Wemah & another v Ojwang & another (Environment & Land Case 184 of 2017) [2025] KEELC 880 (KLR) (27 February 2025) (Ruling)

Neutral citation: [2025] KEELC 880 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT BUSIA

ENVIRONMENT & LAND CASE 184 OF 2017

BN OLAO, J

FEBRUARY 27, 2025

BETWEEN

VALENTINE JUMA WEMAH ..... 1ST PLAINTIFF

DOROTHY NABWIRE WEMAH ..... 2ND PLAINTIFF

AND

SAPHINA OJWANG ..... 1ST DEFENDANT

NAPOLEON NAMDY NYONGESA ..... 2ND DEFENDANT

RULING

1. Order 8 Rule 3(1) and Rule 5(1) of the *Civil Procedure Rules* is couched in the following terms:

   3 (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."

   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."

   The general principle is that amendments to pleadings should be freely allowed even if they introduce a new cause of action so long as the other party is not prejudiced. In the case *Eastern Bakery v Castellino* 1958 EA 461 Sir Kenneth O'konnorPresident of the Court of Appeal stated:

   > " It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs."

And in the case of *Central Kenya Ltd v Trust Bank Ltd*2000 2 EA 365, the Court of Appeal stated that:

> " ... 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."

Section 100 of the *Civil Procedure Act*also donates to this Court the general power to amend. It reads:

> " 100 "The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

Finally, in the case of *Joseph Ochieng & 2 Others v First National Bank Of Chicago* C.a. Civil Appeal No149 of 1991, the Court of Appeal cited *Bullen & Leake & Jacob's Precedents Of Pleadings* – 12Th Edition and said as follows:

> " 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the Court, that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the Court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed, that if 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 frame 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 but subject however to powers of Court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the Court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the action by applying for leave to seek amendment".

What emerges from all the above legal provisions and precedents is that the Courts have a wide discretion to allow the amendment of pleadings. However, like all discretions, it must be exercised judicially and on sound grounds.

2. Valentine Juma Wemah And Dorothy Nabwire Wemah(the 1st and 2nd Plaintiffs respectively) have moved this Court *vide* their Notice of Motion dated 19th April 2024 in which they seek the following orders:

1. That the Plaintiffs be given leave to amend their plaint and the draft amended plaint annexed hereto be deemed as duly filed upon payment of the requisite fees.

2. That the costs of this application be provided for.

3. The Motion is anchored on the provisions of Order 8 Rules 3 and 8 of the *Civil Procedure Rules*. The Motion is based on the grounds set out therein and is also supported by the affidavit of the 1st Plaintiff. The gravamen of the application is that new evidence has cropped up touching on issues in question and for which new evidence should be pleaded. Annexed to the Motion is an amended plaint dated 19th April 2024.

4. The 1st Defendant (Saphina Ojwang) opposed the application and filed a replying affidavit dated 7th October 2024 in which she has deponed, inter alia, that the application has been filed late in the day this case having commenced in 2017 and if allowed, there will be inordinate delay in this matter contrary to the tenets of expediency in the determination of cases. That some of the proposed amendments to the plaint are hearsay derived from sources who cannot be called as witnesses. That this case has proceeded and extensive ground has been covered including consents of the parties made on 13th December 2017 which paved way for a visit to the land in dispute by the County Land Registrar and County Surveyor who filed a report which the Plaintiff is seeking to challenge without offering any expert report. The application is founded on biased assumptions and innuendos which are not relevant in a Court of law and this application should be dismissed with costs.

5. The 2nd Defendant Napoleon Namdy Nyongessa did not oppose the application.

6. On 1st October 2024, I directed that the application be canvassed by way of written submissions. Those submissions were filed both by MR Onsongo instructed by the firm of Obwoge Onsongo & Company Advocates for the Plaintiffs and by Mr Makokha instructed by the firm of J. P. Makokha & Company Advocates for the 1st Defendant. The 1st Defendant did not oppose the application and therefore his counsel Mr Otanga instructed by the firm of Bogonko Otanga & Company Advocates did not file any submissions.

7. I have considered the application, the rival affidavits by the Plaintiffs and the 1st Defendant and the submissions by counsel.

8. I have at the commencement of this ruling set out the applicable law and some of the relevant precedents. As is now clear, the power to amend pleadings is wide. And although the 1st Defendant has deposed in her replying affidavit and rightly so, that this is a 2017 case, the record also shows, however, that the case has never commenced hearing. The parties have been pre-occupied referring this dispute to the Land Registrar and County Surveyor. I can see some reports filed herein including one dated 22nd November 2022 by the Land Registrar Busia and on 20th September 2023, Mr Makokha had hinted that the said report would settle this dispute. That appears not to have happened and 7 years and 3 months after this suit was filed on 17th November 2017, not a single witness has testified in this case. Guided by the principle that "amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side" – *Eastern Bakery v Castello* (*supra*) – I see no reason to dismiss the application as sought by the 1st Defendant.

9. In his submissions on this issue, counsel for the 1st Defendant has stated at page 2 thus:

> " In this instance, it is our submissions are that the proposed amendments are bogus and will not serve the ends of justice.

