdivisions were obtained, and after the sub-division, the smaller plots were allocated to the members, but the large plots were to be allocated at a later date.

3. The appellants claimed that there was an attempt to re-survey the land allocated to them under the purported authority of the 1st to 7th respondents, thereby interfering with their ownership rights. Consequently, the appellant's prayed for inter alia: (a) A permanent injunction restraining the respondents from interfering, trespassing or in anyway, dealing with their land parcels; (b) An order empowering them to present to the Narok District Land Registrar the necessary documents for registration of the sub-divisions as contained in the Mutation Form dated 10/3/86 and approved by the District Surveyor on 14/3/86; and subsequent issuance of title documents; (c) General damages for loss of user and illegal interference with their land; and (d) Costs of the suit.

4. In their defence dated 12th September 2002, the respondent's denied the appellants' claim contending inter alia that the 1st appellant unlawfully allocated himself plots and sold others before the members could be lawfully allocated plots, as a result, the 8th respondent was engaged to survey and subdivide the land to pave way for the allocation of the plots to the members.

5. Hearing commenced before Kullow, J. on 25th September 2017 when PW1, Johnson Sandera (the 1st appellant) testified and completed his evidence. Hearing was adjourned to 17th October 2017. However, on the said date, it did not proceed. Subsequently, there were several adjournments for various reasons. On 6th April 2018, the appellants counsel informed the trial court that they had filed an application dated 3rd April 2018 seeking leave to amend their amended plaint dated 25th July 2012 and a prayer that Harum Lempaka be enjoined in the suit as the 5th Plaintiff. They also prayed that if the leave to amend is permitted, their draft amended plaint be deemed as duly filed. Lastly, they prayed for costs of the application to be provided for.

6. The respondents opposed the application vide replying affidavit dated 25th April 2018 sworn by Pasaye Ole Kerem (the 1st respondent). The salient points were that the plea for leave to amend was mischievous, made in bad faith and intended to cure an otherwise bad case. It was also averred that the 1st plaintiff in his evidence in chief and cross-examination admitted that he filed the suit on behalf of his father before obtaining grant of representation, and that subsequently, he obtained a grant of letters of administration Ad Litem.

7. In the impugned ruling dated 31st October 2018, Kullow, J. dismissed the said application with costs for being devoid of merits. In rejecting the prayer to amend the plaint, the learned judge stated:

> " Whereas the courts have wide discretion to allow a party to amend its pleading so that the amendment sought will assist the court in determining the final issues between the parties, in the instant application, it is my considered view that if the amendments sought are issued will be prejudicial to the Defendants as the substantive suit has already proceeded and if the amendment sought are allowed then the same will mean the case has to start afresh with new facts and issues of law canvased by the parties."

8. Aggrieved by the said ruling, the appellants appealed to this Court. In their memorandum of appeal dated 4th November 2019, they have cited nine grounds of appeal essentially faulting the learned judge for: (a) misapprehending the nature of the application before him; (b) manifesting bias against the appellants in his analysis of the evidence and the law; (c) ignoring the fact that the application and the suit before him concerned the respondent's misconduct in the proceedings before him; (d) misconstruing the law on amendment of pleadings; (e) holding that there was no affidavit by the 3rd appellant in support of the said application; (f) failing to consider substantive justice; (g) wrongfully holding that the proposed amendment was prejudicial to the respondents; (h) wrongfully exercising his discretion against the appellants; (i) ignoring settled principles of law barring a court from enforcing an illegal contract.

9. In his submissions, the appellants' counsel Mr. Munyori Karanja cited United India Insurance Company Limited and Kenindia Insurance Company Limited vs. East African Underwriters Kenya Limited & Others, [1982- 1988] KLR, 639 in support of the proposition that where a court acts on wrong principles or fails to take into account relevant considerations and takes into account wrong factors, the Court of Appeal must interfere. Counsel argued that the respondents' opposition to the application was based on gross misapprehension of the law governing amendment of pleadings and joinder of parties because the issues raised by the respondents in opposition to the application ought to have been canvassed during the trial.

