



REPUBLIC OF KENYA



**Kiuna v Mwenje & 4 others (Environment & Land Case 5 of 2023)  
[2024] KEELC 6476 (KLR) (26 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6476 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 5 OF 2023  
AA OMOLLO, J  
SEPTEMBER 26, 2024**

**BETWEEN**

**NGUGI KIUNA ..... APPLICANT**

**AND**

**NELLY WANJIKU MWENJE ..... 1<sup>ST</sup> RESPONDENT**

**MARY WANJIKU MWENJE ..... 2<sup>ND</sup> RESPONDENT**

**MILKA WANJIRU MWENJE ..... 3<sup>RD</sup> RESPONDENT**

**ALICE WANGUI WAWERU ..... 4<sup>TH</sup> RESPONDENT**

**CHIEF LANDS REGISTRAR ..... 5<sup>TH</sup> RESPONDENT**

**RULING**

1. The plaintiff/applicant has moved this court vide notice of motion dated 14<sup>th</sup> March, 2024 brought under the provisions of Section 3A of the Civil Procedure Act and Order 1 rule 10, Order 8 rule 3 of the Civil Procedure Rules. The Applicant prays for orders;
  1. That the Honourable court be and is hereby pleased to grant leave to the Plaintiff to amend the Plaintiff and also enjoin the 6<sup>th</sup> to 13<sup>th</sup> Defendants in terms of the Draft Amended Plaintiff.
  2. That the Draft Amended Plaintiff attached herewith be deemed as duly filed and served upon payment of the requisite Court filing fees.
  3. That the costs of this Application be in the cause.
2. The application is grounded on the following facts;
  - i. That the Plaintiff filed the suit herein against the 1<sup>st</sup> to 5<sup>th</sup> Defendants vide plaintiff dated 25<sup>th</sup> September, 2003.



- ii. That the Plaintiff has since realised that the 1<sup>st</sup> to 4<sup>th</sup> Defendants have further subdivided his original property land parcel known as MUGUGA/GITARU/278 into several subdivisions and sold the same to third parties during the pendency of the suit herein and the Civil Appeal No. 117 of 2008 filed at the Court of Appeal hence the need to enjoin the intended 6<sup>th</sup> to 16<sup>th</sup> Defendants.
  - iii. That the intended 6<sup>th</sup> to 16<sup>th</sup> Defendants and the 1<sup>st</sup> to 5<sup>th</sup> Defendants/Respondents will not be prejudiced by the granting of the prayers sought.
  - iv. That it is mete and just to grant the Orders sought so that the Plaintiff can amend his Plaint and also enjoin the 6<sup>th</sup> to 16<sup>th</sup> Defendants for the court to determine all the issues in dispute.
3. In the affidavit in support of the motion sworn by Ngugi Kiuna, he deposed that he is the registered owner of LR No. Muguga (Gitaru/278 which was fraudulently subdivided by the 1<sup>st</sup> – 4<sup>th</sup> Defendants to other several subdivisions. That it is important he adds the proposed Defendants to this suit for the reason that they bought some of the portions of Gitaru/278 after the fraudulent subdivision as shown by copies of the certificate of official searches he annexed.
  4. The application is opposed by the 4<sup>th</sup> Defendant who filed a replying affidavit dated 22<sup>nd</sup> May, 2024. Ms. Waweru deposed that the application is an afterthought, and an abuse of the court process. She deposes that the 1<sup>st</sup> – 3<sup>rd</sup> Defendants are all dead with the 2<sup>nd</sup> defendant having died before the filing of this suit which fact the plaintiff is aware of since he is related to the said defendants.
  5. That vide a judgment delivered on 8<sup>th</sup> February, 2019, the case was transferred to this court and the plaintiff directed to substitute the deceased 1<sup>st</sup> – 3<sup>rd</sup> defendants. However, to date the said defendants have not been substituted. She deposed further that the ownership of Muguga/Gitaru/278 was the subject matter in NBI HCC No. 2850 of 1980 which determined the dispute. That its subdivisions comprised in L.R Nos Gitaru/1911, 1913, 1915, 2103, 1873 and 1874 have since been disposed of. She annexed a copy of the ruling from NBI HCC 2850/1980 as evidence.
  6. It is the 4<sup>th</sup> Defendant's averment that the plaintiff had NBI HCC file JR No. 1132 of 2002 in which that court directed he be refunded purchase price of Kshs.70,000 otherwise he was entitled to 025 acres. That via cheque No. 003611 dated 1<sup>st</sup> April, 2004, she refunded the Applicant the said sum of Kshs.70,000/-. That vide previous court rulings in 2007, it was declared that Gitau/278 was no longer in existence. Another suit ELC 29 of 2008 was dismissed by Mbogholi on 11<sup>th</sup> May, 2008 as an abuse of the court process.
  7. The 4<sup>th</sup> Respondent asserts that the Applicant cannot now claim to have known that the original title L.R No. Gitaru/278 is no longer in existence and ownership passed on to other parties. That the Applicant is fully aware of these dealings over the suit parcel of land as they are neighbours. She urged that litigation must finally come to an end and urged the court to dismiss the application.
  8. The plaintiff filed written submissions dated 7<sup>th</sup> May, 2024 in support of his application. He cited the provisions of order 8 rules 3 and 5 which governs amendment of pleadings and of note that the amendment should not introduce inconsistent cause of action and that it should be brought timeously. He submitted that the assertion by the 1<sup>st</sup> – 3<sup>rd</sup> Defendants are deceased are not supported by any evidence by failure to attach their death certificates.