> To begin with, in the issue of delay. The case was filed in 2017, and as at now, it is about six years down the line, the matter has not been set down for hearing. Worse is that the Plaintiff who drugged (sic) the Defendants to Court now seeks to reopen the case afresh historical background of the dispute are unnecessary in a plaint. Pursuant to Section .... Of the Civil Procedure Rules 2016, a plaint should contain a concise statement pleading issue."

I have already alluded to the issue of delay earlier in this ruling. But as is clear from the record, all the parties are to blame for taking a route which, as is now clear, has yielded no results in resolving this dispute. In any event, the Defendants were at liberty to seek for the dismissal of this suit if the Plaintiff was not interested in prosecuting it expeditiously. The claim that the Plaintiff is seeking to "re-open the case afresh" is not valid. The term re-open is defined in *Black's Law Dictionary* 10Th Edition As:

> "(Of Court) to review (an otherwise final and non-appealable judgment) for the purpose of possibly granting or modifying relief. A Court will reopen a judgment or case only in highly unusual circumstances".

As I have already stated above, the witnesses in this case have yet to testify. The case has not been heard or a judgment delivered. There is nothing to reopen in the circumstances.

10. Counsel for the 1st Defendant is however right when he submits that a plaint should only contain statements. Order 2 Rule 3(1) of the *Civil Procedure Rules* provides that:

> "3 (1) "Subject to the provisions of this rule and rules 6, 7 and 8, every pleading shall contain, and contain only, a statement in a summary form of the material facts on which the party pleading relies for his claim or defence, but not the evidence by which those facts are to be proved, and the statement shall be as brief as the nature of the case admits".

11. I have perused the pleadings in the amended plaint and I must agree with Mr Makokhathat some of them contain evidence. They are also rather verbose. For instance, in paragraphs 5(F) and 5(I) and 7(A) of the amended plaint, it is pleaded thus:

> "5(F) "In 2006 or thereabout, the 1st Defendant's late husband started interfering with the said original boundary between Bukhayo/Kisoko/5 and Cornel Wemah's Bukhayo/Kisoko/984 and Cornel Wemah reported the matter to the area chief who is turn invited the Land Registrar to resolve the dispute but it was never resolved till Cornel Wemah died in 2009."
>
> 5(I) "Since the 2nd Defendant's husband Rapahel Ojwang bought the entire parcel of land namely Bukhayo/Kisoko/5 from Raphael, it means that the boundary between the Plaintiffs' parcel of land Bukhayo/Kisoko/984 and the 1st Defendant's parcel of land is the original boundary of the 1st registration. When the 2nd Defendant bought his land, he joined hands with the 1st Defendant and started trespassing on the Plaintiffs' parcel of land beyond the original boundaries."
>
> 7(A) "In 2014 when the Land Registrar and County Surveyor visited the site and purported to resolve the dispute, the said boundary was still intact despite the encroachments and whereas they recognized the same from the road southwards and left it intact, they ignored the said original from the road northwards towards the river, moved several metres onto the Plaintiffs' parcel

of land and planted new boundaries and others in the Plaintiffs' land and immediately planted eucalyptus trees on the new boundary."

The above averments could best have been contained in the witness statements. A pleading should state, in summary form, only the relevant facts upon which the claim is predicated but not verbose statements. However that is not fatal to the application but is a practice which counsel and parties would do well to embrace.

12. Counsel for the 1st Defendant has also submitted at page 2 of his submission that:

> "Paragraph 7 in it's entirety accuses the Land Registrar and the County Surveyor of misappropriation in the manner they carry out the surveying exercises. The two officials are thus criticized for what the Plaintiff considers they did a shoddy job yet there's no request to have these two officials enjoined in these proceedings. What the proposed amendments will end up achieving if the application is allowed, the two officers will have been condemned unheard yet substantive orders including prayers A, Bb, Ca and A are being sought against the said officers annulling there (sic) report and castigating their failure."

I understand the 1st Defendant to be saying that the proposed amendments cannot achieve the desired end result. All I can say is that a claim belongs to the litigant. And unless a claim is barred by statute, a party is entitled to pursue his claim in a Court for determination no matter how hopeless it may seem to appear. Other than on the ground for delay and which I think the 1st Defendant can be adequately compensated for by an award of costs, I see no reason to dismiss the application.

13. The up-shot of all the above is that having considered the Notice of Motion dated 19th April 2024, I allow it and make the following disposal orders:

    1. The Plaintiff shall within 7 days of this ruling file and serve an amended plaint and any other statements if need be.

    2. The Defendants shall within 14 days of service upon them of the amended plaint be at liberty to file and serve their amended defences and if need be, any further statements.

    3. The matter shall be listed for pre-trial before the Deputy Registrar on 10th March 2025 who shall then list it for hearing before me on a date convenient to all the parties.

    4. The Plaintiff shall meet the 1st Defendant's costs of the application.

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025

RULING DATED, SIGNED AND DELIVERED BY WAY OF ELECTRONIC MAIL ON THIS 27TH DAY OF FEBRUARY 2025 AND WITH NOTICE TO THE PARTIES.

BOAZ N. OLAO

JUDGE

27TH FEBRUARY 2025