



REPUBLIC OF KENYA



Omolo & another v Gathima & 2 others (Environment and Land Appeal E021 of 2023) [2024] KEELC 7062 (KLR) (24 October 2024) (Ruling)

Neutral citation: [2024] KEELC 7062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISUMU
ENVIRONMENT AND LAND APPEAL E021 OF 2023**

E ASATI, J

OCTOBER 24, 2024

BETWEEN

ERASTUS KWAKA OMOLO 1ST APPELLANT

AGNES TERESA KWAKA 2ND APPELLANT

AND

ESTHER NYAMBURA GATHIMA 1ST RESPONDENT

DAVID GATHIMA 2ND RESPONDENT

MOSES MUNENE GATHIMA 3RD RESPONDENT

(Being an appeal from the ruling of the Hon. J Wambilyanga delivered on 26th September 2023 in Kisumu MC ELC No. 53 of 2018 Erastus Kwaka Omolo & Another -vs- Esther Nyambura Gathima & 2 Others)

RULING

1. This ruling is in respect of the Notice of Motion application dated 13th December 2023 brought pursuant to the provisions of article 50 of *the Constitution*, Order 42 Rule 6 (1) and (2), Order 51 Rule 1 of the Civil Procedure Rules and sections 78, 1A and 1B of the *Civil Procedure Act*.
2. The application seeks for an order of stay of proceedings in the Chief Magistrate’s EL case No. 53 of 2018 pending the hearing and determination of the appeal herein. The application was supported by the contents of the Affidavit of Erastas Kwaka Omolo and the annexures thereto.
3. The application was opposed vide the Statement of Grounds of Opposition dated 28th June 2024 filed on behalf of the Respondents.
4. The application was urged orally on 29th September 2024. It was the applicants’ case that they will be prejudiced if the matter before the trial court from which the appeal arises proceeds without allowing



the appellants to amend their plaint. That the appeal is against a ruling that declined an application for leave to amend the plaint. That the applicants' right to be heard stands to be violated.

5. The Respondents' case, on the other hand, is that the appeal is not arguable as the same is only a tactic employed by the appellants to delay the suit which was filed in the year 2014. That the present application ought to have been filed in the first instance before the trial court as per the provisions of Order 42 Rule 6(1) Civil Procedure Rules 2010.
6. I have considered the application and the grounds advanced in opposition thereto. The appeal arises from a ruling that disallowed an application for leave to amend plaint. The main issue to be decided in the appeal is whether the plaint should be amended or not. If the trial proceeds before that decision is made the appellants (plaintiffs in the lower suit) will no doubt be prejudiced.
7. Though it is true as contended by the Respondents that the present application ought to have first been filed in the trial court, I find nothing in Order 42 rule 6 curtailing this court's jurisdiction from entertaining the application as presented.
8. I find that the application has merit and hereby allow it. Costs to the Respondents.
Orders accordingly.

RULING DATED AND SIGNED AT KISUMU, READ VIRTUALLY THIS 24TH DAY OF OCTOBER 2024 THROUGH MICROSOFT TEAMS ONLINE APPLICATION.

**E. ASATI,
JUDGE.**

In the presence of:

Ann & Alex- Court Assistant

Mwamu for the applicants.

No appearance for the Respondents.

