



**Namisi v County Government of Trans Nzoia & 5 others (Environment & Land Case 79 of 2015) [2024] KEELC 6368 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6368 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KITALE  
ENVIRONMENT & LAND CASE 79 OF 2015  
FO NYAGAKA, J  
SEPTEMBER 24, 2024**

**BETWEEN**

**PENROSE SHELASALA NAMISI ..... PLAINTIFF**

**AND**

**THE COUNTY GOVERNMENT OF TRANS NZOIA ..... 1<sup>ST</sup> DEFENDANT**

**COUNTY PUBLIC SERVICE BOARD OF TRANS NZOIA ..... 2<sup>ND</sup> DEFENDANT**

**RATILAL GOSAR GODHIA ..... 3<sup>RD</sup> DEFENDANT**

**VIPUL RATILAL ..... 4<sup>TH</sup> DEFENDANT**

**AVIR KANTI SHAH ..... 5<sup>TH</sup> DEFENDANT**

**BENJAMIN NYAMUMBO OONGE ..... 6<sup>TH</sup> DEFENDANT**

**RULING**

**(On an Application for Amendment of Plaintiff)**

1. By a Notice of Motion dated 25/03/2024, the Plaintiff moved this Court under Order 8 Rule 3 of the *Civil Procedure Rules*, Section 1 and 3A of the *Civil Procedure Act* and all enabling provisions of the law. She sought the following orders:-
  1. That this Honorable Court to be pleased to grant leave to the plaintiff/Applicant to amend her plaint in terms of the annexed draft plaint.
  2. That the annexed draft plaint be deemed as duly filed upon payment of requisite fees court fees.
  3. Costs of this application in the cause.
2. The application was based on twelve grounds which are summarized as follows. The Plaintiff filed her Pleadings of an Amended Plaintiff dated 25/02/2021, the same date. Pre-trial directions have been taken,



the suit proceeded but the matter was yet to be fully determined. The suit land involved matrimonial property situate in Kitale and registered as Kitale Municipality Block 7/20 which was sold by the 6<sup>th</sup> Respondent and transferred to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents who later sold and transferred it to the 1<sup>st</sup> Respondent without the consent of the Plaintiff who was the wife to the 6<sup>th</sup> Defendant.

3. On 23/06/2016 the High Court sitting in Kitale Petition No. 4 of 2015 nullified the sale and transfer of the suit property. The Court of Appeal in Eldoret Civil Appeal No. 44 of 2017 on 15/02/2023 ordered the setting aside of the Kitale Honorable Court's Judgement of the High Court in Petition No. 4 of 2015 which had nullified the sale and transferred the parcel of land. The order was by the consent of the parties on the following terms:
  1. That by consent, the Appeal be and is allowed and the judgment of the High Court dated 23/06/2016 in High Court Petition No. 4 of 2015 be set aside.
  2. That the 1<sup>st</sup> and 2<sup>nd</sup> Respondents, Timothy Otuya Afubwa and Fred Maruti Murunga be paid Kshs. 3,000,000/= as throw away costs, by the County Government of Trans Nzoia.
  3. That the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents hereby confirm that they had no interests in the suit property.
  4. That both High Court Petition No. 4 of 2015 and the Court of Appeal No. 26 of 2017 be marked as settled.
  5. That the payment of Kenya Shillings 3,000,000 being thrown away costs shall be paid by the 1<sup>st</sup> and 2<sup>nd</sup> Respondents immediately after the adoption of this Settlement Agreement by the Court of Appeal.
4. The Plaintiff/Applicant was not a party either to the High Court Petition No. 4 of 2015 and Civil Appeal No. 44 of 2017. Further, the Applicant was aware that the suit existed in regard suit property. Further, that the consent of the Court of Appeal was entered without the Applicant's consent but in collusion between the 1<sup>st</sup> Respondent and the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup>. It was in relation to land parcel No. Kitale Municipality/Block 7/20 in which the Plaintiff claims matrimonial property rights.
5. In view of the decisions in High Court Petition No. 4 of 2015 and Civil Appeal No. 4 of 2017 the Plaintiff was of the opinion that a prayer for general damages would be reasonable in the circumstances considering that the suit.
6. The property had already been transferred to the 1<sup>st</sup> Respondent who had already paid a sum of Kenya Shillings 3,000,000/= as thrown away costs in order to retain the land. As a result, she sought leave to amend the plaint dated 14/01/2021 to include the prayer for general damages. By the Amendment the Court would determine the real questions in controversy against the County Government and other Defendants. The proposed amendments did not introduce new facts or any inconsistencies in regard to the cause of action, but only to introduce the prayer of general damages which is just and fair in the circumstances.
7. The Application was brought in good faith and timeously hence it would be just to grant it. The Court has power to entertain the application.
8. The Application was supported by the affidavit of the plaintiff Penrose Shilasala Namisi sworn on 25/03/2024. She repeated the contents of the grounds save that, she added that she filed High Court Petition No. 4 of 2015 over the suit land, being, Kitale Municipality/Block 7/20 to be declared matrimonial property and have the same restored as such. She annexed a copy of the Petition and marked it as PSN 1. She annexed a copy of the Judgment of the High Court in the Petition as PSN 2. In



