



REPUBLIC OF KENYA



Mwangi (Suing as the Administrator of the Estate of Stephen Mwangi Maina) & 2 others v Ndungu & 3 others (Environment & Land Case 174 of 2019) [2024] KEELC 4843 (KLR) (13 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4843 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 174 OF 2019**

JO MBOYA, J

JUNE 13, 2024

BETWEEN

TERESIA NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN MWANGI MAINA) 1ST PLAINTIFF
JAMES MUSOMBA NDUNGU 2ND PLAINTIFF
CHARITY WAKO KAGWI 3RD PLAINTIFF

AND

JAMES MUSOMBA NDUNGU 1ST DEFENDANT
CHARITY WAKO KAGWI 2ND DEFENDANT
TERESIA NJERI MWANGI (SUING AS THE ADMINISTRATOR OF THE ESTATE OF STEPHEN MWANGI MAINA) 3RD DEFENDANT
CHIEF LAND REGISTRAR 4TH DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant has approached the Honourable court vide Notice of Motion Application dated the 5th March 2024; brought pursuant to inter-alia the provisions of Order 8 Rule 3 and 5 and Order 51[1] of the *Civil Procedure Rules, 2010* and in respect of which same [Plaintiff/Applicant] has sought for the following reliefs;
 - i. The Plaintiff be granted leave to amend the Plaint filed on the 1st August 2019 in terms of the annexed amended amended Plaint and the draft amended amended Plaint be deemed as duly filed on payment of the requisite court fees.



- ii. Costs of the Application be in the cause.
2. The instant application is anchored and premised on various grounds which have been enumerated at the foot thereof. Besides, the Application is supported by the affidavit of the Plaintiff/Applicant sworn on even date and wherein the Applicant has annexed one document.
3. Suffice it to point out that the application beforehand was served upon the Defendants/Respondents; as well as on the 2nd Defendant to the Counterclaim [namely the Chief Land Registrar].
4. Be that as it may, upon being served with the instant application, the 1st and 2nd Defendants filed grounds of opposition whereas the 2nd Defendant to the Counterclaim did not file any response to the application.
5. Moreover, the application beforehand came up for hearing on the 11th March 2024 whereupon the Advocates for the parties covenanted to canvass the application by way of written submissions. Consequently and in this regard, the court proceeded to and circumscribed the timelines for the filing and exchange of the submissions.
6. First forward, learned counsel for the Plaintiff/Applicant thereafter filed written submissions dated the 12th March 2024. However, despite being granted further extension, the 1st and 2nd Defendants failed and/or neglected to file written submissions.
7. On the other hand, learned counsel for the 2nd Defendant to the counterclaim intimated to the court that same [2nd Defendant to the counterclaim] will not be opposing the application.
8. Notably, the only written submissions on record are the ones [written submissions] filed by the Plaintiff/Applicant.

Parties' Submissions:

a. Applicant's submissions:

9. The Applicant herein filed written submissions dated the 12th March 2024 and wherein same [Applicant] has adopted and reiterated the contents of the supporting affidavit as well as the grounds enumerated in the body of the application.
10. Other than the foregoing, learned counsel for the Applicant has raised, highlighted and canvassed two[2] salient issues for consideration by the court.
11. Firstly, learned counsel for the Applicant has submitted that the Applicant herein filed the suit seeking to be declared as the lawful and legitimate proprietor as pertains to LR No 12672/79 [suit property] and that at the time of the filing of the suit same [Applicant] was not aware of the fact that the 1st and 2nd Defendants also had a certificate of title over and in respect of the suit property.
12. Be that as it may, learned counsel for the Applicant has contended that during the hearing of the matter and particularly during the defense hearing, the 1st and 2nd Defendants adverted to and tendered before the court a certificate of title in respect of the suit property.
13. Arising from the foregoing, learned counsel for the Applicant has therefore contended that a situation has arisen to warrant the amendment or re-amendment of the plaint beforehand to include a prayer seeking for the revocation of the parallel certificate of title in favor of the 1st and 2nd Defendants.



