



**Gakuru & another v Owiti & 8 others; vuti & another (Third party)
(Environment and Land Case Civil Suit E041 of 2016 & 121 of 2023
(Consolidated)) [2024] KEELC 3850 (KLR) (26 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3850 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT
E041 OF 2016 & 121 OF 2023 (CONSOLIDATED)**

MD MWANGI, J

APRIL 26, 2024

BETWEEN

STEPHEN KIBE GAKURU 1ST PLAINTIFF

NANCY WANJIKU KIBE 2ND PLAINTIFF

AND

BONIFACE OWITI 1ST DEFENDANT

PAUL OUYA GAWA 2ND DEFENDANT

ALEXANDER KIOKO MUSAU 3RD DEFENDANT

WILSON O. MABWA 4TH DEFENDANT

STEPHEN NGUGI 5TH DEFENDANT

THOMAS ARUKA OCHIENG 6TH DEFENDANT

STANLEY WECHULI SIMIYU 7TH DEFENDANT

STELLA MIRITI 8TH DEFENDANT

DANIEL OKETCH 9TH DEFENDANT

AND

JOHN NGEI VUTI THIRD PARTY

ANNE MBERE NG'ANG'A THIRD PARTY

((In respect of the Plaintiff's application dated 7th December, 2023))



RULING

1. By a Notice of Motion dated 7th December, 2023 brought under Order 5 Rule 17 & 21, Order 8 and Order 51 of the Civil Procedure Rules, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all enabling powers and provisions of the law, the Plaintiff/Applicant seeks the following orders that:
 - a. Spent
 - b. The Honourable Court be pleased to grant leave to the Plaintiff/ Applicants' Advocate to effect substituted service upon the 5th Defendant herein.
 - c. The Honourable Court be pleased to grant leave to the Plaintiff/Applicants' Advocate to amend the Complaint in this matter.
 - d. The Draft Amended Complaint attached to the Supporting Affidavit herein be admitted as the Complaint in this suit subject to payment of filing fees.
 - e. Costs of the application be in the Cause.
2. The application is premised on the grounds on the face of it and the Supporting Affidavit of Nancy Wanjiku Kibe sworn on the 30th November, 2023. The deponent avers that her husband, Stephen Kibe Gakuru, the 1st Plaintiff with whom they commenced this proceedings, has now passed on. She has attached a Death Certificate to that effect. She therefore needs to amend the Complaint to reflect the actual position as the sole proprietor and Plaintiff.
3. Further, that the 3rd Defendant, Alexander Kioko Musau passed on and ought to be substituted with his personal representatives. On the other hand, the 2nd Defendant in ELC No. 121 of 2013 has since vacated the plots in the suit property hence the need to have his name removed from the proceedings.
4. The Applicant avers that the consolidated Complaints herein lacked specificity as to the plots occupied by the Defendants in the suit. The suit Number ELC 410 of 2016 contained 2 Defendants, wherein the 2nd Defendant therein, is also the 1st Third Party in ELC 121 of 2013 thereby occasioning an error on the face of the record through variance in description of the Party.
5. In addition, the amendment is aimed at adding another occupant of Plot 19 who was initially omitted in the suit.

Replying Affidavit by the 1st, 3rd, 4th and 6th Defendants

6. The 1st, 3rd, 4th and 6th Defendants opposed the Plaintiff's application vide the Replying Affidavit sworn by the 1st Defendant, Bonifance Owiti on the 29th January, 2024. They argue that the draft Amended Complaint has now introduced a new cause of action being fraud, change in description of the plots, addition of two parties and a prayer for mesne profits. The deponent further states that the Plaintiff has already closed her case and what is pending is defense hearing.
7. In further response thereof, the deponent avers that the claim of fraud and mesne profits is time – barred and should be struck-out.
8. They maintain that although the Court has the general power to allow amendments at any time before the final judgement, leave should not be granted where there is undue delay, inconsistency in the cause of actions or where the Plaintiff wishes to rephrase the claim as is the case herein.



9. They contend that the matter has been in court for over Ten (10) years. The Application should therefore be dismissed with costs.

Replying Affidavit by the 7th Defendant

10. The 7th Defendant, Stanley Wechuli Simiyu responded to the Plaintiff's application by way of a Replying Affidavit deponed on the 1st February, 2024 averring that the Draft Amended Plaint has introduced a new cause of action; fraud, changed the description of the Plots added two new parties and a prayer for mesne profits which is time-barred and should be struck –out.

Court's directions

11. The court directed that parties to file their respective submissions which they did. The Plaintiff's submissions are dated 15th February, 2024, 1st, 3rd, 4th & 6th Defendants are dated 4th May, 2024 and the 7th Defendants are dated 13th February, 2024. The court has had occasion to read the submissions which now form part of its record.

Issues for determination

12. I have considered the affidavit evidence, the annexures thereto, the submissions by counsel and the applicable law. I have looked at the rival Submissions and two issues arise for consideration:
1. At what stage of the proceedings can a party be debarred from amending his pleading?
 2. Whether the intended amendments are statutorily time barred.