9. The Applicant avers that the 4<sup>th</sup> Defendant has not demonstrated any injustice which will be caused to them by allowing the proposed amendments. In support of this argument he cited the case of *Kampala Coach Ltd Vs. First Community Bank & Another* (2016) eKLR which held thus;

“From the foregoing law & legal texts cited, it goes without saying that the court has wide discretion to allow any part to amend its pleadings 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 under Order 8 Rules 3 of the Civil Procedure Rules. 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. I am of the opinion that if the application for amendment is allowed, the Defendants will have the opportunity to respond to the amendment if they so wish. In sum, the first ground for opposing the application for amendment must fail....”

10. The 4<sup>th</sup> Defendant’s submissions are dated 29<sup>th</sup> August 2024 which by way of background restated the facts set out in their replying affidavit. She submits that the suit herein is *res judicata* and ought to be struck out for being an abuse of the court process. She made reference to ELC Case no 29 of 2008 where the Plaintiff was declared a vexatious litigant and urged the court to dismiss the application. In support of this argument, the 4<sup>th</sup> Defendant cited the case of *Jackson Kipkemoi Chebochok vs Charles Kibet Chepkwony and 2 Others* (2016)eKLR.

#### **Analysis and determination:**

11. I am alive to the provisions of law which allows for amendment of pleadings at any stage of the proceedings. However, the grant of leave is an exercise of discretion which the party moving the court must satisfy that he merits such discretion. From the heading of this court, this suit was filed in the year 2003 before it was subsequently transferred to this court. The Applicant was obligated to explain the delay in bringing the application. Although he argued that there is no prejudice likely to be occasioned to the 4<sup>th</sup> Respondent, clearly explained the prejudice *inter alia* that this matter has been previously litigated.
12. I have perused the file and came across amended plaint dated 23<sup>rd</sup> February, 2007 which introduced the 6<sup>th</sup> – 8<sup>th</sup> Defendants namely Joshua Njuguna Gacheche, Henry Nga’anga Waweru and Josphine Mukuhi Ng’anga. The current application still hit these persons to be introduced as 7<sup>th</sup> – 9<sup>th</sup> Defendants. Having been joined by the amendment of 23<sup>rd</sup> February, 2007, their joinder is now overtaken by events. The question which arises is whether or not they were served with the present application.
13. The Applicant has not explained the reason for delay. The 4<sup>th</sup> Respondent has stated that the issue of subdivision and sale of the subdivided plots was always within the knowledge of the Applicants. This is exhibited *vide* the plaint herein where the paragraph 6 of the amended plaint refers to the decision of Land Disputes Tribunal which ordered for the subdivision of Muguga/Gitaru/278 between; Nelly Wanjiku Mwenye ....00375 acres, Mary Mwenye .....003125 acres, Milka Wanjiku/Alice Wangui.....0.09625 acres, Ngugi Kiuna 0.025 acres.
14. At paragraph 10, the Applicant pleaded thus;

