Malombe (Suing as the Power of Attorney for Janet Wakio Mgongo) v Wangai (Environment & Land Case 116 of 2019) [2024] KEELC 7039 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7039 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ENVIRONMENT & LAND CASE 116 OF 2019

LL NAIKUNI, J

OCTOBER 24, 2024

BETWEEN

SUSAN MKANGOMBE MALOMBE ..... PLAINTIFF

SUING AS THE POWER OF ATTORNEY FOR JANET WAKIO MGONGO

AND

MARY NYATHIRIGA WANGAI ..... DEFENDANT

RULING

I. Introduction

1. This Honorable Court is tasked to determine of the Notice of Motion application dated 14th May, 2024 by Mary Nyathiriga Wangai, the Defendant herein brought under the dint of Sections 3A, 63 & 100 of the *Civil Procedure Act*, Cap. 21; Order 8, 51 of the Civil Procedure Rules, 2010.

2. Upon service of the Notice of Motion application, the Plaintiff while opposing the said application vide her Replying Affidavit sworn on16th May, 2024. The Honorable Court shall be dealing with it much more in this decision.

II. The Defendant/Applicant's case.

3. The 1st Defendant/Applicant sought for the following orders:-

    a. Spent.

    b. That the Defendant be granted leave to amend the Defence in terms of the Draft Amended Defence.

    c. That the Plaintiff be at liberty to amend its pleadings if need be within 14 days of service of the Amended Defence.

d. Costs be in the cause.

4. The application was premised on the grounds, testimonial facts and the averments made out under the nine (9) Paragraphed Supporting MARY NYATHIRIGA WANGAI sworn and dated on 14th May, 2024. She averred as follows:-

   a. She was sued herein by the plaintiff seeking vacant possession of Plot No. MSA/ MWEMBELEGEZA 375 which had been swapped with Plot No. MSA/MWEMBELEGEZA 349.

   b. At the time she bought and took possession of the land in the year 2005, constructed on the said property there was no complaint by any other person and she openly occupied the same to date.

   c. It was clear and apparent that the current situation would have been avoided if the Plaintiff intervened at the earliest and as of now she had occupied the land for 19 years and as at the time the suit was filed in 2019 she had occupied the same for 14 years.

   d. She wished to amend the Plaint to include the issue of the *limitation of actions Act* to enable the court deal with the issue as to whether a Plaintiff who had acquiesced to the swapping of the land and her occupation for 14 years can turn around and evict her from the property

   e. The Plaintiff would not be prejudiced as she would be allowed to amend her pleadings accordingly.

   f. She urged the Court to exercise its jurisdiction and latitude and allow the application herein.

II. Submissions

5. On 16th May, 2024 while all the parties were in Court directions were granted to have the Notice of Motion application dated 14th May, 2024 be disposed of by way of written submissions. Pursuant to that on 9th July, 2024 the Honourable Court reserved 23rd September, 2024 as the date to deliver its Ruling thereof. But due to unavoidable circumstances it was delivered on 24th October, 2024 accordingly.

A. The Written Submissions by the Defendant/Applicant

6. The Defendant through the Law firm of Messrs. Mathew Nyabena & Co. Advocate filed their written submissions dated 6th June, 2024. Mr. Nyabena Advocate commenced the submissions by stating that the Defendant/Applicant herein has instituted the instant Application under a Certificate of Urgency dated the 14th May 2024 seeking for the above orders.

7. On the background, the Learned Counsel informed the Honourable Court that the Defendant's application was premised on the grounds set out therein in the supporting affidavit of one Ms. MARY NYATHIRIGA WANGAI. The Defendant purchased plot number Mombasa/ Mwembelegeza/349 on the 4th June 2005 from one Mr. Abdi Mohammed Ali for a consideration of a sum of Kenya Shillings Four Hundred Thousand (Kshs. 400,000/-). She was duly registered as the proprietor and a title deed was issued in her name and she took possession of the same. Upon her acquisition of the subject matter the District Land Adjudication Officer and the Land Registration Mombasa District embarked on an exercise of swapping the plots of Mwembelegeza Settlement Scheme in accordance with the ground occupancy.

8. According to the Learned Counsel, the Respondent subsequently sued the Applicant for vacant possession as the respondent claims that the Applicant constructed a permanent structure and resided in her suit property. To date, the defendant/applicant has been in occupation of the property. The Plaintiff response according to the Learned Counsel, they had gone through the Plaintiff/ Respondent replying affidavit dated 16th May, 2023. They noted that most of the averments were as to the merits or otherwise of the defence of limitation in the matter. It was the Learned Counsel's submission that at this stage the court cannot consider the merits or otherwise of the defence of limitation. The court was being asked to allow amendments so that the same can be part of the final submission and Judgment. In any case the approach by the plaintiff shows that the same is a valid defence consistent and complimentary to the defence that the plots had been swapped by the relevant government agencies.

