



REPUBLIC OF KENYA



Ethics and Anti-Corruption Commission v Chembe Holdings Limited & 4 others (Civil Suit 70 & 71 of 2009 (Consolidated)) [2024] KEELC 6432 (KLR) (26 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6432 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 70 & 71 OF 2009 (CONSOLIDATED)
LL NAIKUNI, J
SEPTEMBER 26, 2024**

BETWEEN

ETHICS AND ANTI-CORRUPTION COMMISSION PLAINTIFF

AND

CHEMBE HOLDINGS LIMITED 1ST DEFENDANT

MUSK-DEER LIMITED 2ND DEFENDANT

SAMMY KOMEN MWAITA 3RD DEFENDANT

MOHAMED HUSSEIN JAFFER 4TH DEFENDANT

ASHOK DOSHI 5TH DEFENDANT

RULING

I. Introduction

1. This Honorable Court was tasked to hear and determine the Notice of Motion application dated 28th May, 2024 by Musk – deer Limited, Mohamed Hussein Jaffer and Ashok Doshi, the 2nd, 4th and 5th Defendants/Applicants herein. The application was brought under the provision of Order 2 Rule 15, Order 37 Rule 7 (2) of the *Civil Procedure Rules*, 2010, Section 3A of the *Civil Procedure Act*, Cap. 21 and all other enabling provisions of the law.
2. Upon service of the Notice of Motion application, the Plaintiff/Respondent responded through filing of a Replying Affidavit sworn on 5th June, 2024 which the Court shall be dealing with indepth at a later stage herein.

II. The 2nd, 4th and 5th Defendants/Applicants' Case.

3. The 2nd, 4th and 5th Defendants/Applicants sought for the following orders: -



- a. Spent.
 - b. Spent.
 - c. Spent.
 - d. That leave be and is hereby granted to the 2nd, 4th and 5th Defendants to further amend their Defence and to introduce a Counter - Claim thereto.
 - e. That costs of this application be awarded to the Applicant.
4. The application was premised on the grounds, testimonial facts and the averments made out on the face of it and under the thirty (30) Paragraphed Supporting Affidavit of Ashok Doshi, the 5th Defendant sworn and dated on 28th May, 2024 and the seven (7) annextures marked as “AD - 1 to 7” annexed thereto. He averred as follows:-
- a. It had come to his attention that during the pendency of this suit, the Plaintiff/Respondent and/or certain government offices materially altered the status of the suit properties being Mombasa Island/Block 1/528 and Mombasa Island/Block 1/529 by amalgamating the same with Mombasa Island Block 1/523 to form Mombasa Island Block V/576.
 - b. This suit was filed in the year 2009.
 - c. He had come to learn that in the year 2010, one year after this suit had been filed and while, the same was still pending, the Commissioner of Lands (as it was then) vide a Letter of Allotment dated 25th August 2010 granted to the Kenya Ports Authority (on whose behalf the Plaintiff brought this suit) an extension of the property known as Mombasa Island Block 1/523. Annexed in affidavit and marked as ‘AD - 1’ a true copy of the said Letter of Allotment dated 25th August 2010.
 - d. Vide a letter dated the same day, that was 25th August 2010. Kenya Ports Authority with alacrity and an unusual speed accepted the Letter of Offer. Annexed in the affidavit and marked as ‘AD - 2’ a true copy of the letter by Kenya Ports Authority dated 25th August, 2010.
 - e. Although the Letter of Allotment dated 25th August 2010 did not state that the extension of Mombasa Island Block 1/523 was to be undertaken by amalgamating Mombasa Island/Block 1/528 and Mombasa Island/Block I/529 with Mombasa Island Block 1/523, vide a letter dated 26th August 2010, the Commissioner of Lands purported to order the Director of Surveys to cancel the surveys for Mombasa Island/Block 1/528 and Mombasa Island/Block I/529 on the allegation that the said plots were irregularly allocated. Annexed in the affidavit and marked as ‘AD - 3’ was a true copy of the letter by the Commissioner of Lands dated 26th August 2010.
 - f. Vide a letter dated 3rd September 2010, the Director of Surveys purported to amend the Registry Index Map so as to increase the acreage of Mombasa Island Block 1/576 so as to reflect the amalgamation of Mombasa Island/Block 1/528 and Mombasa Island/Block 1/529 with Mombasa Island Block V/523. Annexed herewith and marked as ‘AD - 4’ was a true copy of the letter by the Director of Surveys dated 3rd September 2010.
 - g. Vide a letter dated 5th October 2010, the Commissioner of Lands confirmed the amalgamation of Mombasa Island/Block 1/528 and Mombasa Island/Block 1/529 with Mombasa Island Block 1/523 to create Mombasa Island Block V/576. Annexed in the affidavit and marked as ‘AD - 5’ was a true copy of the letter by the Commissioner of Lands dated 5th October 2010.