10. Counsel asserted that the proposed amendment was not prejudicial to the respondents and maintained that the court has the power to permit amendments at any stage of the proceedings and more so, where the interests of justice so require. He contended that the respondent did not demonstrate the prejudice they would suffer should the amendment be allowed. In support of the said argument, he relied on J.C. Patel vs. B.D. Joshi, 19, EACA, 42 at pg. 48 and added that the suit properties are held in trust for the appellants as demonstrated by the evidence on record.

11. Regarding the prayer for joinder, Mr. Karanja cited Order 1 Rule 10 of the Civil Procedure Rules, 2010 and the holding in Yusuf Abdi Adan & Another vs. Hussein Ahmed Farah & 3 Others [2016] eKLR in support of the proposition that a necessary party to any proceedings ought to be enjoined in the suit. In conclusion, counsel maintained that the respondents had during the pendency of the suit and despite the existence of conservatory orders against them, illegally surveyed the suit property destroying the substratum of the litigation in contravention of the doctrine of lis pendens as was held in Moline vs. Oganda [2009] KLR 620 and stressed the need for the amendment sought to be allowed so as reflect those developments.

12. In opposition to the appeal, the respondent's counsel Mr. Akango submitted that the 1st appellant during his evidence in chief stated that he instituted the suit to claim his father's land, which point was also confirmed during cross- examination, therefore, he had no personal claim in the suit nor had he obtained letters of administration in respect of his late father's estate, a fact attested by the 1st appellant's

act of obtaining a limited grant of letters of administration Ad litem in Narok High Court probate and Administration Cause No. 5 of 2018. To support this argument, counsel relied on the High Court decision in Isaya Masira Momanyi vs. Daniel Omuoyo & Another [2017] eKLR in support of the finding that the suit was incompetent and an abuse of the court process.

13. Mr. Akango also submitted that the intended amendment is brought in bad faith and is mischievous because it seeks to introduce the issue of trust which had not been pleaded before so as to sustain an otherwise incompetent suit for want of capacity. Counsel also submitted that no explanation was proffered for the unreasonable delay in filing the said application and added that the issue of disobedience of court orders can be addressed through defined procedure without necessarily seeking to amend the plaint

14. Mr. Akango contended that the learned judge dismissed the application for leave to amend upon finding that it was brought in bad faith and the prayer for joinder of an additional party for failure to prove that the intended plaintiff had a stake in the matter. He maintained that the power to allow or refuse amendment of pleadings is discretionary, therefore, this Court should not interfere with the trial court's discretion. He relied on United India Insurance Company Limited and Kenindia Insurance Company Limited vs. East African Underwriters Kenya Limited & Others (supra) in which the amendment was sought after a delay of 15 years and this Court agreed with the superior court that such long lapse of time can occasion prejudice to the respondent especially where it might be difficult to trace witnesses and documents in the matter.

15. Mr. Akango cited this Court's decision in Rubina Ahmed & 3 Others vs. Guardian Bank Ltd [2019] eKLR in support of the holding that an application for amendment must be brought in good faith, and such an applicant will not be allowed in the last stages of the trial, especially where it is demonstrated that it is intended to advance a new ground and no useful purpose will be served by allowing the amendment sought.

16. We are alive to the fact that an Appellate Court, when considering an interlocutory appeal, such as this one, should generally refrain from extensively examining the merits of the underlying dispute that is still pending before the trial court, focusing instead on whether the interlocutory order itself is procedurally flawed or demonstrably unjust. However, we note that some submissions urged before us by both parties digressed into the merits of the pending dispute. For example, Mr. Karanja submitted that there are conservatory orders issued in the suit before the trial Court but the respondents blatantly disobeyed the same and purported to sub-divide and issue title deeds to unsuspecting persons. Whether or not the respondents disobeyed conservatory orders in purporting to sub-divide the suit property is a matter for determination during the hearing of the main suit. We also note that Mr. Akango submitted that the appellants' suit was filed by a person who lacked capacity to institute it for lack of grant letters of administration. He argued that the 1st appellant had no personal claim to the land since he brought the suit to recover his father's land. Whether or not the appellants lacked capacity to institute the suit or whether he had no personal interest in the land is a matter for determination during the hearing. We say no more.

