



**Wanyama v Kibet & another (Environment & Land Case  
924 of 2012) [2024] KEELC 5824 (KLR) (23 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5824 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT ELDORET  
ENVIRONMENT & LAND CASE 924 OF 2012  
JM ONYANGO, J  
JULY 23, 2024**

**BETWEEN**

**NICHOLAS KUNDU WANYAMA ..... PLAINTIFF**

**AND**

**BENSON KOSGEY KIBET ..... 1<sup>ST</sup> DEFENDANT**

**JANE NYONGESA ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By a Notice of Motion dated November 23, 2023, the Plaintiff filed an application seeking leave to amend the Plaint in terms of the annexed Draft Amended Plaint. He also sought to recall two witnesses namely; the Plaintiff for purposes of producing the sale agreement dated July 22, 1991 and secondly, the Uasin Gishu County Surveyor for purposes of producing the records relating to parcels L.R No 10492/Emtin Farm , Eldoret Municipality Block 21 (King'ong'o)/17 and Eldoret Municipality Block 21 (King'ong'o)/1940 as well as mutation forms of plot No. 10492/Emtin Farm.
2. He further sought that in the alternative, he be granted leave to call he Uasin Gishu County Land Surveyor or his advocate to produce the letter dated July 25, 2022. Lastly, he sought leave to file a Supplementary List of Documents.
3. The main grounds upon which the application is predicated is that the Applicant received new evidence from the Survey Department shading light on the history of the suit property. This evidence was obtained after the Plaintiff had testified and closed his case. These grounds are set out on the face of the Notice of Motion and elaborated in the Supporting Affidavit sworn by the Applicant on 23<sup>rd</sup> November, 2023.
4. The 1<sup>st</sup> Respondent opposed the application through his Replying Affidavit sworn on 15<sup>th</sup> January, 2024. In the said affidavit he deposed that the application offends the provisions of Order 7 of the *Civil Procedure Rules* (sic) in view of the ruling of this Honourable Court dated 30<sup>th</sup> October 2018 and that



the applicant was in effect asking the court to sit on appeal on its own ruling. He pointed out that the application had been filed more than 5 years since the dismissal of the first application and closure of the Plaintiff's case.

5. Additionally, he averred that the Applicant sought to fill the gaps that arose during cross-examination of his witnesses and granting the orders would seriously prejudice the defendants. He also asserted that the letter dated 25<sup>th</sup> July, 2022 had been in the Applicant's possession for 18 months prior to the filing of the application and that the Applicant had had ample time to file the application seeking to file a supplementary List of Documents. He accused the Applicant of inordinate delay and an attempt to scuttle the proceedings.
6. The 2<sup>nd</sup> Respondent also opposed the application vide her Replying Affidavit sworn on 20<sup>th</sup> May 2024 in which she reiterated the grounds raised in the 1<sup>st</sup> Respondent's Replying Affidavit. She added that the Applicant voluntarily closed his case signifying that he was satisfied with the pleading and evidence adduced in support of his case.
7. The application was argued orally on 19<sup>th</sup> June, 2024 after which the court reserved its ruling.

### **Applicant's Submissions**

8. Mr. Ogongo, learned counsel for the Applicant submitted that the suit property was formerly known as L.R No 10492/Emtin Farm but with the passage of time the said farm was sub-divided into several parcels giving rise to Eldoret Municipality Block 21 (King'ong'o)/17 and Eldoret Municipality Block 21 (King'ong'o)/1940. He submitted that when the suit was filed the Plaintiff was not aware that the suit property had been sub-divided. Counsel further submitted that there were other proceedings between the plaintiff and the husband to the 2<sup>nd</sup> Defendant in the lower court which resulted in HCC Appeal No. 140 of 2007. While the said appeal was pending, some transactions took place between the Respondents which necessitated the filing of the instant suit.
9. It was counsel's contention that re-opening of a case is discretionary and it depends on the circumstances of the case. He submitted that in the instant case, he realized that he needed to have the case re-opened soon after closing the Plaintiff's case.
10. With regard to amendment of the Plaintiff, he submitted that amendments can be done anytime before judgment. He referred to the case of *Ochieng & 2 Others v First National Bank of Chicago* (1995) EALR which sets out the principles upon which the court can allow an application for amendment of pleadings.
11. On the question of recalling the Plaintiff to produce the sale agreement dated 22<sup>nd</sup> July, 1991 counsel explained that when the Plaintiff sought to produce the sale agreement, counsel for the Defendants raised an objection on the grounds that the agreement was a photocopy. At the time the original sale agreement had been produced as an exhibit in Eld Cmcc No. 1031 of 1998 which resulted in Elc.a No. 11 of 2013. The latter file was produced as an exhibit.
12. Counsel submitted that the production of survey records relating to the suit property, he said the same omitted as a result of a lapse that occurred owing to the change of advocate. He argued that the said documents would aid the court in arriving at a just decision.

### **1<sup>st</sup> Respondent's Submissions**

13. In opposing the application Mr. Kibii relied on the 1<sup>st</sup> Respondent's Replying Affidavit together with the annexures. He submitted that the application was an abuse of the court process. It was his submission that the application offends the provisions of section 7 of the *Civil Procedure Act* and that



court lacks the jurisdiction to entertain the application as the same is *res judicata* in view of the ruling of the court dated 30<sup>th</sup> October, 2018 which the Applicant had neither appealed against or sought to review. He posited that the court was therefore functus officio. He pointed out that the draft Amended Plaintiff was similar to the Draft Amended Plaintiff annexed to the application dated 30<sup>th</sup> October, 2017 which had been dismissed.