9. With regards to the witness expenses, it was the Learned Counsel's submission that the same could only be awarded upon judgment in the case on the merits. The same cannot be used as a barrier to the amendment of pleadings. The Learned Counsel relied on the only single issue for determination being whether the court can grant the application to grant the leave to amend the defence.

10. On the law of amending of Pleadings, the Learned Counsel submitted that the provision of Article 47 of *the Constitution* of Kenya, 2010 provides that every person has a right to have any dispute that can be resolved by the application of the law decided in a fair and public hearing before a court or an independent and impartial tribunal. The provision of Article 159 (d) states that justice shall be delivered without undue regard to procedural technicalities.

11. The Learned Counsel submitted that the Applicant's constitutional right of fair hearing also includes the right to amend its pleadings and adduce evidence in support of its case. The Applicant is seeking leave to amend the defence as they had omitted an essential issue in the defence. They seek to raise the defence that the action is statute barred by virtue of the *Limitation of Actions Act*. The provision of Order 8 rule 8 of the Civil Procedure Rules, 2010 provides that:

> " 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 be direct, allow any party to amend his pleadings.
>
> Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (50 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 sub rule if it thinks just so to do.

12. Order 8 rule 5 the Civil Procedure Rules, 2010 provides that:-

> " 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 a manner as it directs and on such terms as to costs or otherwise as are just."

13. The Learned Counsel submitted that the amended defence sought to facilitate and make the court make an informed decision based on true substantive merits and not upon hypothesis. It was necessary to amend the defence to enable the court consider whether the plaintiff who had acquiesced to the defendant's occupation and the swapping can now seek to evict her. The Applicant had a right to be heard on the defence of Limitation and the defendant has a right to defend the same. The Applicant was seeking leave to amend the defence so the parties can ventilate on the line of defence to enable the court decide as they had omitted an essential issue in the defence.

14. The Court of Appeal outlined the principles in amendment of pleadings in the case of:- "Elijah Kipngeno Arap Bii – Versus - Kenya Commercial Bank Limited [2013] eKLR" 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 – Versus - *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 defense 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. They were also a guided by the case of "Institute For Social Accountability & another – Versus - 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."

16. From the decision in the case of "Elijah Kipngeno case (supra)" amendments can be allowed at any stage even on an appeal. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.

17. The Learned Counsel asserted that the amendment of the defense to include a defense of Limitation is consistent to the cause of action at hand. The leave prayed for will aid the court to deal with the matter at once and avoid multiplicity of suits. The Applicant omitted in the initial defence and failed to raise the defence of limitation by virtue of the *Limitation of Actions Act*. This was an oversight on their part and they are hereby seeking leave to amend their defence and include the same.

18. The Learned Counsel submitted that this application had been brought late but that does not hinder the court from granting the prayers sought as the Applicant has a valid reason on why the application was delayed. It was well established law, that leave for amendment of pleadings is usually granted before hearing of matters but the court is not bound to follow suit as other courts had granted the prayers not matter how late they were.

19. Faced with a similar situation, the court in the case of:- "Malakwen Arap Chobe (Suing as the administrator ad litem of the estate of Kipchobe Arap Murgor deceased) – Versus - David Mibei [2022] eKLR" where the court granted leave for the amendment of pleadings though they were late when the Applicants prove that the delay was occasioned by circumstances beyond their control.

20. The Learned Counsel submitted that the amendment of the defence seeks to bring to the attention of this court the fact that the matter is statute barred by virtue of the *limitation of actions Act* and it aids the court to decide whether the respondent has any action against the Applicant as she acquiesced to the swapping of land and whether she could reclaim her land and evict the Applicant after 14 years of occupation. It was in the best interest of all parties that the issues raised be canvassed fully. As a general rule, the amendment is intended to bring judgment to all issues in controversy should be allowed at this stage. The amendment sought to be made is in good faith and should be allowed to enable the court do justice. As a show of good faith the applicant was prepared to pay the cost of the Application.

21. In conclusion, the Learned Counsel urged this Court to find that the application had merit and exercise its discretion and grant the application as prayed. The Respondent could be granted leave to amend.

B. The Written Submission by the Plaintiff/Respondent

22. The Plaintiff/Respondent through the Law firm of Messrs. V.N. Okata & Company Advocates filed her written submissions dated 12th June, 2024. M/s. Okatta Advocate commenced her submission by stating that, the Defendant/Applicant vide the Notice of Motion application dated 14th May, 2024 brought under the provisions of Order 8 and 51 of the Civil Procedure Rules, 2010 and Sections 3A, 63 and 100 of the *Civil Procedure Act*, Cap. 21 seeks the above orders.