- h. The above letters evidencing the amalgamation of Mombasa Island/Block 1/528 and Mombasa Island/Block 1/529 with Mombasa Island Block V/523 to create Mombasa Island Block 1/576 was brought to my attention when the Plaintiff herein filed and served a Further List of Documents dated 20th February 2024, 14 years after the letters came into existence
- i. He was shocked and taken aback to learn that the suit properties had been amalgamated with another plot to form a new plot Mombasa Island Block 1/576 during the pendency of this suit. He immediately contacted Mr. Daniel Kihiko, Advocate who is a partner in the Law firm of Messrs. Kihiko N & M Law Advocates LLP that was representing the 1st Defendant who was the original owner of the suit properties and asked him whether he knew of the amalgamation.
- j. Mr. Daniel Kihiko Advocate advised him to wait so that he could verify the authenticity of the survey maps so as to ascertain whether indeed the amalgamation was done and whether the same was reflected in the official survey records.
- k. Mr. Daniel Kihiko Advocate informed him, that he wrote a letter to the Director of Surveys dated 2nd March 2024 seeking to authenticate the maps which had been filed in court by the Plaintiff/Respondent.
- l. His advocate received a letter of response dated 7th May 2024 from the Director of Surveys confirming the authenticity of the amalgamation maps by way of certification as true copies. Annexed in the affidavit and marked as 'AD - 6' was a true copy of the letter by the Director of Surveys which were attached the certified copies of the maps.
- m. Mr. Daniel Kihiko Advocate shared the letter dated 7th May 2024 with the Deponent on 24th May 2024 and upon sharing the same with his advocates, he was advised that there was need to amend their Defence so as to seek cancellation and reversal of the amalgamation exercise hence this application.
- n. The speed with which the cancellation letters were processed was suspect. For instance, the letter of allotment to Kenya Ports Authority was issued on 25th August 2010 and KPA accepted the letter on the same day. One was left wondering when the Board of KPA sat to approve the acceptance and to issue the bankers cheque for the required amount of premium and other payments.
- o. It was also suspect that the documents of amalgamation were processed in the year 2010 but only filed in Court in the year 2024, 14 years later.
- p. There were issues that require interrogation by the court which could only be done if they were allowed to further amend their defence and include a counterclaim. Annexed in the affidavit and marked as 'AD - 7' was a true copy of the draft further Amended Defence and Counter - Claim.
- q. The Plaintiff itself had amended its Plaint several times and they never saw why they should not be granted leave to amend their Defence.
- r. The action of amalgamating the suit properties with another to form a new property was not only prejudicial to the Defendants' right of being heard before such drastic action was taken but also went against the "doctrine of lis pendens".
- s. During the pendency in any court having authority in Kenya of any suit in which the right to immovable property was directly and specifically in question, the immovable property was not to be dealt with by any party to the suit or proceedings so as to affect the rights of any



other party thereto under any decree or order that would be ultimately made, except with the authority of the court and on terms.