17. Two issues stand out for resolution by this Court in this matter. One, whether the learned judge erred in law in declining the plea for amendment of the appellants' plaint, and, two, whether the learned judge erred in law in rejecting the prayer to enjoin Harun Lempaka as the 5th plaintiff in the suit before the trial court.

18. We are alive to the fact that grant or refusal to grant a prayer for amendment of pleadings and a plea for joinder of a party to proceedings entail exercise of judicial discretion. Ordinarily, an appellate court will not interfere with the exercise of discretion of the court of the first instance and substitute its own

discretion, except where the discretion has been shown to have been exercised arbitrarily or capriciously or perversely, or where the court had ignored the settled principles of law regulating grant or refusal to grant such orders. If the discretion has been exercised by the trial court reasonably and in a judicial manner, the fact that the appellate court would have taken a different view may not justify interference with the trial court's exercise of discretion. An appellate Court should not lightly or whimsically interfere in the exercise of discretion by a subordinate court unless such exercise is palpably perverse. (See Sir Kenneth O'Connor P. in Eastern Bakery vs. Castelino [1958] E.A. 461).

19. We will first address the question whether the learned judge properly addressed himself to the law and judiciously exercised his discretion in refusing the prayer for amendment of the appellant's plaint. For starters, the court's power to allow amendment of pleadings is provided under Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010 which reads:

> 5. General power to amend [Order 8, rule [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.

20. The phrase "for the purpose of determining the real question in controversy between the parties" essentially means that a court should allow amendments to pleadings or take necessary steps to ensure the core dispute between parties is clearly identified and adjudicated upon. Therefore, the basic object of the above rule is that courts should try the merits of the cases that come before them and should consequently allow all amendments that may be necessary for determining the real question in controversy between the parties provided it does not cause injustice or prejudice to the other party. As to when an application for amendment of pleadings can be brought, Order 8 rule 3 (1) of the Civil Procedure Rules, 2010 is instructive. It provides:

> "Subject to Order 1, rules 9, 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."

21. The drafters of the rules were conscious of the fact that amendment of pleadings may have alter the cause of action.

In this regard, Order 8 rule (3) (5) clearly provides the permissible limits as follows:

> " An amendment shall be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

22. As the above rule suggests, so long as the cause of action sought to be introduced arises out of the same facts or substantially the same facts as those already pleaded in the plaint sought to be amended, an application for amendment will be allowed. That courts world over have been liberal in determining applications for amendment of pleadings is not in doubt. However, decided cases have over the years laid down tests which guide courts in such applications. The common factor in discernible in jurisprudence world over is that courts have adopted a liberal approach in determining such applications for amendment.

23. In English law, court decisions highlight a liberal approach to allowing amendments to pleadings, with prominent cases including C.P.C. vs. A.B. (A Minor)" and "White & Carter (Councils) Ltd vs. McGregor [1961] UKHL 5 which emphasized the importance of ensuring a fair trial by permitting amendments unless significant prejudice would result to the opposing party, even if the amendment is sought at a late stage, provided it is done in good faith.

24. The test in the South African courts for determining whether to grant an amendment is whether the interests of justice permit the granting of such an amendment. In deciding whether to grant or refuse applications for amendment, courts lean in favour of granting them in order to ensure that justice is done between the parties by deciding the real issue between them. An application for amendment will thus always be allowed unless it is made mala fide or would cause prejudice to the other party which cannot be compensated for by an order for costs or by some other suitable order such as a postponement. (See Stainbank vs. South African Apartheid Museum at Freedom Park 8 Another [2011] JOL 27343 (CC) para 2).