it the learned judge ordered that the property reverts back to her and the 6<sup>th</sup> Respondent as matrimonial property but the 3<sup>rd</sup> and 4<sup>th</sup> Respondents appealed against the judgment. She annexed as PSM 3 a copy of the Appeal arising from the judgment.

9. The parties settled the appeal without her. She also annexed as PSN 4 a copy of the settlement agreement in Eldoret Civil Appeal No 44 of 2017 and PSN 5 a copy of the Draft Amended Plaintiff. She deposed that she was neither aware of the consent nor was she involved in entry into it.
10. The Application was opposed by the 4<sup>th</sup> and 5<sup>th</sup> Respondents through Grounds of Opposition dated 09/04/2024. He stated that the application was incurably defective, misconceived and hinged on wrong principles of law and procedure; the purported Amendments are an abuse of the process of court, scandalous, frivolous, vexatious and intended to embarrass the court and legal process and would be prejudicial to 3<sup>rd</sup>, 4<sup>th</sup> 5<sup>th</sup> Respondents. The Application lacked merit. The Application was brought up with undue delay since the Plaintiff was filed in 2015 and the Application was brought close to nine years down the line. The matter was partially heard, and the application didn't meet the evidentiary threshold of the order sort. The application was not legally tenable but a mere afterthought.
11. The Applicants filed their written submissions dated 07/06/2024 on 20/06/2024. She argued about the delay in bringing the application by stating that it was necessitated by the consent recorded between the 1<sup>st</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents on 09/02/2023 following their collusion. She argued that Order 8 of the Civil Procedure Rules gives the Court the power to determine the application. She relied on the case *Lewar Ventures Limited v. Equity bank (Kenya) Limited* [2022] eKLR.
12. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents filed submissions dated 22/07/2024 on 23/07/2024. They argued that the Application was brought with undue delay. It was prejudicial to them. They relied on the cases of *Central Kenya Ltd v. Trust Bank Ltd & 4 others* [2000] eKLR; *Ochieng & Others v. First Bank of Chicago*, Civil Appeal No. 147 of 1991 [1995] eKLR; *Kenya Commercial Bank v. James Osebe* [1982] eKLR, and *Institute for Social Accountability & Another Parliament of Kenya & 3 others* [2014] eKLR.
13. Further, they argued that the Application was an abuse of the process of the Court and it was scandalous and frivolous.
14. This Court has considered the application, the law and the submissions. There are two issues for determination, namely, whether the application is merited, and who to bear the costs of the same.
15. It is tried law that where pleadings have closed, a party may amend its pleadings at any stage but with leave of the Court. Order 8 Rule 3(1) provides that:

“(1) Subject to Order 1, rules 9 and 10, Order 24, rules 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.”

16. Additionally, Order 8 Rule 5 provides that:

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



17. Thus, parties to a suit have the right to amend their pleadings at any stage of the proceedings. Where they seek to do so before pleadings close, they do not need leave of the Court to do so. But after the pleadings close, the right may be exercised but with leave of the Court which is discretionary and exercised judiciously depending on the circumstances of each case, and whether the parties meet the criteria set out in Order 8 Rule 3 of the Civil Procedure Rules. It does not matter whether the matter is partly heard or even pending judgment.
18. Needless to say, that the general power to amend pleadings is provided for, further, under Section 100 of the *Civil Procedure Act*. Thus, in the case of *Eastern Bakery v Castelino* (1958) 1 EA 461 (CAK) the Court of Appeal held that; -
- “Generally speaking, this court will not interfere with the discretion of a judge in allowing or disallowing an amendment to a pleading, unless it appears that in reaching his decision he has proceeded upon wrong materials or a wrong principle”.
19. The Easter Bakery case (*supra*) held further that: -
- “It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case.....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g. by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”
20. This sets the Court to considering the provisions under which the instant application was brought Section 1 and 3A of the *Civil Procedure Act* are not in so far as there is an express provision in the law which deals with the issue to be addressed. It therefore leaves this Court to consider Order 8 rule 5 of the *Civil Procedure Rules* which 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.”
21. Therefore, in relation to amendments generally, the Court of Appeal case of *Central Kenya Limited - v- Trust Bank Limited* (2000)2 EA 365 where the court held that: -
- “that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”