- t. He was aware that this Honourable Court had not at any time been asked to grant permission for the consolidation of the suit properties.
- u. The instant suit was a gross abuse of court process because the resultant amalgamation means that suit properties on which the instant suits were pegged were non-existent having been consolidated to form Mombasa Island Block 1/576.
- v. The Plaintiff/Respondent's and/or their principal had not come to this Honourable Court with clean hands judging from their calculated and fraudulent acts of interfering with the status of the suit properties to the extent of procuring a new title during the pendency of the suit which was filed by themselves
- w. Since the Government went ahead to unilaterally amalgamate the suit properties with another and cancel their title, there was no need for the Plaintiff/Respondent to pretend to be seeking redress in this court by filing this suit. They should have just gone ahead and done the cancellation.
- x. Unless this critical issue was addressed, any directions, orders and/or judgment of this Court would be an academic exercise because reference would be made to non - existent titles due to the irregular amalgamation.
- y. He was aware that unless the application was certified urgent and the orders sought granted, this Application shall be rendered nugatory in the event the Honourable Court proceeds to conduct site visit and hear the matter without hearing this Application.
- z. It was therefore imperative and in the interest of justice that the Plaintiff and/or their principal be ordered to reinstate the suit properties as they were at the time the instant suit was filed.
- aa. In view of the foregoing it is just and equitable that the orders sought herein be granted.
- ab. Unless the application was certified urgent and the orders sought granted, this Application shall be rendered nugatory in the event the Honourable Court proceeds to conduct site visit scheduled for 14th June 2024 and the hearing scheduled for 26th June 2024.
- ac. Save as otherwise expressly stated herein, the contents of this Affidavit were based on his own knowledge acquired in his abovementioned capacity and were true to the extent that any matter in this affidavit was based on the information he had disclosed and ground (as the case may be) of the same.

II. The responses by the Plaintiff/Respondent

- 5. The Plaintiff/Respondent opposed the Application through a 23 Paragraphed Replying Affidavit sworn on 5th June, 2024 by Abraham Kemboi, an Investigator with the Ethics and Anti-Corruption Commission, in the Lower Coast Regional Office, Mombasa and annexures marked as "AK" annexed thereto. The deponent averred that:
 - a. This Honorable Court issued interlocutory on 22nd July, 2009 against the 2nd Defendant whether by itself, servants or agents from dealing with the suit properties in any way pending the hearing of the suit (annexed in the affidavit and marked as "AK – 1" was a ruling of the court).



- b. Despite knowing that there existed a suit and court orders relating to the subject properties, the 2nd Defendant went ahead and transferred the properties to the 4th and 5th Defendants on 25th May, 2017 (see annexed copies of green cards marked as “AK – 2 and 3”).
- c. The said ruling was delivered in the presence of the 2nd Defendant and it was therefore being mischievous in bringing the present application as a way to confuse this Honorable Court from determining the fundamental issues raised in the Plaintiff/Respondent’s Plaint.
- d. From the green cards, the Plaintiff/Respondent had placed restrictions against the suit properties on 2nd April, 2008 and the same have never been lifted to date as required under Section 138 of the Registration of Lands Act CAP. 300 (now repealed).
- e. The Applicants could not therefore invoke the doctrine of lis pendens, yet they interfered with the ownership of the property despite a court order and restriction being in force.
- f. Following the Amended Defence filed by the 1st Defendant the Commission carried out further investigations on the allegation of amalgamation as had been pleaded by the said Defendant.
- g. The investigations findings were that the Commissioner of Lands, in his ordinary course duty, did write to the Director for Survey on 26th August, 2010, confirming that the Letters of Allotment that had been issued relating to the suit parcels had been irregular and should not have been processed.
- h. The Director for Survey was therefore directed to cancel the surveys that had led to the creation of the suit properties and subsequently amalgamate them with Mombasa Island Block I/523, a property belonging to Kenya Ports Authority (annexed in the affidavit letter marked as ‘AK - 4’).
- i. The amalgamation of the properties happened on 5th October, 2010, seven years, before the 4th and 5th Defendants bought the properties and as such the two Defendants did not have any interest and/or locus to deal with the properties when amalgamation happened.
- j. The 4th and 5th Defendants could not therefore allege to have any rights over the suit parcels of land yet at the time of amalgamation they were strangers to the suit properties.
- k. The legality of the alienation of properties known as Mombasa Island Block/ I/528 and Mombasa Island Block I/529 (suit properties) was the fundamental issue to be determined by this Honorable Court (see paragraphs 10-29 of the Plaints).
- l. Amalgamation of properties known as Mombasa Block/ 528 and 529 never negated the fact that the said parcels of land existed and the legality of their alienation was the fundamental issue to determined by this Honorable court.
- m. The Plaintiff/Respondent claims and orders prayed in the filed Plaints could not be taken away, not by an event, not even by amalgamation. The claim and orders being sought for by the Plaintiff/Respondent were therefore not an academic exercise as alleged by the 2nd, 4th and 5th Defendants (see orders in the plaints).
- n. The 2nd, 4th and 5th Defendants should not be allowed to amend their Defence as the issues to be determined by this Honorable Court relate to parcels known as Mombasa Island Block/ I/528 and Mombasa Island Block I/529 and not parcel Mombasa Island Block I/576.



