



**Bivwanda v Ngala & 3 others (Environment & Land Case  
291 of 2016) [2024] KEELC 5776 (KLR) (24 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5776 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 291 OF 2016**

**EK MAKORI, J**

**JULY 24, 2024**

**BETWEEN**

**NYEVU KALUME BIVWANDA ..... PLAINTIFF**

**AND**

**PANDE NYIRO NGALA ..... 1<sup>ST</sup> DEFENDANT**

**KILIFI DISTRICT LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**THE HON ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**THOMAS JOSEPH BAYA ..... 4<sup>TH</sup> DEFENDANT**

**RULING**

1. The application dated 22nd January 2024 seeks to amend the plaint and introduce a 5<sup>th</sup> Defendant with attendant costs. It is supported by the annexed affidavit of the applicant deposed on 22<sup>nd</sup> of January 2024.
2. The 4<sup>th</sup> Defendant has opposed the same vide replying affidavit deposed on 9<sup>th</sup> February 2024.
3. The applicant avers that the 1<sup>st</sup> respondent filed Malindi District Magistrates Court Succession Cause No.36 of 1980, purporting that Kalume Nyevu (late husband to the applicant) had died while, in essence, he was alive then. He obtained a certificate of grant. When Kalume Nyevu discovered that, he filed Succession Application No. 2 of 1982, which annulled the proceedings in Succession Cause No. 36 of 1980. The nullification effectively canceled the 1st respondent's claim over the suit property. Despite the orders and through fraudulent schemes, the 1st defendant was still registered as the owner of the suit property, purported to subdivide the same and sell to third parties, including the 4th respondent, in this matter.



4. The applicant further avers that the fraudulent scheme goes back to the adjudication time, hence the need to introduce the fifth defendant, because the record for the late Nyevu Kalume at the land's office seems to have been destroyed.
5. In a rejoinder, the fourth respondent avers that this weighty legal issue has been in Court for the last eight years. Strangely, the applicant is now introducing new issues on a matter that has been heard and is at the defence level. She has testified, and he has also testified. There remain a few witnesses for the defence to have the matter closed.
6. He further alleges that what is intended to be introduced in the amendment plaintiff represents a new cause of action that is already time-barred. Besides that, there has been no plea to reopen or recall witnesses.
7. The application also represents an abuse of the Court process. The Succession Causes alluded to have not been attached or supplied.
8. From the materials placed before me, the most significant issue for this Court's determination is whether to allow the amendment at this stage of the proceedings.
9. This Court was supplied the decision in *John Nyagaka Osoro v Reynold Karisa Charo and five others* [2021]; Odeny J. (Dr.) discussed the parameters to reckon in a plea for amendments of pleadings as follows:

“The general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.

Order 8 rule 5 of the *Civil Procedure Rules* provides as follows: -

“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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

The court has the power to amend pleadings, which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition, which provides as follows concerning amendment of pleadings:

“...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...”

Similarly, in Halsbury's Laws of England, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at, paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose, the court may at



any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. .... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

10. The amendment sought to be introduced in the plaint is to bring to these proceedings decisions handled by the Courts in 1980 and 1982. It also aims to introduce a fifth defendant, the Director of Land Adjudication and Settlement, whose role is not assigned or aligned to these proceedings in the intended amendment.
11. The 4<sup>th</sup> respondent objects that the applicant has taken a tangent to reopen a new cause of action and a stale claim.
12. Looking at the intention of the amendment in totality, this matter was filed in 2016. It has been in our Court system for over eight years. It was initially dismissed, and eviction proceedings set in. This Court intervened, realizing the plaintiff was unrepresented and a senior member of our society. The Court directed the matter be heard on merit. The plaintiff and the 4<sup>th</sup> defendant have already testified. We remained with one or two witnesses to close the case on merit. That is neither here nor there. What is controversial is the introduction of new matters. Issues of 1980 and 1982 that may render the intended claim or new cause of action to be introduced – time-barred.
13. In my view, instead of introducing an amendment at this stage, the plaintiff would have applied to reopen the matter and produce the court’s decisions alluded to. Besides, if those decisions exist, the question will be why they are not being enforced.
14. The forgoing means that an amendment at this stage will completely alter the architect of the pending suit and introduce a different cause of action, which may suffer the wrath of the Statute of Limitations. Application dated 22nd January 2024 is hereby dismissed with costs. The matter is to proceed to a conclusion as scheduled.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS 24TH DAY OF JULY 2024**

**EK. MAKORI**

**JUDGE**

**In the presence of:**

Mr. Tindika, for the Applicant

Ms. Bwanadi for 4<sup>th</sup> Defendant

Happy: Court Assistant