14. In any event, learned counsel for the Applicant has contended that the only aspect of the Plaint that is sought to be amended relates to the introduction of the singular relief for revocation of the parallel title and more.
15. Secondly, learned counsel for the Applicant has submitted that the intended amendment shall not introduce any new issue and hence the Defendants/Respondents shall not suffer any prejudice and/or grave injustice.
16. Furthermore, learned counsel for the Applicant has submitted that the intended amendment is calculated to bring before the court all the issues in controversy so that the court can determine the dispute once and for all.
17. In any event, learned counsel has contended that amendment of pleadings, like the one beforehand, can be allowed at any time of the proceedings provided that the net effect of such amendment is to clarify the issue[s] for determination and to enable the court to appreciate the character of the dispute.
18. Consequently and in view of the foregoing, learned counsel for the Applicant has invited the court to find and hold that the application beforehand and the intended amendment is in the interest of justice and thus be allowed.
19. To buttress the submissions highlighted in terms of the preceding paragraphs, learned counsel for the Applicant has relied on inter-alia the holding in the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014]eKLR and *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd* [2013]eKLR, respectively.

b. 1st And 2nd Respondents' Submissions:

20. The 1st and 2nd Respondents herein participated during the issuance of directions on the 11th March 2024 and wherein it was agreed that the application beforehand be canvassed by way of written submissions.
21. Furthermore, the 1st and 2nd Respondents were privy to and knowledgeable of the timelines that were set for the filling and exchange of written submissions. Nevertheless, the said Respondents failed to file their written submissions either within the set timeline at all.
22. Additionally, when the matter came for mention on the 13th May 2024, neither the 1st and 2nd Respondents nor their counsel attended Court. Besides, no written submissions had been filed.

c. 2nd Defendant To The Counterclaim Submissions:

23. Learned counsel for the 2nd Defendant to the counterclaim intimated to the court that the 2nd Defendant to the Counterclaim was not averse to the said application beforehand. In this regard, learned counsel pointed out that same [counsel] was therefore conceding the application.

Issues For Determination:

24. Having reviewed the application beforehand and having taken into account the written submissions filed on behalf of the Applicant, two [2] issues crystalize and are thus worthy of determination;
 - i. Whether the intended amendment shall introduce any new issue and/or cause of action.
 - ii. Whether it is in the interests of justice that the application be allowed to enable the court to effectively address and adjudicate upon all issues in dispute.



Analysis and Determination

Issue Number 1 Whether the intended amendment shall introduce any new issue and/or cause of action.

25. The dispute beforehand touches on and concerns ownership of LR No 12672/79 [suit property] which is claimed by both the Plaintiff/Applicant on one hand the 1st and 2nd Defendants on the other hand.
26. Furthermore, the dispute beforehand brings to the fore a scenario that is now too common within our country [Kenya] and jurisdiction, namely, a scenario where two or more persons hold certificates of title over and in respect of the same property.
27. To the extent that the dispute concerns ownership of the suit property and coupled with the fact that both the Plaintiff/Applicant and the 1st and 2nd Defendants/Respondents both holds certificate of title, the Plaintiff/Applicant is desirous to implead an additional relief for revocation of the parallel certificate of title.
28. It is this intended relief which is sought to be brought forth vide [sic] the amended amended Plaint. In any event, the Plaintiff/Applicant contends that the inclusion of the additional relief shall enable the court to effectively and effectually determine the issues in dispute.
29. To my mind, the introduction and/or inclusion of the additional relief [whose details has been highlighted in the preceding paragraph] does not introduce a new cause of action nor does the said introduction alter and/or change the character of the suit beforehand.
30. Pertinently, there is no gainsaying that even without the intended amendment this court would have been called upon to determine and/or authenticate which of the two [2] competing certificate of title is authentic. Certainly, the determination of the authenticity of the rival certificate of title is at the core of the dispute beforehand.
31. Taking the foregoing position into perspective, it is thus obvious that the court would be called upon to revoke and/or cancel [sic] the certificate of title which shall have been found to be invalid.
32. In my humble view, the intended amendment is inconsequential. However, to the extent that the Applicant has brought same forth and coupled with the fact that same [amendment] shall neither change nor alter the character of the suit, it is my finding and holding that same [amendment] is meritorious.
33. To this end, it is imperative to adopt, restate and reiterate the established [hackneyed] position as pertains to amendment as posited in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, where the Court of Appeal stated as hereunder;

The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No 149 of 1991 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 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.”

34. Arising from the foregoing, my answer to issue number one [1] is to the effect that the intended amendment shall not bring forth [introduce] any new cause of action and neither would same [amendment] alter the character of the suit.

Issue Number 2 Whether it is in the interests of justice that the application be allowed to enable the court to effectively address and adjudicate upon all issues in dispute.