- o. Allowing the 2nd, 4th and 5th Defendants to amend their defense will prejudice the Plaintiff since the matter was part heard and evidence adduced was based on the pleadings which relate to suit parcels known as Mombasa Island Block/ I/528 and Mombasa Island Block I/529.
- p. The 2nd, 4th and 5th Defendants' aim was to delay this suit from being concluded as they had demonstrated lack of good faith by seeking to invoke the doctrine of lis pendes, whilst at the same time seek to amend their defence.
- q. Amalgamation was an issue which the only the 2nd Defendant can deal with during their defense hearing and/or at submission stage.
- r. The 2nd, 4th and 5th Defendants still held Leases and Certificate of Lease documents relating to Mombasa Island Block/ I/528 and Mombasa Island Block I/529 whose registration are yet to be cancelled and/or revoked.
- s. The hearing and site visit scheduled for 14th June, 2024 and 26th June, 2024 should therefore proceed as has been directed by the Honorable court.
- t. The Application by the 2nd, 4th and 5th Defendants/Applicants was frivolous, vexatious and an abuse of court process and waste of court's precious judicial time hence should be dismissed with costs to the Plaintiff/Respondent.

II. Submissions

6. On 11th June, 2024 while all the parties were in Curt directions were granted to have the Notice of Motion application dated 28th May, 2024 be disposed of by way of written submissions. Unfortunately, by the time of penning down this Ruling, the Honourable Court had not been able to access written submissions from any of the parties herein. Pursuant to that the Honourable Court proceeded to reserve the delivery of the Ruling on 24th July, 2024 on its own merit accordingly.

A. The Written Submissions by the Plaintiff/Respondent

7. While opposing the Notice of Motion application dated 28th May, 2024 by the Ex - Parte Applicant, the Plaintiff/Respondent through Messrs. Songole A. Brillan & Company Advocates for the EACC filed their written submissions dated 1st July, 2024. M/s. Songole Advocate commenced the submission by recounting on the afore - stated prayers sought by the Ex – Parte Applicant herein. According to the Learned Counsel, the Application was supported by an affidavit sworn by the Ex Parte Applicant, Ashok Doshi, dated 28th May, 2024. As a rejoinder, the Plaintiff/Respondent herein filed a response to the said application via a Replying Affidavit dated 5th June, 2024 sworn by Abraham Kemboi.
8. To support its case, the Plaintiff/Applicant relied on the following three (3) issues to be considered for the determination by the Honourable Court. These were, firstly whether the Applicant should be allowed to amend his Defence and introduce a Counter – Claim. The Learned Counsel averred that the purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings. The Counsel stated that the general power to amend pleadings is donated by the provision of Section 100 of the *Civil Procedure Act*, Cap. 21 being the substantive law and its handmaiden under provision of Order 8 Rule 5 of the *Civil Procedure Rules*, 2010. The Courts have the discretion to allow amendments of pleadings at any stage of the suit but such discretion ought to be exercised judiciously and not whimsically. The Learned Counsel affirmed that the issues to be determined by this Honorable Court as seen from the filed Plaintiff's application for the allocation of suit parcels known as Mombasa Island Block I/528 and Mombasa Island Block I/529. The Applicant's intended amendment had departed from the original pleadings and introduced a



totally new claim which altered the nature of the defence hence would occasion prejudice to the Plaintiff. The Applicant sought that the amalgamation of Mombasa Island Block I/528, Mombasa Island Block I/529 and Mombasa Island Block I/523 to Mombasa Island Block I/576 be hereby termed as illegal, null and void. That the courts should declare them lawful owners of Mombasa Island Block I/528 and Mombasa Island Block I/529. Lastly that an injunction be issued to the Chief Land Registrar to cancel the registration of Mombasa Island Block I/576. To buttress her point, the Learned Counsel cited the case of: "*Ochieng and Others v First National Bank of Chicago*, Civil Appeal Number 147 of 1991 extensively set out as follows the principles under which Courts may grant leave to amend the pleadings:

- a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b. the amendments should be timeously applied for;
- c. power to amend can be exercised by the court at any stage of the proceedings;
- d. 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;
- 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 Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation".

