



**Onyuna v Anyango (Environmental and Land Originating Summons
63 of 2021) [2024] KEELC 6390 (KLR) (24 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 6390 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT HOMA BAY
ENVIROMENTAL AND LAND ORIGINATING SUMMONS 63 OF 2021
GMA ONGONDO, J
SEPTEMBER 24, 2024**

BETWEEN

BONIFACE ABONG'O ONYUNA PLAINTIFF

AND

JACOB OKECH ANYANGO RESPONDENT

RULING

1. By a Notice of Motion Application dated 14th February 2024 and mounted pursuant to Order 51 Rule 1 as read with Order 8 Rule 3 (1), (2), (5) and Rules 4 and 5 of the [Civil Procedure Rules, 2010](#) (the Rules herein), the applicant, Boniface Abong'o Onyuna, through G. S. Okoth and Company Advocates, is seeking the following orders;
 - a. That the honourable court be pleased to allow the plaintiff to amend the originating summons dated 12th September 2018 and substitute the same with an amended plaint as per the draft plaint annexed hereto.
 - b. That the costs of this application be in the cause.
2. The application is founded upon grounds (a) to (d) stated on the face of the same. Also, it is anchored on the applicant's supporting affidavit of seven paragraphs sworn on even date as well as the documents annexed thereto to wit; a copy of originating summons dated 12th September 2018 and a copy of draft plaint (BAO-1 and 2 respectively).
3. Briefly, the applicant contends that he instructed his counsel to institute a suit against the respondent and the same was duly filed on 17th September 2018 by way of originating summons, wherein he sought to be registered as the proprietor of the suit land on the basis that he had acquired title thereto by way of adverse possession. That however, upon discussion with counsel, they noted that a claim for adverse possession does not arise. Thus, he is seeking leave of this court to amend the pleadings and substitute the said originating summons with a plaint.



4. In a Replying Affidavit dated 4th March 2024 and duly lodged herein on 29th April 2024, the respondent through H Obach & Partners Advocates, opposed the application. He deponed that the instant application is frivolous, vexatious, malicious and a waste of judicial time and resources. That the draft amended plaint introduces new issues and cause of action that is different from that raised in the originating summons. That the originating summons has been heard and parties have testified. That amendment to pleadings should not introduce new or inconsistent cause of actions or issues. That such amendment ought to be made timeously and it should neither affect any vested interest or accrued legal right nor prejudice or cause injustice to the other party. Thus, he prayed that the same be dismissed with costs.
5. On 28th May 2024, the court directed that the application be heard by way of written submissions; see Order 51 Rule 16 of the [Civil Procedure Rules, 2010](#) and Practice Direction number 33 of the [Environment and Land Court \(ELC\) Practice Directions, 2014](#).
6. Accordingly, the applicant's counsel filed submissions dated 6th June 2024 and cited Section 100 of the [Civil Procedure Act](#), Chapter 21 Laws of Kenya and Order 8 Rules 3(1) and 5(1) of the [Civil Procedure Rules, 2010](#). Counsel submitted that the respondent has not specified the nature of prejudice that he stands to suffer if the instant application is allowed. Reliance was placed on the case of [Mario v Kobutbi & 2 others](#) [2022] KEELC 15725 (KLR), to fortify the submissions.
7. The respondent's learned counsel filed submissions dated 14th June 2024 and identified a single issue for determination thus: whether the applicant for amendment should be allowed. Counsel submitted that the applicant does not seek to amend any error or defect, but to introduce a new set of facts and prayers which is an afterthought. That allowing the application would occasion reopening of pleadings thereby causing inordinate delay and prejudice to the respondent. That the same is an abuse of the court process and ought to be dismissed with costs. To fortify the submissions, reliance was placed on the case of [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) (2013) eKLR, among others.
8. Further, the applicant's counsel filed a reply to the respondent's submissions and deponed, inter alia, that the applicant is agreeable to pay any costs as directed by court, since the request to amend the pleadings has been made late in the day. That besides, the decision concerning a cause of action is usually made by counsel, hence the delay and error herein is due to mistake of counsel which should not be visited upon the client. That the delay was occasioned by several factors, including the change of climate and water levels on the lake shore. Counsel relied on the case of [Edney Adaka Ismail v Equity Bank Limited](#) [2014] eKLR, to buttress the submissions.
9. I have duly considered the application, the grounds of opposition and the rival submissions in their entirety. The principal issues for determination are:
 - a. Whether the applicant is deserving of leave to amend the originating summons dated 12th September 2018 and substitute the same with an amended plaint as per the draft plaint annexed thereto.
 - b. Who should bear the costs of this application?
10. Order 8 Rule 3 of the [Rules](#) provides for amendment of pleadings with leave of court as follows:
 - (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.
11. Further, Order 8 Rule 5 of [the Rules](#) gives the court the general power to amend pleadings thus:



- 5.
- (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.
12. To allow an amendment sought, the court ought to examine the intent and purpose of the amendment. Further, the court has to look at whether, any prejudice will be suffered by the other party or parties in dispute and whether such prejudice can be compensated by way of costs.
13. In the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:
- “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...The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Emphasis added)
14. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii case (supra)* as follows:
- “The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s *Precedents of Pleading – 12th Edition*, in the case of *Joseph Ochieng & 2 others v. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:
- “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 plaint the defendant would be deprived of his right to rely on Limitation Acts.”
15. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up that the amendment should:



- a. Not introduce new or inconsistent cause of actions or issues;
 - b. Be made timeously;
 - c. Not affect any vested interest or accrued legal right and
 - d. Not prejudice or cause injustice to the other party.
16. On one hand, the applicant contends that although initially, upon the advice of his counsel, he had made a claim for adverse possession, they have since noted that such a claim does not arise. Thus, he is seeking leave of this court to amend the pleadings and substitute the said originating summons with a plaint. That the delay and error herein is due to mistake of counsel which should not be visited upon a client. That further, the respondent has not specified the prejudice he stands to suffer if the instant application is allowed.
17. On the other hand, the respondent avers that the applicant does not seek to amend any error or defect, but to introduce a new set of facts and prayers which is an afterthought. That allowing the application would occasion reopening of pleadings thereby causing inordinate delay and prejudice to the respondent. That the same is an abuse of the court process.
18. It must be borne in mind that the suit was instituted by way of an originating summons dated 12th September 2018 (the originating summons) whilst the instant application seeking to amend pleadings is dated 14th February 2024 and was lodged herein on 13th March 2024. When the matter up for hearing on 24th October 2022, the applicant's counsel informed the court that the suit land, to wit Lambwe East/112, had been submerged by Lake Victoria and was no longer existent. The same also occurred on 19th June 2023 and 30th October 2023, thereby resulting in the matter being adjourned by court.
19. Whereas the applicant's counsel submitted that the delay in filing the instant application was occasioned by several factors, including the change of climate and water levels on the lake shore, it is my considered view that the delay is inordinate for which the court's discretion ought not to be exercised. Further, the explanation for the delay given by the applicant does not suffice in the circumstances; see Article 159 (2)(b) of the Constitution of Kenya and Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others (2014) eKLR.
20. I further note that the matter is part heard. PW1, the applicant herein, testified on 7th June 2023 and relied on the Originating Summons together with his supporting affidavit sworn on even date, among others. Therefore, this court finds that the instant application is an afterthought.
21. Also, I note that the draft plaint annexed to the supporting affidavit introduces a new or cause of action. Therefore, I am of the view that allowing substitution of the same would occasion an injustice to the respondent herein. Clearly, the proposed amendments introduce a new case and would change the action into one of a substantially different character; see Elijah Kipngeno Arap Bii case (*supra*).
22. To that end, I find no merit in the applicant's application dated 14th February, 2024. The same is hereby dismissed.
23. Costs of this application to be borne by the applicant.
24. It is so ordered.

DELIVERED, DATED AND SIGNED AT HOMA-BAY THIS 24TH DAY OF SEPTEMBER 2024.

G.M.A ONGONDO

JUDGE



PRESENT;

Ms P.Odhiambo instructed by G.S Okoth learned counsel for the applicant/plaintiff

Ms B.Ochieng learned counsel for the respondent

T. Luanga, court assistant