23. The Plaintiff/Respondent opposed the Application vide her Replying Affidavit dated 16th May, 2024. The Application for amendment of Defence was being brought in the tail end of this matter when the parties proceeded for hearing and the Defence closed her case on the 24th April, 2023 and the Plaintiff/Respondent filed her Submissions on the 23rd May, 2023. The Defendant/Applicant was yet to file their Submissions. The Application was also being brought after the parties have proceeded with Alterative Dispute Resolution Mechanisms vide consent dated 24th April, 2023 which the Defendant/Applicant did propose in Court but eventually refused to ratify. The Application had without any valid reason filed this Application for amendment which was incurably defective and an abuse of the Court process. The Application was meant to delay the just and final conclusion of this matter.

24. On the background, the Learned Counsel submitted that the Plaintiff/Respondent instituted a suit against the Defendant vide a Plaint dated 14th June, 2019 and filed on the 26th June, 2019 alongside her compliance documents. The Defendant/Applicant entered appearance through the Law firm of Messrs. Akanga Matende & Company Advocates on the 14th July, 2020 and filed her statement of defence out of time and with leave of the Court dated 15th October, 2020 on the 16th October, 2020 alongside with her compliance documents. The Plaintiff/Respondent thereafter filed her response to the defence dated 4th November, 2020 on the 9th November, 2020. On 11th November, 2020, the Counsel for the Defendant/Applicant sought and was granted time to file witness statements and pre-trial directions were set for 28th January, 2021.

25. Pre-trial directions in accordance with the provision of Order 11 of the Civil Procedure Rules, 2010 were taken on the said 28th January, 2021 when counsels for both parties confirmed compliance and the matter was set down for hearing on the 16th September, 2021 but did not proceed for the reason that the Defendant/Applicant was absent though the date was taken by consent and the Plaintiff/ Respondent was ready. The Defendant was ordered to pay costs to the Plaintiff/Respondent which costs were duly paid. Another hearing date for 19th October, 2021 was given with Court directing that the matter would proceed without fail.

26. On 19th October, 2021 the Plaintiff/Respondent's two witnesses testified and the Defendant/ Applicant who had requested to participate virtually was present. The Defendant/Applicant sought and granted 14 days leave to file and serve further documents being a copy of approval of development dated 20th August, 2021 and a letter from the Ministry of Land dates 11th June, 2021. The Court then granted the Plaintiff/Respondent corresponding leave to recall any of her witnesses on the said documents. Further hearing was scheduled for the 2nd December, 2021 when the Plaintiff/ Respondent's case was closed with Defence hearing slated for the 16th March, 2022. On the 16th March, 2022 the matter came up for the Defence hearing with the Defendant appearing in person having filed a notice to act in person on the 15th March, 2022 and sought three months to engage another advocate and she was granted time. Defence heating was again scheduled for the 26th July, 2022.

27. According to the Learned Counsel submitted that the Defendant, through her newly appointed Advocate Mathew Nyabena & Co. Advocates, filed an Application dated 10th June,2022 seeking the following orders;

    a. Spent

    b. This Honourable Court do grant an order to re-open the Plaintiffs case and allow the witnesses to be recalled and cross-examined.

    c. The Defendant be allowed to file additional documents and witness statements in support of her case.

    d. The Honourable Court to order that the Mombasa District Land Adjudication & Settlement Officer (DLASO) and the Land Registrar Mombasa and Peris Wairimu Gitau be included as parties to this case and the pleadings be amended accordingly.

    e. The costs of this Application be provided for.

    f. The cost of this Application be in the cause

28. The Learned Counsel submitted that the Plaintiff/Respondent filed her Replying Affidavit opposing the Application on 27thJune, 2022 and the Court instructed the parties to file submissions on the matter with the Plaintiff/Respondent filing hers on 19th September, 2022 and Defendant's on 8th September, 2022. Justice Naikuni delivered a Ruling on the Application on the 17th November, 2022 where the Application was partially allowed. Particularly, the Learned Judge entirely declined prayer (b)above. The matter proceeded for defence hearing on the 24th April, 2023 and the Defendant/ Applicant closed her case. The Defendant/Applicant thereafter sought to attempt to settle the matter using the Alternative justice system and the parties agreed as follows:-

    a. That the Plaintiff/Respondent granted 21 days leave to file and serve written submissions and thereafter the Defendant granted 14 days leave.

    b. That the matter be mentioned on the 5th June 2023 for progress made and further direction.

c. That by consent the District Land Adjudication and Settlement Officer (DLASO) Mombasa in conjunction with the Chief Mwembelegeza location do summon and convene a meeting of parties involved in Plot No. 349 owned by Mary Nyathiriga Wangai/Peris Wairimu Gitau, Plot No. 367 Mr. Ketan Hirji Harai, Plot No. 375 Janet Wakio Mgongo within 14 days of service of the orders of the Court.

d. That the District Land Adjudication and Settlement Officer (DLASO) and relevant provisional administration do present to the parties the status report as to occupation and of Plot No. 367 and any claim of ownership by any parties and allow/enable parties to reach an alternative justice system settlement (JSS).