In Mulla, *The Code of Civil Procedure*, 18th Ed, Vol.2 at pages 1751-1752:- sets the following on amendments of pleadings:-

"On the basis of the different Judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- v. Amendment of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;



ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings."

9. The Learned Counsel contended that the Applicants were running away from the substantive and fundamental issues that the parties were seeking to be determined by this Honorable Court, which was the legality of the allocation of the suit properties known as Mombasa Island Block I/528 and Mombasa Island Block I/529 and not amalgamation of the same and/or cancelation of registration of Mombasa Island Block I/576. The evidence tendered by the Plaintiff related to the legality of allocation of the suit properties.
10. Even though the powers to allow amendment are discretionary, there were some instances where the Courts could refuse the exercise of such discretion and such include delay and lack of reasons given for the delay, the addition of fresh causes of action and the judicial disruption of the administration of justice. The Learned Counsel cited the case of: "*Kassam v Bank of Baroda* [2002] 1 KLR 294" where the court refused amendments pointing out that the same would be to facilitate abuse of court process. In that case, the Honorable Judge went on to say that the power of amendment was to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense.
11. Additionally on the same issue, the Counsel referred Court to the decision in the case of: "Abdul Karim Khan v Mohamed Roshan [1965] EA at P. 289, which was cited by Nyakundi J, in the case of "*St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* ([2018]eKLR, it was held that Courts would not permit an amendment that was inconsistent with the original pleading and which entirely alters the nature of the Defence or Plaint. According to the Counsel, amalgamation of properties known as Mombasa Block/528 and 529 never negated the fact that the said parcels of land existed and the legality of their alienation was the fundamental issue to determine by this Honorable court. The said amalgamation was initiated by the Commissioner of Lands who was not a party to this suit.
12. Further, the amalgamation had not changed the fact that the said properties are owned by Kenya Ports Authority, which the Plaintiff had pleaded in the Plaint and is an issue to be determined by this Honorable Court. The Applicant had not brought his application in good faith but was using it as a gimmick to delay the matter from proceeding to its logical conclusion considering that this suit had progressed significantly. Therefore, as far as the Counsel was concerned, the proposed amendment was not meant to assist this Honorable Court in making a finding on the fundamental issues being raised by the suit herein.
13. Secondly, whether the doctrine of lis pendens had been breached. The Learned Counsel averred that the doctrine of lis pendens doctrine was originally a doctrine of common application to both the courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of and the claimant forced to bring a new suit against the new owner only for the latter to dispose of the new suit and the claimant to start all over again. While explaining the doctrine of lis pendens, Justice J.L Onguto in the case of: "*Cieni Plains Company Limited & 2 others v Ecobank Kenya Limited* [2017 eKLR had this to say:-

" 60 The lis pendens doctrine was originally a doctrine of common application to both the courts of law and equity. It rested on the principle that every suit would simply be defeated once property was disposed of and the claimant forced to bring a new suit against the new owner only for the latter to dispose of the new suit and the claimant to start all over again: see Turner LJ in *Bellamy*



v Sabine [1857] 1 De J 566.No suit in a case where the subject matter as constantly being transferred would ever be successfully prosecuted.....