14. With regard to the sale agreement, he pointed out the same had been objected to as the Plaintiff was not the maker thereof. He submitted that the application was mischievous and it had been made in bad faith as the Applicant was seeking to fill in the gaps that arose in cross-examination. With regard to the additional documents, counsel submitted that the Land Registrar testified and he ought to have produced all the necessary documents from the Lands Office. It was his submission that the alternative prayer for counsel to produce the letter addressed to them was improper as counsel cannot testify in a matter in which he represents his client. He urged the court to dismiss the application with costs to the Respondents.

## 2<sup>nd</sup> Respondent's Submissions

15. Mr. Kiboi learned counsel for the 2<sup>nd</sup> Respondent relied on the 2<sup>nd</sup> Respondent's Replying Affidavit and adopted the submissions of Mr. Kibii. He submitted that amendments should only be allowed if they do not cause prejudice to the other party. It was his submission that no amount of costs would cure the prejudice that would be suffered by the 2<sup>nd</sup> Respondent. He stated that the cases cited by the Applicant's counsel were distinguishable from the facts of this case.
16. He submitted that the documents that the Plaintiff sought to introduce were in the Plaintiff's custody or he was aware of them all along. It was his contention that the Plaintiff was aware of the sub-division of the suit property as he quoted the new parcel numbers in the original Plaintiff. He submitted that the application was not made in good faith and the same is *res judicata*.
17. Having considered the application, the responses thereto and the counsels' oral submissions the main issue for determination are twofold:
  - i. Whether the Plaintiff should be granted leave to amend his Plaintiff.
  - ii. Whether the Plaintiff should be allowed to reopen his case.

Order 8 Rule 3 (1) of the [Civil Procedure Rules](#) provides that:

Subject to order 1 rules 9 and 10. Order 24 rule 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.

Order 8 Rule 3 (5) provides that;

“An amendment may be allowed under sub-rule 2 notwithstanding that its effect will be to add or substitute a new cause of action, if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has been claimed in the suit by the party applying for leave to make the amendment

18. In the case of [Ochieng v First National Bank of Chicago](#) Civil Appeal No. 147 of 1991 cited in the case of [St. Patrick 's Hill Scholl v Bank of Africa Kenya Limited](#) [2018] eKLR the Court of Appeal set out the principles under which courts may grant leave to amend pleadings as follows:



- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case.
  - b. The amendment should be timeously applied for
  - c. The power to amend can be exercised by the court at any stage of the proceedings
  - d. As a general rule, however late the amendment is sought to be made, it should be allowed if made in good faith provided costs compensate the other side
  - e. 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 the Limitations Act subject however to the powers of the court to still allow an amendment notwithstanding the current period of limitation.
19. Whether or not the plaintiff is entitled to leave to amend his plaint in accordance with the rules is a discretion to be exercised by the court judicially and within the principles of natural justice. In the case of *Reg V Gaming Board ex Benaline* 1970 2 QB 17 Lord Denning observed as follows:
- “It is not possible to lay down rigid rules as to when the principle of natural justice are to apply nor as to their scope and extent. Everything depends on the subject matter”
20. In *Josiah Magena v Wakenya Pamoja Sacco Society Ltd, Nrb ELRC Cause no. 510 of 2014* Mbaru J held as follows:
- The court has discretionary power to amend pleading at any stage before judgment for purposes of determining the real questions or issues which have been raised by the parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judicially and with prudence and not whimsically. This was well articulated in *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR, where the court observed that:
- “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.”
21. What can be gleaned from the above decisions is that the court has a wide discretion to amend pleadings at any stage of the proceedings so to bring out the real issues in controversy between the parties and on such terms as to costs as may be just. The principles of law with regard to amendment of pleadings, are underpinned by the sacred and sacrosanct principles of fairness, equity, equality, reasonableness, lawfulness, good conscience and morality.
22. In the instant case, the application for leave to amend the Plaintiff's case and after a similar application was dismissed on 30<sup>th</sup> October, 2018. The prayer for amendment is therefore *res judicata*.
23. On the question of re-opening the Plaintiff's case, it is common ground that the Plaintiff voluntarily closed his case and no good reason has been advanced as to why he wishes to re-open it. The idea of producing the sale agreement and the letter dated 25<sup>th</sup> July, 2022 is clearly an afterthought as the said



letter had been in the custody of the Plaintiff and his counsel for more than one and a half years before the plaintiff testified and closed his case.

24. Even though the court has a discretion to grant the orders sought, I am of the view that reasons given are not satisfactory and I am disinclined to exercise my discretion in favour of the Applicant. Consequently, I find no merit in the application and I dismiss it. Costs shall be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT ELDORET THIS 23<sup>RD</sup> DAY OF JULY 2024**

.....

**J.M ONYANGO**

**JUDGE**

In the presence of;

Mr. Ogongo for the Applicant

Mr. Kibii for the 1<sup>st</sup> Respondent

Mr. Kiboi for the 2<sup>nd</sup> Respondent

Court Assistant: Brian

