



REPUBLIC OF KENYA



**Saimbhi v Kimaru & 2 others (Environment & Land Case 141 of 2017)  
[2024] KEELC 5972 (KLR) (20 September 2024) (Ruling)**

Neutral citation: [2024] KEELC 5972 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 141 OF 2017  
JO OLOLA, J  
SEPTEMBER 20, 2024**

**BETWEEN**

**INDERJIT SINGH SAIMBHI ..... PLAINTIFF**

**AND**

**STEPHEN KIMARU ..... 1<sup>ST</sup> DEFENDANT**

**GERALD WAMBUGU ..... 2<sup>ND</sup> DEFENDANT**

**NELSON KINYANJUI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated 18<sup>th</sup> July 2023, the three Defendants pray for orders as follows:-
  1. That the Defendant/Applicants be granted leave to amend the amended defence amended on 20<sup>th</sup> May 2022 and include a counterclaim;
  2. That the further amended defence to be deemed as filed; and
  3. That the orders issued by the court on 27<sup>th</sup> October 2017 and 15<sup>th</sup> February 2019 on status quo be qualified as follows:
    - a) That the Defendant/Applicants are at liberty to utilize the parcel of land which they currently occupy for economic gain and to erect any temporary structures that they wish to legally earn a living.
2. The application is supported by an affidavit sworn by the Defendants' Advocate Kevin Turunga Ithagi and is premised on the grounds that:
  - i). The Defendants wish to earn a living from the parcel of land which they currently occupy and the interim orders issued on 27<sup>th</sup> October 2017 as they are now do not allow them to do so;



- ii). The Defendants wish to add a counter claim to the amended defence dated 20<sup>th</sup> May 2022 to include the issues of forceful evictions and historical injustices against them with regard to the amalgamation of Plot No. 1/923 and 410;
  - iii). It is iniperative for the amended defence to be amended so as to enable this Honourable Court to reach a just conclusion; and
  - iv). The Plaintiff/Respondent shall not be prejudiced should this application be allowed.
3. The application is opposed. In a Replying Affidavit sworn on 25<sup>th</sup> September 2023, Inderjit Singh Saimbhi (the Plaintiff) avers that the issues raised in the application cannot otherwise be adjudicated upon without the inclusion of Nyeri Municipality as the actions purported therein were and still remain within the purview of the said municipality which is yet to be enjoined in the suit.
  4. The Plaintiff avers that the Defendants have contrary to the orders of status quo issued on 27<sup>th</sup> October 2017 proceeded to construct more structures on the suit property and are now masquerading through this application to correct their errors and or alter the reading of the orders issued.
  5. In addition, the Plaintiff asserts that there has been inordinate delay by the Defendants in bringing the application and there is no justifiable reason to warrant the application.
  6. I have carefully perused and considered the application as well as the response thereto. I have similarly perused and considered the submissions and authorities placed before me by the Learned Advocates representing the parties.
  7. By their application before the court, the three (3) Defendants pray for leave to amend their Defence and include a Counter Claim. In addition, the Defendants want the orders issued on 27<sup>th</sup> October 2017 varied to allow them to utilize the suit property for economic gain and to erect temporary structures thereon to earn a living.
  8. Order 8 Rule 3 of the Civil Procedure 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.”
  9. Further, Order 8 Rule 5 of the Civil Procedure Rules provides as follows:-

“ 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.”
  10. In the matter herein, the Defendants aver that they wish to further amend their Amended Defence dated 20<sup>th</sup> May 2022 to include issues of alleged forceful evictions and other historical injustices following the amalgamation of Plot No. 1/923 and 410. While the Plaintiff objects to the intended further amendment on account that he was not responsible for the amalgamation, I note that the



matter has not gone to trial and that the Plaintiff shall have an opportunity to respond to the amendments sought by the Defendants.

11. As was stated in *Institute for Social Accountability & Another –vs- Parliament of Kenya & 3 Others* [2014] eKLR:

“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 the 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.”

12. Arising from the foregoing, I was persuaded in the circumstances herein that it would be fair and just to allow the Defendants to amend their pleadings in order to include the intended counterclaim.
13. In regard to the prayer to have the orders of status quo issued on 27<sup>th</sup> October 2017 varied, I was unable to find any basis for that prayer. From a perusal of the record, it was evident that the parties had appeared before the Honourable Justice L.N. Waithaka on 13<sup>th</sup> February 2019 where the Defendants were accused of carrying out various acts of wastage on the suit property.
14. In their defence, the Defendants informed the court of the various activities that they were carrying out on the suit property prior to the institution of the suit. Having heard the parties, the Learned Judge varied the status quo order and allowed the Defendants to continue residing and using the portion of the land they were using and restrained them from erecting further structures on the land.
15. By urging the court to vary the said orders to allow them build other structures and to utilize the land for economic gain, it was apparent to me that the Defendants want to engage in acts that would continue to cause damage and waste the suit property prior to the determination of the rights of the parties herein. That prayer is without basis and is accordingly declined.
16. In the circumstances I partially allow the Motion dated 18<sup>th</sup> July 2023 in terms of Prayer No. (1) thereof. The Defendants have 14 days from today to file and serve the further Amended Defence and Counterclaim.
17. Upon service of the Further Amended Defence and Counterclaim, the Plaintiff shall have 14 days within which to respond.
18. The costs of this application shall be borne by the Defendants.

**DATED, SIGNED AND DELIVERED AT NYERI THIS FRIDAY 20<sup>TH</sup> DAY OF SEPTEMBER, 2024.**

In the presence of:

No appearance for the Plaintiff.

Mr. Stephen Kimaru – 1<sup>st</sup> Defendant present.

Mr. Gerald Wambugu – 2<sup>nd</sup> Defendant present.



Court Assistant: Michael

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**J. O. OLOLA**

**JUDGE**