35. Other than the foregoing, it is not lost on this court that the first and foremost duty of a court of law is to administer justice by having the disputes mounted by the parties heard and determined on merits, unless there is a serious hindrance that militates against the exercise of such mandate.
36. Additionally, it is imperative to underscore that at all times the court should endeavor to rise to the occasion and administer justice without undue regard to procedural technicalities. [See Article 159[2] [d] of the Constitution 2010].
37. Furthermore, there is no gainsaying that even when the parties appearing before the court have made blunders arising from inadvertence or at times, negligence, the court should still be able to ensure that justice is done to the parties provided that the impugned blunder shall not occasion grave injustice to the adverse party.
38. For good measure, the fact that blunder shall be made from time to time was aptly captured and highlighted in the case of Philip Keipto Chemwolo & another v Augustine Kubende [1986] eKLR, where the court [Court of Appeal] stated and observed as hereunder;

I think a distinguished equity judge has said:

“ Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”

39. The foregoing words [details in terms of the preceding paragraph] may have been spoken to and highlighted more than 30 years ago, but the import and tenor thereof still holds sway to date. In any event, the provisions of the Constitution 2010 have amplified and expanded the contours of the court whilst endeavoring to render substantive justice. [See Article 10[2] [b], 48 and 159[2] of the Constitution].
40. Suffice it to point out that the Plaintiff/Applicant herein knew and was aware that the 1st and 2nd Defendants held a certificate of title over the suit property right from the time same [Applicant] was served with the statement of defense and counterclaim.



41. In my humble view, the Plaintiff/Applicant herein, if same [Applicant] was suitably advised ought to have pursued the question of amendment from the time same [Applicant] was served with the statement of defense and counterclaim as well as the list and bundle of documents by the 1st and 2nd Defendants.
42. Nevertheless, same [Applicant] did not do so in good time. However, the Plaintiff is now before the court and beseeching the court to grant liberty to facilitate the intended amendment.
43. I must point out that the Applicant herein has neither placed before the court any plausible and cogent reason why the amendment was not sought for timeously and with due promptitude; but for the sake effective and effectual determination of the issues in dispute and to mitigate proliferation of additional suits, I am minded to grant/allow the application for amendment.
44. In any event, it is not lost on this court that the purpose of amendments is to clarify the Issue[s] and enable the parties to litigate on the basis of the actual and real issues in dispute and not otherwise.
45. To this end, I beg to cite and adopt the holding of the court in the case of *Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party)* (Petition 71 of 2013 & 16 of 2023 (Consolidated)) [2014] KEHC 7356 (KLR) (Constitutional and Human Rights) (23 January 2014) (Ruling), where the court stated as hereunder;

17. The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally *Eastern Bakery v Castelino* (1958) EA 461 ; *Ochieng and others v First National Bank Of Chicago* CA Civil Appeal Number 149 of 1991, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & another* [2003] 2 EA.

18. 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 true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.

46. In a nutshell, it is my finding and holding that it is in the interest of justice that the intended amendment be allowed so as to facilitate the bringing on board all the issues in dispute and thereafter to enable the court to effectively determine the question of ownership of the suit property; and where appropriate invalidate the certificate of title, [if any] found to have been acquired contrary to and in contravention of the due process of the law.

Final Disposition:

47. Arising from the foregoing analysis, it is crystal clear and apparent that the application beforehand is meritorious and in any event, intended to bring forth all the issues in controversy for determination once and for all.



48. Consequently and in the premises, the orders that commend themselves to me are as hereunder;
- i. The Application dated 5th March 2024; be and is hereby allowed.
 - ii. The Plaintiff be and is hereby granted leave to file and serve the Re-amended Plaintiff and same to be filed and served within 7 days from the date hereof.
 - iii. The 1st and 2nd Defendants; and the 2nd Defendant to the Counterclaim shall be at liberty to file and serve amended statement of defense and appropriate replies, if any; and same be filed and served within 14 days from the date of service.
 - iv. Costs of the Application shall abide the outcome of the suit.
 - v. The instant matter shall thereafter be mentioned within 14 days from the date of close of pleadings [Order 2 Rule 13 of the *Civil Procedure Rules, 2010*] to discern the appropriate way forward and to issue further directions.
49. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 13TH DAY OF JUNE, 2024.

OGUTTU MBOYA,

JUDGE.

In the presence of:

Benson – Court Assistant

Mr. Njonjo for the Plaintiff/Applicant

Ms. Wamboi for the 1st and 2nd Defendants/Respondents

Ms. Fatma Ali for the 2nd Defendant to the Counterclaim