29. After several correspondences initiated by the Plaintiff/Respondent between the parties, the meeting was held as per the Court orders and a Report written by the District Land Adjudication Officer dated 6th December, 2023 and filed in Court on the same day. A report was prepared dated 6th December, 2023 by Mr. Benjo K. D the County Land Adjudication & Settlement Officer Mombasa that acknowledged that the Plaintiff/Respondent was the owner of Plot no. 375 where the Defendant/Applicant had illegally settled. It proposed swapping be done between plot no. 375 and 367 so as to leave the Defendant/Applicant on plot no. 375 which was originally owned by the Plaintiff/Respondent. The Plaintiff/Respondent was agreeable to this despite having incurred costs of obtaining title documents of plot no. 375 and having duly discharged all charges affecting the property with a view of bringing this matter to peaceful conclusion. The acceptance of swapping was conditional in that the Plaintiff stated that it was subject to the Plaintiff/Respondent being guaranteed her parcel with no encumbrances.

30. On 22nd February, 2024 the matter came up for mention to confirm progress on the Alternative Dispute Resolution process between the parties after the DLASO's recommendations. The Defendant/Respondent sought and was granted prayers that summons be issued to one Peris Wairimu and the Pastor, Full Gospel Church Bamburi to appear for the next mention date scheduled for 11th April, 2024 to assist the Court in finalizing the matter. On 11th April, 2024 when the matter came up for mention, the Defendant/Respondent had not secured the attendance of the witnesses as the Court had ordered. The matter was set for mention on the 16th May, 2024. On the 14th May,2024, the Defendant/Respondent filed this current Application which was served upon the Plaintiff/Applicant on the morning of the 16th May,2024. The Application was opposed.

31. The Learned Counsel relied on the following issues for the Court's determination:-

i. Whether the Defendant's Application is merited

ii. Whether the Application will cause the Plaintiff prejudice if allowed

32. On whether the Defendant/Applicant's application was merited, the Learned Counsel submitted that the present application invited this Court to grant orders for Amendment of the Defendant/Applicant's Statement of Defence dated 15th October, 2020. The grounds for this Application was that: -

i. It will enable the Court to deal with all the issues in controversy.

ii. No prejudice will be caused if the amendment is allowed. The crux of the amendment was Paragraph 19A of the Draft Amended Defence which states as follows: -

> " 19A The Defendant avers and asserts that she took possession of the subject property and occupied the same in the year 2005 without

any complaint and bas openly occupied and developed the same. The Defendant contends that the Plaintiff's suit is time barred under the provisions of the Limitations of Actions Act."

33. It was inconceivable that this defence was not available to the Defendant/Respondent when she was filing her defence on the 14th July, 2020 and when Mathew Nyabena & Co. Advocates took over from the Law firm of Messrs. Akanga & Co. Advocates on the 10th June, 2022. For this to be sought when the hearing has been finalized and case closed is an obvious abuse of this Court's process. The applicable law is under the provision of Article 159 (2) and 50 of *the Constitution* of Kenya 2010 and Order 8 Rule of the Civil Procedure Rules 2010. The provision of Article 159 (2) states as follows: -

Article 159

(2) in exercising judicial authority the Courts and tribunals shall be guided by the following principles;

(b) justice shall not be delayed;

Article 50

(1) Every person bas the right to have any dispute that can be resolved by the Application of law decided in a fair and public hearing before a Court or if appropriate, another independent and impartial tribunal or body.

Under Order 8 Rule. .....of the Civil Procedure Rules 2010 a party seeks leave to amend. The leave granted is not automatic but discretionary. The discretion must be exercised judiciously and fairly according to the circumstances of each case.

34. The Defendant/Applicant had ample time and opportunity to amend her statement of defence and it is not in the interest of justice to bring an application for amendment at this stage when the case has been concluded because the Plaintiff/Respondent already filed their submissions in this suit. Although Order 8 Rule of the Civil Procedure Rules, 2010 provides for amendment at any stage, there are principles that guide such amendment.

35. The Learned Counsel relied on the case of "CACA 149 of 1991 Joseph Ochieng & 2 Others Trading as Aquiline Agencies – Versus - First National Bank of Chicago", the Learned Judge in the primary suit ruled that the Application for amendment was made in bad faith and that it was not shown how the amount of special damages was calculated. He termed the amendments useless. Justice shall on Appeal took into account the history of the case and relied with approval on the case of "Ketterman – Versus - Hansel Properties Limited (1988) I A LLER 35 at page 62" where Griffths said stated;

> " Whether an amendment should be granted is a matter for the discretion of the trial Judge and be soul be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigant, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other. Further to allow an amendment before a trial begins is quite different from allowing it at the end of the trial to give an apparently unsuccessful defendant an opportunity to renew the tight on an entirely different defence.