62. As I understand it, the doctrine of lis pendens is based on justice, equity, expediency and good conscience. It is based on sound policy. The concept of the rule of law anticipates fine and fair adjudication. The law does not allow or encourage litigants to give rights which are still under dispute to others who are not litigants and in the process prejudice fellow litigants. Thus according to the 10th edition of G.C Bharuka's treatise Mulla on the Indian Transfer of Property Act, the doctrine is intended to avoid conflicts between parties to a suit and innocent purchasers and also to stop those who want to circumvent the courts jurisdiction by removing the subject matter from the court's grasp. The aim is accomplished by enforcing the decree against any person who acquires property the subject of litigation: see Bharuka (supra).”
14. The 2nd, 4th and 5th Defendants could not purport to invoke the doctrine of lis pendens yet they were the ones that interfered with the ownership of the property despite a court order and restriction being in force. The 2nd Defendant disregarded the doctrine of lis pendens and in fact was in contempt of court as it went ahead and transferred the said property to the 4th and 5th Defendants on 25th May, 2017 whilst knowing well that there was a court order in place (see Replying Affidavit of the Plaintiff/Respondent). The 4th and 5th Defendants had no enforceable right in the suit properties and therefore cannot invoke the doctrine of lis pendens.. The Counsel referred Court to Judge J.G Kemei in the case of: “[Nelson Rurira Kang'ethe & another v Joyce Wambui Kamanja & 2 others](#)[2018] eKLR held:-
- “ 28. The doctrine of lis pendens rests upon the foundation that it would plainly be impossible that any action or suit could be brought to a successful conclusion if alienations pendent lite were permitted to prevail. In the case of “*Bellamy v Sabine* IDeG & J 566” it was held that:
- “The doctrine of lis pendens intends to prevent not only the defendant from transferring the suit property when litigation is pending but it is equally binding on those who derive their title through the Defendant, whether they had or had no notice of the pending proceedings. Expediency demands that neither party to a suit should alienate his interest in the suit property during the pendency of the suit so as to defeat the rights of the other party...”.
29. In *Festus Oganda v Hans Million* (Civil Appeal No. 100 of 2007) the doctrine was explained as:
- “The doctrine of lis pendens is meant to maintain the status quo over the property which is the subject matter of a pending suit until the final determination of the suit or until the suit is in any other manner terminated.....the transfer was obviously intended to defeat the outcome of the appeal. The transfer of the suit property.”
15. The said amalgamation was initiated by the Commissioner of Lands who was not a party to this suit and it had not changed the fact that the said properties are owned by Kenya Ports Authority. A fundamental issue that the Plaintiff was seeking this court to determine. Therefore, the amalgamation



was of no legal consequences to the suit and fundamental issues that that the Plaintiff was seeking for this Honorable Court to determine. The title documents relating to the suit properties were still being held by the Applicants as they had never been cancelled. Thus, the Applicant's application was misguided, frivolous, a waste of precious judicial time and an abuse of court process and should therefore be dismissed with costs.

Finally, it was the submission of the Counsel that the Ex – Parte Applicants who should bear the costs of this application to the Plaintiff/Respondent.

V. Analysis and Determination

16. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions, myriad of cited authorities by the Learned Counsels, the relevant provisions of the Constitution of Kenya, 2010 and the statutes. I have also perused all the orders that have been mentioned in this application.
17. For the Court to reach an informed decision, it has framed three (3) broad salient issues for its determination. These are:-
 - a. What are the fundamental Legal principles on amendments of pleadings.
 - b. Whether the Court should allow the Notice of Motion application dated 28th May, 2024 for amendment of the Defence to incorporate the Counter - Claim on a part heard matter.
 - c. Who bears the costs of the Notice of Motion application dated 28th May, 2024?

Issue No. a). What are the Fundamental Legal Principles on Amendments of Pleadings.

18. Under this sub title the Court shall evaluate the merits of the Notice of Motion application whereby the main substratum is on amendment of the Defence to include a Counter Claim at the midst of an ongoing proceeding. The general power to amend pleadings is drawn from the provision of Section 100 of the Civil Procedure Act, CAP 21 and Order 8 of the Civil Procedure Rules, 2010 with and without the leave of Court depending on the stage at which the matter would have reached thereof. 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, 2010.
19. 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.”
20. 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, 12th 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...”

21. Similarly, in *Halsbury's Laws of England*, 4th 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...”.

22. The discretion of courts to amend pleadings was summarized by the Court of Appeal in the case of:- *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991” thus:

“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 Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts.”