“On or about September, 2003 the first four Defendants by themselves/their Surveyors or/ and Agents unlawfully entered the suit premises and despite protestation by the Plaintiff’s



mother started sub-dividing the suit premises by putting beacons. The Plaintiff believes that the Defendants are proceedings with the sub-division to facilitate the issue of Title Deeds to their respective portions.”

15. At paragraph 11 of the amended plaint, the Applicant pleads that;

“While carrying out or the said sub-division the Defendants by themselves/servants and/or agents damaged the plaintiff’s crops on the land and the Plaintiff has suffered the following loss and damage: -

1. The value of destroyed crops Kshs.500,000/=

11(b) The plaintiff contends that the said 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants must have irregularly obtained titles to the said sub-division after which they further sub-divided the suit property and sold and/or assigned the subsequent sub-division to the 6<sup>th</sup>, 7<sup>th</sup> and 8<sup>th</sup> Defendants herein.”

16. These statements confirm that the Applicant has always been aware of the subdivision which is the gist of this suit. Some of the copies of the official searches e.g for Muguga/Gitara/1914 show the transfer to Henry Ng’ang’a was done on 10<sup>th</sup> May, 2004. The transfer of Gitaru/1911 to Symor Ltd was done on November, 2018.

17. The Applicant has not deposed that he tried to undertake searches at the lands office and faced any difficulties. Therefore, I agree with the Respondent that the application has been brought after undue delay.

18. Be that as it may, is there merit to join the new parties? The Applicant has exhibited that the new proposed defendants are currently the registered owners of the resultant subdivision. The Respondent said the ownership of the title Gitaru/278 was already determined in NBI HCCC No. 2850 of 1980. However, at paragraph 27 of the Court of Appeal in the judgement dated 8<sup>th</sup> February, 2019 noted that Justice Shields did not make any orders that were adverse to the plaintiff’s title and that the HCCC 2850 of 1980 was not about ownership of Muguga/Gitaru/278. The Court of Appeal held that the issues raised in HCCC 986 of 2003 had not been finally determined hence its dismissal was reversed and It is the said judgement which transferred the case to the Environment and Land Court for hearing and determination and now registered as number 5 of 2023.

19. Since this case is challenging the subdivision for which the parties to be joined are beneficiaries, the orders to be made in the event the Applicant is successful is likely to affect the parties sought to be joined. The case is yet to be heard and it important that the proposed party are made aware of these proceedings so that they chose whether to participate or not.

20. Lastly, on the issue of demise of 1<sup>st</sup> – 3<sup>rd</sup> Defendants is one that should be dealt with during pre-trial or hearing when the question of whether the suit as against them is still alive or dead. It cannot form a basis to deny the leave to amend the plaint.

21. Thus, it will serve the interest of justice that the application be allowed for the just and final determination of the dispute and involve all the parties likely to be affected by the orders which may be issued. Consequently, the plaintiff is granted leave to further amend the plaint to join Eunice Njeri Symar Ltd; Gladius Kihara; Michael K. Kinyanjui; Joseph M. Mwaura; Nicolas N. Njoroge; Gad Njuguna Musaka; and Lydia Angogo. The further amended plaint be filed and served on all the parties within 14 days of the date of delivery of this ruling.



22. To cure any prejudice to the 4<sup>th</sup> Respondent for delay in bringing the amendment, I award her costs of the application which i assess at Kshs.15,000/=. The said costs are payable within 30 days hereof and in default, execution to issue.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 26<sup>TH</sup> DAY OF SEPTEMBER, 2024**

**A. OMOLLO**

**JUDGE**