36. The Defendant/Applicant in her Affidavit claims that she took possession of Msa/Mwembelegeza/345 in 2005, claims that the Plaintiff/Respondent did not act first enough to reclaim her property and states that the Plaintiff/Respondent acquiesced to swapping hence the amendment. There was no reason given why the amendment is being made at the tail end of this suit at the point when all parties have given evidence and the Plaintiff/Respondent had filed their Submissions.

37. The Defendant/Applicant had had ample opportunity to amend her Defence severally ie.;

    i. Upon filing Defence on the 15th October, 2020.

    ii. Upon filing Application dated 10th June, 2022.

38. The Defendant gave the Court no reason why none of these instances was opportune enough to file this Amendment that they have set out in their paragraph 19A of the Draft Amended Defence and the reason can be deduced by the Defendant taking the Plaintiff down the path of falsehood purporting to invite the District Land Adjudication Officer to settle this matter through the Alternate Justice system than falsely claiming in her supporting Affidavit to this Application that the Plaintiff acquiesced to swapping.

39. The Learned Counsel submitted that the Plaintiff acquiesced to swapping after the meeting with the DSLAO and his report dated 6th December, 2023 with condition as was evident in the report. The swapping is yet to be agreed, formalized or carried out. The Defendant/Applicant seemed to argue that the swapping (yet to be carried out) is now backdated to the date of her acquisition of Plot No. Msa/Mwembelelgeza/349.This is a falsity because unless and until the swapping is formalized and agreed no swapping can be carried out. The Defendant/Applicant did not seem to know what she wanted to claim in her defence. The Defendant/Applicant sought two (2) substantive and completely diverse prayers from the Court. The Defendant/Applicant sought that: -

    i. Swapping be done or deemed to have been done

    ii. She be entitled to adverse possession

40. These prayers were not open to her. Either she was the owner of Plot No. Msa/Mwembelegeza/375 or she was a squatter entitled to adverse possession she cannot be a beneficiary of both positions. The Defendant has further refused to acquiesce to the implementation of the District Land Adjudication Agreement dated 6th December, 2023 she could not in the same breath appropriate the agreement to her benefit and refuse to implement it in the same breath. This was a confused litigant who is not certain what her defence would be in this case. Moreover, the Defendant/Applicant's Defence that she was in possession from 2005 is not supported by her own evidence and she had now adduced further evidence in her Application in support of this claim;

    i. She purchased Plot No.Msa/Mwembelegeza/349 from Abdi Ali and deliberately sought to occupy Plot No. Msa/Mwembeegeza/375.

    ii. She had admitted to be a resident in Germany and at the filing of this suit was served in Germany.

    iii. Approvals that she sought to commence building were sought on 20th August, 2008 for Plot Number Msa/Mwembelegeza/349 and not Msa/Mwembelgeza/375. Hence her occupation of Msa/Mwembelegeza/375 was illegal, void ab initio.

iv. She has adduced no evidence in her Application to prove that she occupied Plot No. Msa/Mwembelegeza/345 in 2005 or at all. The Plaintiff/Respondent has to always know which case she was meeting

41. The Learned Counsel submitted that the Plaintiff/Respondent had shown all along that she was aware that the property was hers as the Defendant/Applicant was not resident in the Country and she began seeing structures on her property from 2012. The Defendant/Applicant could not claim adverse possession as this suit was filed in year 2019. The Defendant/Applicant's intended amendment was unmerited and the Defendant/Applicant's Application should be dismissed with costs.

42. On whether the application would cause the Plaintiff/Respondent prejudice, the Learned Counsel submitted that the Application will cause the Plaintiff great prejudice. The Application sought to substantively change the tenor of suit and the Application will require that the parties go for a Re-trial to litigate whether the Defendant/Applicant was on the premises in year 2005. The guiding principle in Application to amend pleadings was that the same would be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party.

43. The Learned Counsel relied on the case of "Harrison C.Kariuki – Versus - Blue Shield Insurance Co. Limited 2006" the court was faced with a similar application and stated as follows:-

> "I hold that to allow extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. it will occasion injustice to the Defendant who will have to extensively amend its defence. The defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expended case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted."

44. The Defendant/Applicant's evidence never supported the Defendant/Applicant's position that she was on the property in 2005.

i. If swapping had been done by 11th June, 2015 then the Plaintiff/Respondent would not have been issued with a title in the 14th June, 2016.

ii. The Plaintiff/Respondent had expended time and resources to prosecute this case. Notably the Plaintiff/Respondent brought to Court four (4) witnesses including herself, the Land Registrar, Government Land Surveyor and District Land Adjudication and Settlement Officer to give evidence and has expended transport costs from Nairobi in prosecuting this matter and other costs.

iii. The Plaintiff/Respondent Janet Wakio Mgongo was 90 years, very old and may not enjoy the fruits of the judgement.

iv. Litigation must come to an end and the Defendant/Applicant was currently abusing the Court process.