23. The principles governing amendment of pleadings have been set out in numerous Court cases among them being the case of: *St. Patrick's Hill School Ltd v Bank of Africa Kenya Limited* (2018) eKLR”, where the Court of Appeal set out the principles as follows: -

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings;
- d) 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.
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.



24. In the case of “*AAT Holdings Limited v Diamond Shields International Ltd* [2014] eKLR”, the court cited the principles as set out by the Court of Appeal in the case of:- “*Central Kenya Limited* Case No. 222 of 1998” as shown below: -
- i. That are necessary for determining the real question in controversy.
 - ii. To avoid multiplicity of suits provided there has been no undue delay.
 - iii. Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
 - iv. That no vested interest or accrued legal rights is affected; and
 - v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.
25. This Court makes reliance on the decision in the case of “*K K Lodgit Limited v Geminia Insurance Company Ltd & Another* (2021) eKLR” where it was held that:
- “..... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party’s case”.
26. From the principles set out above and as captured in the authorities cited by the advocates for the parties, it is clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. That amendments should be allowed even in situations of delay if the other side can be compensated by award of costs. The caveat in amendments is that it should not change the character of the case and should not deprive the other side of its legal rights. Any amendments allowed by the court should be geared towards achieving a just and final determination of the real issues in controversy between the parties. In addition, the application must be made in good faith.

Issue No. b). Whether the Court should allow the Notice of Motion application dated 28th May, 2024 for amendment of the Defence to incorporate the Counter - Claim on a part heard matter

27. Under this sub heading, the Honourable Court will be applying the above elaborated legal principles on amendment of pleadings to the filed application herein. Fundamentally, I reiterate that the Defendants/Applicants are seeking leave to amend their Statement of Defence to introduce a Counter - Claim. While this suit was pending, the Plaintiff directly and/or through other government irregularly procured an allotment letter and fraudulently amalgamated the two suit properties that is Mombasa Island/Block I/528 and Mombasa Island/Block I/529, together with Mombasa Island Block I/523 to form Mombasa Island Block V576 hence altering the status of the suit properties. The consolidation of the suit properties and their amalgamation with Mombasa Island Block 1/523 resulted in the subsequent issuance of a new survey plan and a new title for Mombasa Island Block V576.
28. According to the Defendants, the said action was not only prejudicial to the Applicants' right of being heard before such drastic action is taken but also goes against the doctrine of lis pendens. There was also a real danger that due to the irregular amalgamation, the instant suit was pegged on a non-existent property/ title. The said action of amalgamating and consolidating the suit properties with another to form a new title is mala fides and retains an unwanted effect of embarrassing the Court by altering the status of the suit property before the Court can adjudicate on the appurtenant issues.



29. The Defendants contended that their intended amendment of their defence seeks to introduce and plead a counterclaim seeking the reversal of the aforesaid consolidation and amalgamation and cancel the resultant title.
30. The Plaintiff/Respondent on the other hand argued that the Honourable Court issued an interlocutory injunction on 22nd July, 2009 against the 2nd Defendant whether by itself, servants or agents from dealing with the suit properties in any way pending the hearing of the suit. Despite knowing that there existed a suit and court orders relating to the subject properties, the 2nd Defendant went ahead and transferred the properties to the 4th and 5th Defendants on 25th May, 2017.
31. Amalgamation of properties known as Mombasa Block/ 528 and 529 does not negate the fact that the said parcels of land existed and the legality of their alienation was the fundamental issue to be determined by this Honourable court. The 2nd, 4th and 5th Defendants should not be allowed to amend their Defense as the issues to be determined by this Honourable Court relate to parcels known as Mombasa Island Block/ I/528 and Mombasa Island Block I/529 and not parcel Mombasa Island Block I/576.
32. Allowing the 2nd, 4th and 5th Defendant to amend their defense will prejudice the Plaintiff since the matter was part heard and evidence adduced was based on the pleadings which relate to suit parcels known as Mombasa Island Block/ I/528 and Mombasa Island Block I/529. The 2nd, 4th and 5th Defendants' aim was to delay this suit from being concluded as they had demonstrated lack of good faith by seeking to invoke the doctrine of *lis pendens*, whilst at the same time seek to amend their defense.
33. The court in the case of "*Eastern Bakery v Castelino* [1958] E. A 461" set out the principles the court has to consider in determining whether or not to allow an application for amendment as follows: -
- (a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.
 - (b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.
34. In the judicial decision of "*Cyrus Mucebiu Irungu v Alexander Mugambi Miriti & 7 others* [2019] eKLR", the court at paragraph 13 stated: -
- "Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs."
35. Additionally, in the case of "*David Jonathan Grantham & Another v National Social Security Fund* [2007] eKLR" the court held as follows: -
- "The court's power to allow amendments is donated under Order VIA Rules 3, 5 and 8 (now Order 8 under the 2010 *Civil Procedure Rules*). The court can allow amendments at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the Defendant/Respondent and whether the amendment is material and not merely technical."
36. In the instant case, I fully take notice to the fact that would be an amount of inconvenience that the granting of leave to amend shall cause to the Plaintiff but that in itself cannot be a reason to refuse



