



REPUBLIC OF KENYA



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**Barsiele v Barmase & 2 others (Environment & Land Case 7 of 2018)
[2024] KEELC 14158 (KLR) (7 November 2024) (Ruling)**

Neutral citation: [2024] KEELC 14158 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 7 OF 2018
LA OMOLLO, J
NOVEMBER 7, 2024**

BETWEEN

ANDREW KIPROTICH BARSIELE PLAINTIFF

AND

PAUL KIPTONUI BARMASE 1ST DEFENDANT

**MET'ET KIPNGENO VINCENT (SUED AS THE LEGAL
REPRESENTATIVE OF THE ESTATE OF ALICE CHEPKURUI CHUMO
(DECEASED) 2ND DEFENDANT**

ELIZABETH CHELANGAT BARMASE 3RD DEFENDANT

RULING

Introduction.

1. This ruling is in respect of the Defendants/Applicants Notice of Motion application dated 31st October, 2023. The application is expressed to be brought under Order 45 Rule 1, Order 51 Rule 1, Order 22 Rule 22 & Order 9 Rule 9 of the Civil Procedure Rules and Sections 1A, 1B, 3, 3A, 63(e) & 80 of the *Civil Procedure Act*.
2. The Defendants/Applicants seek the following orders;
 - a. Spent
 - b. That the Defendants be allowed to further amend the amended statement of defence dated the 20th day of May 2022 and filed herein on the 24th day of May, 2022 on the terms proposed in the draft further amended statement of defence.
 - c. That the further amended statement of defence be deemed filed upon payment of the Court's requisite fees.



- d. That the costs of this application be provided for.
3. The application is based on the grounds on its face and the supporting affidavit sworn on 31st October, 2023 by one Paul Kiptonui Barmase the 1st Defendant/Applicant herein.

Factual Background.

4. The Plaintiff/Respondent commenced this suit by way of the Plaint dated 23rd January, 2018. He seeks the following prayers;
 - a. A permanent mandatory injunction restraining the Defendants herein either by themselves or their servants, agents, representatives or nominees from interfering with the Plaintiff's quiet use occupation and enjoyment of all that land known as Kericho/Kimulot/413.
 - b. A declaratory Order that the Plaintiff is entitled to the exclusive title, ownership, occupation, quiet use and enjoyment of the suit land being the beneficial owner and being the registered proprietor.
 - c. An order revoking all the suit property resultant titles if any produced from the sub-division conducted and retaining the title number Kericho/Kimulot/413. (sic)
 - d. Costs and interests (sic) of this suit.
 - e. Any other relief that this Honourable Court may deem fit to grant.
5. On 22nd March, 2018 the Defendants filed their Statement of Defence dated 20th March, 2018 which Statement of Defence was amended on 20th May, 2022 and filed on 24th May, 2022.
6. The Amended Statement of Defence included a Counterclaim which seeks the following orders;
 - a. An order of eviction.
 - b. An order permanent injunction (sic) restraining the Plaintiff (now Defendant) either by himself, agents, servants, employees or any other party acting howsoever interfering with, trespassing onto, erecting structures thereon and/or doing any other act which is prejudicial to the Plaintiffs' proprietary interest in land parcels Kericho/Kimulot/2277, Kericho/Kimulot/2278 and Kericho/Kimulot/2279.
 - c. The Plaintiff (now Defendant) to meet cost of the Counter claim plus interest thereon.
 - d. Any other relief this Honourable Court may deem fit to grant.
7. The application under consideration first came up for directions on 2nd November, 2023 when the Court gave the Plaintiff/Respondent twenty-one days to file his response.
8. On 7th February, 2024 the Plaintiff/Respondent was given a further fourteen days to file his response and directions were issued that the application would be heard by way of written submissions.
9. The application was mentioned severally to confirm whether parties had filed their submissions. It was finally reserved for ruling on 24th July, 2024.

The Defendants/Applicants Contention.

10. The 1st Defendant/Applicant contends that even though land parcel No. Kericho/Kimulot/413 is registered in the name of the Plaintiff/Respondent, it was solely purchased by their late father Chuma



Saboge and that their late father had purchased the said land from Kimaru Mogori Arap Simatei (Deceased) in the year 1968.

11. He also contends that the suit property does not exclusively belong to the Plaintiff/Respondent and it should be equally subdivided between the sons of the late Chumo Saboge and transferred and registered in their names.
12. The 1st Defendant/Applicant further contends that the suit property is family land and that the Plaintiff/Respondent is holding it in trust for all of them.
13. It is his contention that they all use the suit property to cultivate cash crops and food for consumption.
14. It is also his contention that for this matter to be determined fairly, it is necessary for the Amended Statement of Defence to be further amended to include a prayer that an order be issued declaring that the Plaintiff/Respondent is holding the suit property in trust.
15. It is further his contention that the exclusion of the said prayer from the Amended Statement of Defence was a mistake which the present application seeks to rectify.
16. He contends that the said amendment will not occasion the Plaintiff/Respondent any prejudice even though he had already given his evidence as he will be given an opportunity to interrogate the said amendments.
17. He also contends that the orders sought in the present application obviate the need to file an application in the event the Court delivers judgement in their favour.
18. He further contends that the orders sought will enable this Court to render an effective and efficacious remedy in the event that their claim succeeds.
19. He ends his deposition by stating that the application has been brought in good faith and that it is in the interest of justice that it be allowed as prayed.