45. According to the Learned Counsel, in the case of "Lawrence Otieno Omondi – Versus - Kenneth Inea Myera [2017] eKLR", the Learned Judge dismissed the Plaintiff's Application for amendment stating that;

> " It is not proper for the administration of justice that a party show wait till all evidence has been given so that they may amend their pleadings. If the evidence bad not been taken, the situation would have been different. Now here there is a risk of move judicial time being expended on this case."

46. The Learned Counsel submitted that the Defendant/Applicant sought to create a new defence having seen that her old defence was unmeritorious and seeks to fill gaps in her case. The discretionary power of the Court ought to be exercised judiciously so as not to prejudice the Plaintiff/Respondent. It could not be exercised to advance an indolent party's whims and help them seal loopholes in their case with due diligence this Defendant/Applicant would have pleaded Limitation at the earliest as she had all the facts and has given no reason why it was not pleaded. The Defendant/Applicant was not limited by any material factor in pleading limitation as a defence.

47. The Learned Counsel was guided by the case of "Samuel Kiti Lewa – Versus – Housing Finance Co. of Kenya & Another [2015] eKLR", where the Court stated that:-

> " 20. ..The court retains discretion to allow re-opening of a case. That discretion must be exercised judiciously. In exercising that discretion the court sbould ensure that such re-opening does not embarrass or prejudice the opposite party. In that regard re-opening of a case should not be allowed where it is intended to fill gaps in evidence. Also such prayer for re-opening of the case will be defeated.by inordinate and unexplained delay."

48. In the case of "Odoyo Osodo- Versus- Rael Obara Ojuok 4 Others [2017] eKLR", the Court observed that the discretion of the Court could not be exercised whimsically but ought only to be exercised judicially and judiciously and that a basis for such exercise of discretion has to be laid. Further, that the Court could not allow the re-opening of a case so that a party could fill the gaps in his evidence as that definitely would be prejudicial to the opposing party.

49. In the case of "Agwu Ukiwe Okali – Versus - Suresh Sofat 3 Others [2020] eKLR" where the Applicant contended that he had since discovered new and important evidence which he was unable to produce at the time he testified, the Court found that it could not be said that such evidence was not within his knowledge as at the time he testified and as at the time the 1st and 3rd Defendants testified. The Court observed thus:

> " 14. ..The Courts have in many cases considered factors which should be considered when a court is determining whether to re-open a case or not. Re-opening cannot be ordered where it is clear that the party applying is seeking to seal certain loopholes he/she has seen in his/her case as the trial progresses. In High Court Succession cause No.26 of 2008. In the matter of the Estate of Ngethe Karuga (Deceased)Justice Achode referred to Malindi HCCC No. 56 of 1999 where the court states as follows: -
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> > ...re-opening a case is not an impossibility but there must be urgent reasons for re-opening and not because a party has suddenly bad a

brain wave and spotted a loophole in its case, which it can now seal by re-opening the case...

15. The Applicant has suddenly noticed that his former advocate did not cross-examine well. He now wants to have the 1st Respondent recalled so that he can seal the loopholes which he has now seen. This cannot be sanctioned by the court. This is a case which was filed in 2011..... The Applicant in his claim is contending that the 1st and 4th Respondents constructed a house on their property which has infringed on his right to security and that the said building did not accord with the requirements of the relevant authorities. The Applicant cannot claim that the evidence which he seeks to adduce is new and could not be availed as at the time he testified....." (their underlining)

50. Further, in the case of "Hannah Wairimu Ngethe –Versus -Francis Mungai Ng'ang'a & Another [2016] eKLR", it was found thus:

"20. ....Indeed the reopening of a case is not a new or novel thing but cogent reasons must be advanced for asking the court to do so...

21. ..This court has not been told that the Petitioner bas come upon or discovered some new and important evidence which after the exercise of due diligence was not within his knowledge. It is noted that the Petitioner bas always had the advantage of counsel from the inception of this case.

22. The court has also not been told where the Applicant has been for the last eight years since this cause was filed yet she was aware of it according to the Objector and bas even bad occasion to attend court in that regard.

23. In my view this is an attempt by the Petitioner to have a second bite at the cherry. If he is allowed to re-open his case so as to prove it this would amount to allowing him to fill the gaps in his evidence after having beard the Objector's case. That would be prejudicial to the Objector....