the amendment. In any event this can be resolved by awarding costs. It is clear from the principles set out in the cases quoted above that the court can allow amendments of pleadings at any stage of proceedings. The Defendants/Applicants have also annexed to their supporting affidavit a Draft Amended Statement of Defence and Counter - claim incorporating the intended amendments.

37. Equally, I have taken into consideration the reasons advanced by the Defendants/Applicants for seeking leave to amend the Statement of Defence. I also note that this matter has not proceeded to hearing and have no doubt that no prejudice will be occasioned to the Plaintiff save for a degree of inconvenience. Further, the Plaintiff/Respondent have opportunity to amend its pleadings should it deem it necessary.
38. This court notes that the Applicants have been tardy in filing the application to amend their Statement of Defence. However, in the interest of justice, in order to determine the real issues in controversy and to avoid multiplicity of suits, this court grants leave to the Applicants to amend their Statement of Defence. Therefore, I am persuaded and thus find that the application has merit and is allowed as prayed.

Issue No. c). Who bears the costs of the Notice of Motion application dated 28th May, 2024

39. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “*Jasbir Rai Singh v Tarchalan Singh*” (2014) eKLR and *Cecilia Karuru Ngayo v Barclays Bank of Kenya Limited*, (2014) eKLR.
40. A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

VII. Conclusion & Disposition

- a. The Upshot of this is that from the critical analysis of the framed issues, the Honourable Court on the Preponderance of probability and balance of convenience proceed to make the following findings:-
- b. That the Notice of Motion Application dated the 28th May, 2024 be and is hereby found to have merit and is allowed entirely.
- c. That leave be and is hereby granted to the 2nd, 4th and 5th Defendants/Applicants to further amend their Defence and to introduce a counterclaim in terms of the annexed draft Amended Written Statement of Defence and Counterclaim.
- d. That the 2nd, 4th & 5th Defendants/Applicants are to file their Amended Defence and Counter - Claim as per the Annexed Draft Amended Defence and Counter – Claim within 7 days of this ruling.
- e. That the Plaintiff/Respondent is hereby granted corresponding leave of 7 days to file a Further Further Amended Plaintiff and respective responses to the Amended Defence and Counter - Claim, if need be and Defence to the Counter – Claim thereof.



- f. That the Plaintiff/ Respondent shall have costs of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) as thrown away costs for the inconvenience caused to it to be borne by the 2nd, 4th & 5th Defendants herein jointly and severally.
- g. That for expediency sake, the scheduled hearing of this matter to remain as 19th November, 2024.
- h. That the costs of this application shall abide the outcome of the suit.
It is ordered accordingly.

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL, SIGNED AND DATED AT MOMBASA THIS 26TH .DAY OF SEPTEMBER, 2024.

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**HON. MR. JUSTICE L.L. NAIKUNI,
ENVIRONMENT & LAND COURT AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Songole Advocate for the Plaintiff/Respondent.
- c. Mr. Ochieng Advocate holding brief for Mr. Kihiko Advocate for the 1st & 3rd Defendants.
- d. Mr. Kilonzo Advocate holding brief for Mr. Oluga Advocate for the 2nd, 4th, 5th Defendants/Applicants.