22. In *Bullen and Leake & Jacob's Precedents of Pleading*, 12<sup>th</sup> Edition, the learned authors opine that the Court has the power which can be exercised at any stage of the proceedings before judgment, to amend pleadings. They stated that the:
- “...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...”
23. Similarly, of amendments of pleadings, the *Halsbury's Laws of England*, 4<sup>th</sup> Ed. (re-issue), Vol. 36(1) at paragraph 76, state as follows: -
- “...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...”
24. In the instant application the Plaintiff contended that following the judgment of the learned judge in Kitale High Court Petition No. 4 of 2015 by which the Court found that the sale of the suit land was unlawful there was an appeal preferred to the Court of Appeal in Eldoret in Civil Appeal No. 44 of 2017, as evidenced by annexures PSN 1, 2, 3 and PSN 4. The determination which was by the consent of the parties in the Appeal but to her exclusion. She contends that the act was collusion between the parties on appeal. The reason was that although she was a party to the judgment appealed against she was made not a party to the consent order in the appeal matter, which set aside the judgment and effectively handed over the ownership of the property to the 1<sup>st</sup> Respondent. She stated further that for these reasons it had become necessary to amend the pleadings to include a claim for general damages which she had not pleaded earlier for reason that she understood that her claim was complete.
25. The 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents opposed that application arguing that it was incurably defective, lacked merit, misconceived, hinged on wrong principles of law and procedure, an abuse of the process of court, scandalous, frivolous, vexatious, an afterthought, intended to embarrass the court and legal process, prejudicial to them, and brought with undue delay, among other reasons.
26. This Court is of the humble view that, as the law provides, amendments to pleadings should be freely allowed, upon certain conditions, even where a matter is partly heard as long as care is taken by the Court to ensure no prejudice is occasioned to the other parties. Such would include the Court giving an opportunity to the other party to amend its pleadings and adduce further evidence to take care of the new issues pleaded. It is indeed true that the matter is partly heard. The hearing took place for the first time on 17/04/2024, about two months after the consent in the Court of Appeal matter was entered into. But it is deponed that the Applicant was unaware of the consent until some time later. This fact alone shows that indeed of there was an issue that passed into the matter before this Court which was not within the knowledge of the Plaintiff when she prepared for the hearing, by taking pretrial directions, it should be brought before the Court for trial so that all such issues in controversy



are determined at once. I see no prejudice that may be occasioned to the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents by the proposed Amendment. In any event, they benefited from the consent to the matter in the Court of Appeal to the exclusion of the Applicant and her knowledge, and by the said consent put the property outside of her possible reach by this Court. They cannot act behind her back and cry foul when she wishes to amend the Pleadings to include a prayer for compensation.

27. About the delay, the 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants argued that since the instant matter was filed in 2015, the amendment sought after nine (9) years of the matter being in court and now at part-heard stage was prejudicial. Contrary, as stated above, and guided by the authorities this Court has cited with approval, amendments can be allowed even after pleadings have closed and circumstances of each case ought to be weighed. There cannot be a one-size-fits-all prescription on how the Court should decide every application for amendment. Otherwise it will fetter the discretion of the Court.
28. The upshot is that the Application is merited. It is allowed with costs to the Applicant.
29. Following the grant of the Application, the Applicant is given 14 days to file the Amended Plaint and serve the parties. The Defendants shall be at liberty to amend their pleadings and serve. The usual period for filing any Reply will apply.
30. Further, all parties shall, thereafter, have 30 days to file and serve their paginated trial bundles. The suit shall be mentioned for pre-trial directions once again on 06/11/2024.
31. Orders accordingly.

**RULING DATED, SIGNED AND DELIVERED VIA TEAMS PLATFORM ON THE 24<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

**HON. DR. IUR FRED NYAGAKA**

**JUDGE, ELC KITALE**

In the presence of:

Ms. Nyaboto for----the Plaintiff

Mrs. Songole for-----the Defendant

Other Parties absent.