...In the premise it is my considered view that allowing any of the two applications set out above would not only be prejudicial to the Objector but would also amount to an abuse of the court process..." (their underlining)

51. And in the case of:- "Thomas Kinyua Mbeu – Versus - Maurice Ndambuki Kitivo [2022] eKLR" it was held that whereas it may be allowable to re-open a case after it has been closed, it should not and must not be allowed where it is intended to help one party to fill up gaps in evidence. The Court further stated that it has become fashionable for litigants to hide behind the provision of Article 159 of *the Constitution* every time they find themselves in a situation of falling short of procedural requirements or limits and they call upon the Court to do substantive justice without undue regard to technicalities. It was the Court's view that the horizons of justice are vast and wide and justice must be exercised within the limits set by the statutes and in accordance with the law.

52. It the Learned Counsel's position that the Defendant/Applicant's Application seeking amendment is a clever way of re-opening the case. Guided by the foregoing case laws, it was the Learned Counsel's submission that the Defendant/Applicant had not advanced compelling reasons to warrant the exercise of this Honourable Court's discretion to amend the Defence and cause a re-opening of the case. Further and as is stated hereinabove, the Defendant/Applicant had always had the advantage of counsel as she was ably and effectively represented by her then counsel on record throughout the hearing of

all the Plaintiffs/Respondents witnesses whereby her advocate had a chance to cross-examine and introduce a new cause of action. In addition, the Defendant/Applicant herself actively participated in the proceedings as she was present virtually (following her own request) during the hearing of the Plaintiffs/Respondents first two witnesses and physically present in open court during the hearing of the Plaintiffs/Respondents three final witnesses.

53. It could not be said that the Defendant/Applicant had since discovered new evidence facts or a new cause of action which, after the exercise of due diligence was not within her knowledge as a quick glance at her statement of defence reveals that all matters and information, the basis of this application, were available to her then and now counsel even before the hearing of the Plaintiffs/Respondents case took off and she was aware of the case she was facing. It was now five (5) years since the filing of this suit and Amendment and Re-opening the case will cause the Plaintiffs/Respondents great stress, hardship and prejudice.

54. It was thus their submission that this prayer as sought is mischievous as the Defendant/Applicant's intention is to actually gamble with the process of this Honourable Court and fashion her case by rebuilding, repairing and plugging in gaps and possible cause the Plaintiffs/Respondents fatigue in following up her Plot No. Msa/Mwembelegeza/375. This would not only be a travesty of justice but also a crude mockery of the justice system. Also, the Plaintiffs/Respondents would severely be prejudiced as she has incurred costs to attend Court and to secure the attendance of her witnesses. Indeed, the Plaintiffs/Respondent had indicated the amount expended. Allowing this prayer would further delay the prosecution of the case to its logical conclusion as the case had been in court since the year 2019 and the Plaintiffs/Respondents had been kept out of her property without any compensation whatsoever.

55. The Learned Counsel submitted that it was their humble prayer that if the Honourable Court is inclined to grant the Defendant/Applicant her Application (which they prayed that it does not), they prayed that the Defendant pay the Plaintiff costs and expenses of a sum of Kenya Shillings Eight Hundred Thousand (Kshs. 800,000/-) to cover previous Plaintiffs/Respondents costs so far expended in obtaining witnesses and further costs to be incurred by the Plaintiffs/Respondents if the case is reopened and payment be made prior to the matter being set down for hearing as this application is highly prejudicial to the Plaintiffs/Respondenets . In any event they prayed the Defendant’s application be dismissed with costs and the Court proceed to render Judgment alongside the evidence and Submissions filed.

56. In conclusion, the Learned Counsel urged the Honourable Court to apply the age-old principle that costs follow the event. The Plaintiffs/Respond having strenuously objected to the Defendant’s application is thus entitled to an award of costs proportionate to her success.

V. Analysis and Determination

57. As indicated above, I have keenly considered the pleadings filed by all the parties, the elaborate and robust written and oral submissions by the Learned Counsels, the relevant provisions of the law and the cited authorities. I have also perused all the orders that have been mentioned in this application.

58. For the Honourable Court to reach an informed, fair and reasonable decision, it has framed three (2) broad salient issues for its determination. These are:-

    a. What are the legal principles on amendment of pleadings.

    b. Whether the Court should allow the Notice of Motion application dated 14th May, 2024 for the amendment of the defence.

c. Who bears the costs of the Notice of Motion application dated 14th May, 2024?

Issue No. a). What are the legal principles on amendment of pleadings.

59. Under this sub title the Court shall evaluate the merits of the Notice of Motion application where the main substratum is on the amendment of pleadings. The legal principles on amendment are founder under the general power to amend pleadings under the provision of Section 100 of the *Civil Procedure Act*, Cap. 21 and Order 8 of the Civil Procedure Rules, 2010. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules, 2010. The provision which is couched in mandatory terms, is entitled with leave of Court. The law envisages that an amendment of pleadings may be undertaken without leave of court if the pleadings have not been closed. Otherwise, under all circumstances, the leave of Court must be formally sought and hence granted for any party to undertake any amendment of pleadings.

