



**Mwakisha (Chairman) & 2 others (Suing as officials of Jesus Worship Sanctuary) v Maghanga & another (Environment & Land Case 303 of 2017) [2024] KEELC 3719 (KLR) (24 April 2024) (Ruling)**

Neutral citation: [2024] KEELC 3719 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 303 OF 2017**

**NA MATHEKA, J  
APRIL 24, 2024**

**BETWEEN**

**PASTOR SAMUEL VENANT MWAKISHA (CHAIRMAN) ..... 1<sup>ST</sup> PLAINTIFF  
ESTHER B WAMBUGHA (SECRETARY) ..... 2<sup>ND</sup> PLAINTIFF  
LEWIS D PIKO (TREASURER) ..... 3<sup>RD</sup> PLAINTIFF  
SUING AS OFFICIALS OF JESUS WORSHIP SANCTUARY**

**AND**

**EMMANUEL CHOMBO MAGHANGA ..... 1<sup>ST</sup> DEFENDANT  
AHMED ALI SAID ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application is dated 18<sup>th</sup> November 2022 and is brought under Section 1A and 3A of the [Civil Procedure Act](#), Order 7 Rules 3 & 8, Order 8 Rule 3, and Order 51 Rule 1 of the [Civil Procedure Rules](#) seeking the following orders;
  1. That the 2<sup>nd</sup> Defendant herein be granted leave to amend his statement of defence and include a counterclaim.
  2. That the draft amended statement of defence and counterclaim be deemed duly filed upon payment of requisite fee.
  3. That the costs be in the cause.
2. It is based on the annexed Affidavit of Gloria Nduku, Advocate and on the following general grounds that upon perusal of the documents provided by the 2<sup>nd</sup> Defendant on 18<sup>th</sup> November 2022 and upon taking his statement, it has become apparent that there is need to amend the statement of defence filed



herein to include a counterclaim that the matter may be determined wholesomely. That the Plaintiffs and 1<sup>st</sup> Defendant will not suffer any prejudice should leave to amend be granted as the matter is still at its preliminary stage. That it is in the interests of justice and overriding objectives that the 2<sup>nd</sup> Defendant be granted leave to amend his statement of defence and counterclaim. The 1<sup>st</sup> plaintiff opposed the application through a replying affidavit sworn on 30/1/2024 went into the merits of the suit and opposed stating that the application is made in bad faith and a tactic to mislead the Honourable Court.

3. Counsel for the 2<sup>nd</sup> defendant in their submissions argued that the issues raised by the plaintiff do not concern the application and are to be handled during the main hearing. Counsel also relied on the overriding objectives in section 1A and 1B of the *Civil Procedure Act* and also on Order 8 Rule 5 (1) of the *Civil Procedure Rules*.
4. Having perused the application, the replying affidavit and the submissions thereto, the issue for consideration is whether or not the court can allow the prayers requested or not?
5. The general power to amend is found in section 100 of the *Civil Procedure Act* which provides that the parties can amend the pleadings to determine the real questions in controversy at any stage of the proceedings but it is a discretionary power. Counsel for the 2<sup>nd</sup> defendant cited Order 8 rule 5 of the *Civil Procedure Rules* which reiterates the above. There are several cases which have discussed amendment of pleadings which I will briefly mention below. I am guided by *Joseph v Elena Chepkurgat Talam (sued as the legal administrator of the estate of the late Kiptalam Arap Kogo)* (2019) eKLR, the court stated;

The overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.”

6. The court of appeal in *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 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 rights is affected and that the amendment can be allowed without injustice to the other side.”
7. A look at what is amended is that a counterclaim has been introduced against the plaintiff and the 1<sup>st</sup> defendant. The plaintiff prays for an injunction against the defendants from disposing off LR No 5051/II/MN and also an order of specific performance to compel the defendants to transfer the same. The counterclaim by the 2<sup>nd</sup> defendant seeks eviction orders against the 1<sup>st</sup> defendant and the plaintiff and a permanent injunction. It alleges breach of contract by the 1<sup>st</sup> defendant. The court finds that the counterclaim raises issues which can be conclusively determined in this suit without necessary filing another suit and it would assist in promoting quick disposal of the matter which is a constitutional right. I find that the application is merited and I grant it as prayed.
8. It is so ordered.

**DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24<sup>TH</sup> DAY OF APRIL 2024.**

**N.A. MATHEKA**

**JUDGE**