25. This Court in Joseph Ochieng & 2 Others Trading as Aquiline Agencies vs. First National Bank of Chicago [1995] eKLR stated:

> " The ratio that emerges out of what was quoted from the said book is that 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."

26. The Supreme Court of India in Life Insurance Corporation of India vs. Sanjeev Builders Pvt. Ltd. & Ano. AIR 2018 SC 902, after considering numerous precedents in regard to the amendment of pleadings, culled out the following principles: -

    i. All amendments are to be allowed which are necessary for determining the real question in controversy provided it does not cause injustice or prejudice to the other side. This is mandatory, as is apparent from the use of the word "shall", in the latter part of Order VI Rule 17 of the CPC.

    ii. In the following scenario such applications should be ordinarily allowed if the amendment is for effective and proper adjudication of the controversy between the parties to avoid multiplicity of proceedings, provided it does not result in injustice to the other side.

    iii. Amendments, while generally should be allowed, the same should be disallowed if –

        a. By the amendment, the party seeking amendment does not seek to withdraw any clear admission made by the party which confers a right on the other side.

        b. The amendment does not raise a time-barred claim, resulting in the divesting of the other side of a valuable accrued right (in certain situations).

c. The amendment completely changes the nature of the suit;

d. The prayer for amendment is mala fide,

e. By the amendment, the other side should not lose a valid defence.

iv. Some general principles to be kept in mind are –

a. The court should avoid a hyper-technical approach; ordinarily be liberal, especially when the opposite party can be compensated by costs.

b. Amendment may be justifiably allowed where it is intended to rectify the absence of material particulars in the plaint or introduce an additional or a new approach.

c. The amendment should not change the cause of action, so as to set up an entirely new case, foreign to the case set up in the plaint.

27. What can be deduced from decided cases is that: (a) amendment of pleadings can be allowed at any stage of the proceedings; (b) amendment must be necessary to determine the "real question in controversy" "inter se parties"; (c) if such amendment is sought to be brought after commencement of trial the court must, in allowing the same come to a conclusion that in spite of best efforts on the part of the party to the suit, the same could not have been brought before the point of time, when it was actually brought; (d) amendments will not be allowed if they will cause injustice to the other party; (e) amendments should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs.

28. The phrase "at any stage of proceedings" appearing in Order 8 rule 3 (1) postulates that amendment of pleadings can be permitted at any stage of the proceedings, from the initial filing of the suit to the conclusion of the suit. As mentioned earlier, whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. (See Lord Griffths statement in Ketteman vs. Hansel Properties Limited [1988] 1 ALL ER at page 62). This appeal turns on whether the learned judge properly exercised his discretion in disallowing the appellants' application. The respondents' contestation is that the amendment was brought in bad faith because it sought to introduce new issues of trust which had not been pleaded. This, according to the respondent was aimed at sustaining an incompetent suit.

29. In the earlier cited excerpt, the learned judge took the view that if allowed, the amendment would be prejudicial to the respondents because the substantive suit had already proceeded and if the amendments sought were allowed, then the same will mean the case would start afresh with new facts and issues of law canvased by the parties. As the law clearly provides, an application for amendment can be brought at any stage of the proceedings before final judgment. In this case, only the 1st appellant had testified. The learned judge did not address his mind to the meaning and import of the phrase "at any stage of the proceedings" and the suitability or otherwise of recalling the 1st appellant who was the only witness who had completed his testimony and whether, the respondents could have been compensated by way of costs.