60. The provision of Order 8 Rule 5 of the Civil Procedure Rules, 2010 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."

61. My reading of the above provisions point to the fact that indeed an amendment may be allowed at any time of the suit. This however is discretionary and therefore the parties need to seek leave. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. That said, it is preferable that applications to amend come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

62. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, which provides as follows concerning amendment of pleadings:

> " .....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..."

63. Similarly, in Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

> " ...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...".

64. The discretion of courts to amend pleadings was summarized by the Court of Appeal in "Joseph Ochieng & 2 others – Versus - *First National Bank of Chicago, Civil Appeal No. 149 of 1991*" thus:

> " 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."

65. The principles governing amendment of pleadings, among them the case of "St. Patrick's Hill School Ltd – Versus - Bank of Africa Kenya Limited (2018) eKLR", where the Court of Appeal set out the principles as follows: -

a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) The amendments should be timeously applied for;

c) Power to amend can be exercised by the court at any stage of the proceedings;

d) 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.

e) 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

66. This Court makes reliance on the decision in the case of "K K Lodgit Limited – Versus - Geminia Insurance Company Ltd & Another (2021)eKLR" where it was held that:

> ..... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party's case.

67. From the principles set out above and as captured in the authorities cited by the advocates for the parties, it is clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. That amendments should be allowed even in situations of delay if the other side can be compensated by award of costs. The caveat in amendments is that it should not change the character of the case and should not deprive the other side of its legal rights. Any amendments allowed by the court should be geared towards achieving a just and final determination of the real issues in controversy between the parties. In addition, the application must be made in good faith.

Issue No. b). Whether the Court should allow the Notice of Motion application dated 14th May, 2024 for the amendment of the defence.

68. Now applying the above elaborate cited legal principles to the instant case. From the surrounding facts, the Applicant seeks an amendment of her defence because she wished to amend the defense to include the issue of the *Limitation of Actions Act*, Cap. 22 to enable the court deal with the issue as to whether a plaintiff who had acquiesced to the swapping of the land and her occupation for 14 years can turn around and evict her from the property.

69. The main reason underlying the provision of Order 11 of the Civil Procedure Rules, 2010 is to ensure efficient case management and quick disposal of matters. There must be an end to litigation and indeed an end to amendments and perennial filing of documents. Parties are required to ensure that their pleadings are in order before proceeding for hearing.

70. I therefore find that the application has merit and is allowed as prayed. However, the Court will grant the Plaintiff/Respondent throw away costs of a sum of Kenya Shillings Fifty Thousand (Kshs. 50,000/-) to compensate her for the lost time and also corresponding leave to also amend the Plaint. In the interest of natural Justice, Equity and Conscience and taking that the matter had been concluded by both the Plaintiff/Respondent and Defendant/Applicant herein, the Honourable Court will proceed to reserve a date for the delivery of Judgement.

Issue No. c). Who bears the costs of the Notice of Motion application dated 14th May, 2024

71. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court "Jasbir Rai Singh – Versus - Tarchalan Singh" eKLR (2014) and Cecilia Karuru Ngayo – Versus - Barclays Bank of Kenya Limited, eKLR (2014).

72. In this case, the Honourable Court arising from the surrounding facts and inferences of the case, elects not to award any costs whatsoever.

VII. Conclusion & Disposition

73. The Upshot of this is that the has made put a case to have partially and thus, for avoidance of doubt, I therefore proceed to make the following findings:

    a. That the Notice of Motion Application dated the 14th May, 2024 be and is hereby found to have merit hence allowed conditionally.

    b. That the Defendant granted leave to file her Amended Defence within 7 days of this ruling.

c. That thereafter, the Plaintiff be granted corresponding leave of 14 days upon service to and serve an Amended Plaint and subsequent respective responses to the Amended Defence.

d. That the Defendant/Applicant shall pay throw away costs of a sum of Kenya Shillings fifty Thousand (Kshs. 50,000/-) within 7 days of this ruling.

e. That the Plaintiff be and is hereby granted 14 days leave to file and serve written submissions and subsequently, the Defendant to have 14 days leave to file and serve written submissions.

f. That the there be a mention on 10th December for compliance and taking a Judgement date.

g. That there shall be no orders as to costs.

It is ordered accordingly.

RULING DELIEVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS .....24TH ...DAY OF .....OCTOBER.....2024.

.....

HON. MR. JUSTICE L.L. NAIKUNI,

ENVIRONMENT & LAND COURT AT

MOMBASA

Ruling delivered in the presence of:

a. M/s. Firdaus Mbula, the Court Assistant.

b. M/s. Okatta Advocate for the Plaintiff.

c. Mr. Nyabena Advocate for the Defendant.