Analysis and determination

A. At what stage of the proceedings can a party be debarred from amending his pleading?

13. Before delving further into this issue, it is important to note that parties were not opposed to the prayer for substituted service upon the 5th Defendant. Prayer 2 of the application is therefore allowed by consent of the parties.
14. Turning to the first issue, Courts have rendered themselves on the import of Order 8 Rule 3 & 5 of the Civil Procedure Rules on the principles for amendment of pleadings. The General Rule is that amendment of pleadings is to be freely allowed. However, there are exception to the general rule.
15. Section 100 of the *Civil Procedure Act* provides that: -

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.

16. Order 8 Rule 5 (1) of the *Civil Procedure Rules* provides that: -

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on 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.”



17. It is evident from the above provisions of the law that an amendment of pleadings may be permitted at any stage of the proceedings for purposes of determining the real question in controversy between the parties. The power of Courts to allow amendment is discretionary and such discretion ought to be exercised judiciously.
18. In the case of *Lawrence Owino Omondi vs Kenneth Inea Muyera* [2017] eKLR, the Court held that: -
- “The discretion of the court is made to be subject to satisfaction on the courts part that:-
1. The mistake sought to be corrected was a genuine mistake.
 - (2) The mistake was not misleading.
 - (3) The mistake was such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.”
19. Having set out the law relating to amendment of pleadings, it is now important to apply the said principles to the present suit. The Plaintiff/Applicant has explained that she jointly filed this suit with her husband, who has since passed on. The 3rd Defendant passed on as well thus the need to have him substituted with his personal representatives. She stated that the 2nd Defendant in ELC No. 121 of 2013 on the other hand has since vacated the plot in the suit property hence the need to have his name removed from the proceedings. Further that she needs to add a party whose name was initially left-out despite him being in occupation of one of the plots on the suit property.
20. The Defendants/Respondents in opposition to the application states that the application has been brought rather late in the day. They further argued that the proposed amendments seek to introduce a new cause of action of fraud and the claim of mesne profits.
21. Although the suit is fairly old and one of the Plaintiff’s witness has already testified, it is not only logical and just to allow the amendments but a legal requirement under the provisions of Order 24 of the Civil Procedure rules on substitution of a deceased party. A suit cannot proceed against a dead Defendant. When one of the defendants dies and the cause of action survives or continues and upon an application made, the Court shall cause the legal representative of the deceased to be made a party or to be substituted in place of the deceased party to proceed with the case. On that ground alone I would allow the application.
22. In the case of *Central Kenya Limited –Vs- Trust Bank Limited* (2000) EALR 365, the court held thus:
- “The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted not on the false hypothesis of the facts already pleaded or the relief or remedy, already claimed but rather, on the basis of the state of facts which the parties really and finally intend to rely on. The power to amend makes the function of the court more effective in determining the substantive merit of the case rather than holding it captive to form of the action and proceedings”.
23. Again, in *Joseph Ocheing & 2 Others –vs- First National Bank of Chicago*, Civil Appeal No. 149 of 1991 the court held that:
- “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” (emphasis added.)

24. Guided by the above precedents, I allow the amendments to enable the court to substantively and with finality determine the real issues in dispute between the parties in this case.

B. Whether the intended amendments are statutorily time barred.

25. The second limb of this ruling is whether the amendments sought would introduce an otherwise statutorily barred cause of action. The Plaintiff/Applicant has introduced the particulars of fraud at Paragraph 17 of the Draft Amended Plaintiff and the remedy of mesne profits.

26. Section 26 of the *Limitation of Actions Act* provides that the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it. However, in the case of *Justus Tureti Obara -vs- Peter Koipeita Nengiso* (2014) eKLR Justice Okong’o held as follows: -

“The proviso to Section 26(a) of the *Limitation of Actions Act* Cap 22 Laws of Kenya provides that where an action is based on the fraud of the Defendant or his agent, the period of limitation does not begin to run until the Plaintiff has discovered the fraud or could have been expected with reasonable diligence to have discovered it. As to when the Plaintiff herein discovered the fraud alleged against the Defendant is a matter to be ascertained at the trial.”

27. There is no indication anywhere when the Plaintiff discovered the alleged fraud. That makes it a matter that requires to be litigated at the hearing.

28. The upshot of my finding is that the Notice of Motion dated 7th December, 2023 is merited and the same is allowed as follows:

- a. The Plaintiff/Applicant is hereby grant leave to effect substituted service upon the 5th Defendant herein by way of a prominent advertisement in a newspaper of nationwide circulation and on a week day.
- b. Leave is hereby granted to the Plaintiff/Applicants’ Advocate to amend the Plaintiff in this matter.
- c. The Draft Amended Plaintiff be filed and served in the next 14 days from the date of this ruling.
- d. Leave is hereby granted to the Defendants to amend their Defences within 14 days of service of the amended Plaintiff.
- e. Costs of the application be in the Cause.

It is ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY ON THIS 26TH DAY OF APRIL, 2024.

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Muigai for the Plaintiff/Applicant

No appearance for the Defendants/Respondents



Court Assistant: Yvette

M.D. MWANGI

JUDGE