30. The other question is whether the proposed amendment introduced "new" facts and issues as the learned judge held. Order 8 rule (3) (5) stipulates that an amendment shall be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which

relief has already been claimed in the suit by the party applying for leave to make the amendment. This Court in Eastern Bakery vs. Castelino [1958] 1 EA 461 (CA) stated: -

> " The court will not refuse to allow an amendment, simply because it introduced a new case ... But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit ... The court will refuse to amend where the amendment would change the action into one of a substantially different character ... or where the amendment, would prejudice the rights of the opposite party existing

31. As was stated in Evans vs. CIG Mon Cymru Ltd [2008] 1 WLR 2675, [24]-[26]:

> " Amending a claim... to specify a cause of action not previously mentioned therein does not raise a new cause of action if the amendment is made simply to resolve an obvious inconsistency between the claim ... and the particulars of claim served with it. In deciding whether the amendment raises a new cause of action the court should consider the proposed amendment in the context of the statements of case as a whole, not just the claim form by itself." (Emphasis added).

32. The question is whether the intended amendments would introduce "new facts and issues" as the learned judge held or whether it would alter the character of the suit thereby introduce "a new cause of action." To answer these questions, we have compared and contrasted the appellants' amended plaint dated 25th July 2012 and the amendments contained in the draft "amended amended plaint" dated 3rd April 2018 just to satisfy ourselves whether the proposed amendments introduced a new cause of action. At paragraph 7 (h), of the draft "amended" amendment plaint," the proposed addition is a parcel of land mentioned therein which was not in the plaint sought to be amended. Similarly, the proposed amendment at paragraph *8* B also a parcel of land as stated therein. Paragraphs *10* B and C contain averments relating to a parcel of land in the same group ranch brought on behalf of the appellant's father. The details of the land have been clearly spelt out. Whether or not the parcels of land mentioned in the intended amendments form part of the parcels of land the subject to the dispute is a matter of evidence during the trial. More important, they cannot be said to new cause of action nor do we see any prejudice to be suffered by the respondents.

33. Whether or not the deceased held land in the group ranch as pleaded in the proposed amendments and whether the claim is sustainable is a matter of evidence and the law. Lastly, the prayers sought in the proposed draft relate to the disputed parcels of land. We find nothing to support the learned judge's

finding that if the amendments are allowed, the case will start

afresh with new facts and law.

34. In Lloyds Bank plc vs. Rogers [(No.2) [1999] 3 EGLR 83], Auld L.J. noted that what makes a new claim "...is 'not the newness of the claim according to the type or quantum of remedy sought, but the newness of the cause of action which it involves." We find nothing to suggest that the proposed amendments introduced a new cause of action. Conversely, the averments in the proposed draft suggest that the parcels of land are within the group ranch, and should the averments be disapproved by way of evidence, then the trial court will determine the matter accordingly. In any event, the respondent will not only be entitled to amend their defence, but the veracity of the averments in the amended draft will have to be proved by way of evidence.

35. In the impugned finding, the learned judge took the view that if the amendment is allowed, considering the fact that the appellants had presented their evidence or where in the process of adducing evidence, the case would have to start afresh. First of all, in allowing amendment, the trial court can

grant leave to the defendant to amend his defence. If need be, witnesses can be recalled for further cross-examination or tender further evidence. Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party or parties caused by the amendment can be compensated for in costs. To the extent that the learned judge's findings was premised on the erroneous assumption that the issues raised in the proposed amendment are "new" then the learned judge misapprehended the facts presented to him and law and his finding was palpably wrong.

36. The other prayer declined by the learned judge was the plea to enjoin Harun Lempaka as the 5th plaintiff in the said case. The learned judge had this to say while refusing the said prayer:

> " In the instant case, the plaintiff wishes to have one Harun Lempaka joined as a 5th Plaintiff, it is worth noting that this application is being made when the pleadings are closed and when the applicant herein had testified in the substantive suit and during his testimony he did not state anything that indeed showed that the proposed 5th Plaintiff had a stake in the instant matter. Further to the above, I find there is no affidavit in support of the instant application by the proposed 5th Plaintiff in asserting his claim in the instant suit and/or lay claim for the purported trust that the Applicant alludes to in his application."

