



REPUBLIC OF KENYA



**Kiengo & 2 others v Thuo (Environment & Land Case 92 of 2017)  
[2024] KEELC 7036 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEELC 7036 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAJIADO  
ENVIRONMENT & LAND CASE 92 OF 2017  
LC KOMINGOI, J  
OCTOBER 24, 2024**

**BETWEEN**

**DAVID PETERSON KIENGO ..... 1<sup>ST</sup> PLAINTIFF**

**NKIIRI VICTOR MUCHUBU ..... 2<sup>ND</sup> PLAINTIFF**

**KENAKENA INVESTMENTS LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**KARIUKI THUO ..... RESPONDENT**

**RULING**

1. This is the Notice of Motion dated 27<sup>th</sup> October 2023 brought under; (Section 1A, 1B & 3A of the *Civil Procedure Act*, Order 1 Rules 9 & 10, Order 8 Rule 3,5,7 & 8, Order 51 of the Civil Procedure Rules and all other enabling provisions of the law)
2. It seeks orders;
  - a. That this Honourable court be pleased to order that Mary Njeri Thuo & Paul Kihoro Thuo be joined as defendants to this suit to act jointly with the applicant Kariuki Thuo as administrators of the estate of Stephen Thuo Kihoro (Deceased).
  - b. That upon granting prayer (a) hereinabove, this Honourable court be pleased to grant leave to the Defendant/Applicant to amend the defence and counter claim (to reflect the said joinder of parties) in terms of the draft amended defence and counter claim annexed to the supporting affidavit sworn by the applicant herein.
  - c. That the amended defence and counter claim annexed to the supporting affidavit sworn by Kariuki Thuo herein be deemed duly filed and served upon granting leave and payment of the requisite court fees.



3. The grounds are on the face of the application and are set out in paragraphs a-d.
4. The application is opposed.  
There is a supporting affidavit sworn by Kariuki Thuo the Defendant/Applicant, on the 27<sup>th</sup> October 2023.
5. The Application is opposed. There is a Replying Affidavit sworn by Andrew Nkiiri Thinya, on the 15<sup>th</sup> January 2024.
6. On the 23<sup>rd</sup> January 2024, the court with the consent of parties directed that the Notice of Motion be canvassed by written submissions.
7. The Defendant/Applicant's submissions are dated 1<sup>st</sup> July 2024 while the Plaintiff/Respondents are dated 8<sup>th</sup> July 2024.
8. I have considered the Notice of Motion, the affidavits in support, the response thereto, the rival submissions and the authorities cited. The issue for determination is whether this application is merited.
9. Order 8 rule 3 of the Civil Procedure Rules provides that;

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- “(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.
  - (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
  - (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
  - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
  - (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

Order 8 rules 5 of the Civil Procedure Rules 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.
- (2) This rule shall not have effect in relation to a judgment or order.”

10. The Defendant/Applicant seeks to amend the statement of defence and counterclaim to bring in his co-administrators, as the suit property belongs to the estate of Stephen Thuo Kihara.
11. The Plaintiff/Respondents oppose on the ground that the Defendant/Applicant has been aware of the Grant of Letters of Administration since 2002 and he ought to have made this application after the filing of this suit in 2007.
12. In the case of *Elijah Kipngeno Arap Bii Vs. KCB Ltd* (2013 eKLR the Court of Appeal outlined the principles in amendment of pleadings 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 – 12<sup>th</sup> Edition*, in the case of *Joseph Ochieng & 2 others Vs. 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 state 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.”

Similarly in the case of *Beatrice Gikunda Vs. CFC Life Assurance Ltd* (2020) eKLR the court granted with approval Odgers on Pleadings and Practice 20<sup>th</sup> Edition at page 170 and stated thus;

“The learned authors also state that where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.”

13. I have gone through the Draft Amended Statement defence and counterclaim, it only introduces the Defendant’s Co-Administrators.



14. I find that no prejudice will be occasioned to the Plaintiffs who can recall PW2 for further examination in chief.
15. I find merit in this application and the same is allowed in terms of prayer (a) and (b) of the Notice of Motion with corresponding leave to the Plaintiff to file additional documents if need be. The costs of this application shall be borne by the Defendants.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT KAJIADO THIS 24<sup>TH</sup> DAY OF OCTOBER 2024.**

**L. KOMINGOI**

**JUDGE.**

**In the Presence of:**

Ms. Mutinda for Mr. Ayieko for Plaintiff.

Mr. Mathuva for the Defendants.

Court Assistant - Mutisya