37. Order 1 Rule 10 (2) of the Civil Procedure Rules (CPR) provides that:

> "The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added." (Emphasis added).

38. The Court of Appeal of Tanzania in Tanga Gas Distributors Ltd vs. Said & Others [2014] EA 448 had the following to say about the court's power to add a party to a civil proceeding:

> " the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage."

39. In Departed Asians Property Custodian Board vs. Jaffer Brothers Ltd [1999] 1 EA 55 it was held as follows:

> "...A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be

shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co- defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person."

40. In Civicon Limited vs. Kivuwatt Limited & 2 Others [2015] eKLR the court observed as follows:

> " Again, the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial."

41. The learned judge held that applicant had not demonstrated that the person intended to be joined had an identifiable stake in the case nor had he sworn an affidavit to establish his stake in the proceedings. With respect to the learned judge, the test he alluded to applies to joinder of interested parties in constitutional petitions. In such cases, a person seeking to be admitted in the proceedings as an interested party must demonstrate that he has an identifiable stake in the case. (See the Supreme Court decisions in Trusted Society of Human Rights Alliance vs. Mumo Matemu & 5 Others [2015] eKLR). Evidently, the learned judge failed to appreciate that before him was a civil proceeding governed by the Civil Procedure Rules and the tests for joinder or non-joinder are laid down in Order 1 Rule 10. Therefore, the learned failed to appreciate the nature of the application before him and the applicable law and in the process, he fell into a grave error and improperly exercised his discretion in considering and rejecting the prayer for joinder. In particular, the learned judge failed to address his mind to the question whether the intended plaintiff was a necessary party or a proper party to the proceedings and whether his presence was necessary to enable the court to properly and effectively adjudicate the dispute before him. A 'Necessary Party' is one whose presence is indispensable or against whom relief is sought and without whom no effective order can be passed. A 'Proper Party' is one in whose absence an effective order can be passed but whose presence is necessary for complete and final decision on the questions involved in proceedings.

42. The final question is whether in light of our findings in the issues determined above, there is sufficient basis for us to interfere with the learned judge's exercise of discretion. We are reminded of the following authoritative statement of the law by Madan JA (as he then was) in United India Insurance Co. Ltd vs East African Underwriters (Kenya) Ltd [1985] E.A. that:

> "The Court of Appeal will not interfere with a discretionary decision of the Judge appealed from simply on the ground that its members, if sitting at first instance, would or might have given different weight to that given by the Judge to the various factors in the case. The Court

of Appeal is only entitled to interfere if one or more of the following matters are established: first, that the Judge misdirected himself in law; secondly, that he misapprehended the facts; thirdly, that he took account of considerations of which he should not have taken account; fourthly, that he failed to take account of considerations of which he should have taken account, or fifthly, that his decision, albeit a discretionary one, is plainly wrong."

43. Considering the conclusions we have arrived at on the issues discussed above, it will suffice for us to state that we have said enough to demonstrate that the learned judge misconstrued the nature of the application before him and failed to properly apply the law and tests laid down in decided cases governing the grant or refusal to grant prayers for amendment of pleadings and joinder of parties in Civil Suits and in the process failed to exercise his discretion judiciously in dismissing the appellants' application. For the foregoing reasons, this is a proper case for us to interfere with the learned judges' exercise of discretion. Accordingly, we allow this appeal and reverse the ruling dated 31st October 2018 and allow the appellants' application dated 3rd April 2018. We order that the costs of this appeal abide the outcome of the suit. The appeal shall be heard before any other judge of the Environment and Land Court except Kullow, J.

**DATED AND DELIVERED AT NAKURU THIS 7TH DAY OF MARCH, 2025.**

**M.WARSAME**

**.....**

**JUDGE OF APPEAL**

**J.MATIVO**

**.....**

**JUDGE OF APPEAL**

**M.GACHOKA CIArb FCIArb**

**.....**

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

Signed.

**DEPUTY REGISTRAR.**