The Plaintiff/Respondent's Response.

20. In response to the application, the Plaintiff/Respondent filed a Replying Affidavit sworn on 20th February, 2024.
21. He deposes that he filed the present suit in January, 2018 and after close of pleadings, the matter proceeded for hearing of his case.
22. He also deposes that after he gave his evidence the Defendants/Applicants filed the application dated 20th May, 2022 seeking for leave to amend their statement of defence and file a further list of documents.
23. He further deposes that the Defendants/Applicants were granted the said leave and they filed their amended Statement of Defence and Counterclaim dated 20th May, 2022.
24. It is his deposition that later his Advocates on record were served with a notice of change of Advocates appointing the firm of M/s Kirui Kipyegon & Co. Advocates to act on behalf of the Defendants/Applicants in place of M/s Bii VK & Co. Advocates dated 14th June, 2022.
25. It is also his deposition that when the matter came up for directions on 25th July, 2022, Counsel for the Defendants/Applicants did not make an application to further amend the amended Statement of Defence and the Court directed him to file a reply to the amended Statement of Defence and counterclaim.



26. It is further his deposition that the matter was also mentioned on 26th October, 2022 when his Advocates on record sought for more time to file a reply to the amended Statement of Defence and Counterclaim.
27. He deposes that his advocates filed a reply to the amended Statement of Defence and Counterclaim on 4th April, 2023 which was a year after the Defendants/Applicants had filed their amended Statement of Defence and Counterclaim.
28. He also deposes that the matter was then referred to mediation but the mediation process failed to resolve the dispute and it was referred back to Court.
29. He further deposes that he is advised by his Advocates on record that the Defendants/Applicants Advocates are keen on delaying justice as they have filed the application under consideration after more than a year since they took over from the previous advocates and despite having the relevant instructions and access to the Court file for perusal.
30. It is his deposition that the Court record is clear that the Defendants/Applicants were accorded a fair chance to amend their Statement of Defence after close of pleadings and even after he had given his evidence.
31. It is also his deposition that he is advised by his Advocates on record that once a party has been given an opportunity of amending pleadings after close of pleadings and after a matter has been partly heard, the party cannot be heard to say that they have been denied such an opportunity.
32. It is further his deposition that the Defendants/Applicants application is an afterthought as they squandered their opportunity to amend their pleadings on time despite being represented so that they can frustrate him and abuse the Court process.
33. He deposes that the Defendants/Applicants are guilty of laches. Had they been diligent enough, they would have filed the present application as soon as they appointed another Advocate on 14th June, 2022.
34. He also deposes that he is advised by his Advocates on record that equity aids the diligent and not the indolent and that by the Defendants/Applicants conduct, they are not deserving of the orders sought.
35. The Plaintiff/Respondent further deposes that the Defendants/Applicants chose to sleep on their rights and have come to Court with unclean hands and therefore the present application ought to be dismissed with costs.
36. It is his deposition that the Defendants/Applicants will not suffer any prejudice if their application is dismissed because they squandered the time and opportunity to amend their pleadings on time.
37. The Plaintiff/Respondent ends his deposition by stating that if the application is allowed, it will delay his efforts to have the suit determined and also deny him justice.

Issues for determination.

38. The Defendants/Applicants filed their submissions on 9th May, 2024 while the Plaintiff/Respondent filed his submissions on 13th May, 2024.
39. The Defendants/Applicants rely on Order 8 Rule 5 of the Civil Procedure Rules and outline the following issues for determination;



- a. That though the Plaintiff is the registered proprietor of LR No. KCO/Kimulot/413 measuring 9 acres, was the piece of land wholly and solely purchased by their late father Mr. Chumo Sabogei (deceased)? (sic)
 - b. Do the whole family, (sic) inclusively (sic) of both the Plaintiff and the Defendants jointly used and still use LR No. KCO/Kimulot/413 and have continuously and uninterrupted used the same for over 40 years. (sic)
 - c. Did the Plaintiff/Respondent charge out (sic) for a loan LR No. KCO/Kimulot/413 and if so, did he fail to repay the loan facility? (sic)
 - d. That pursuant to line (3) above (sic) if the Plaintiff failed to repay the loan facility why is that the Defendants/Applicants paid out the purchaser. (sic)
 - e. Were the acts of self-registration by the Plaintiff fraudulent?
 - f. Did the Plaintiff get himself registered as a trustee of the parcel on behalf of the family of Chumo Sabogi (deceased)?
 - g. Does this Honourable Court have the inherent jurisdiction to make a declaration that the Plaintiff (now Defendant) was holding land parcel LR No. KCO/Kimulot/413 in trust for his sibling? (sic)
40. The Defendants/Applicants submit that the above identified issues were not canvassed in the pleadings that they had earlier filed.
 41. The Defendants/Applicants also submit that the said issues are crucial for the determination of the issue of who is the rightful owner of the suit property.
 42. The Defendants/Applicants rely on Section 100 of the *Civil Procedure Act*, Order 8 Rule 3 (1) to (5) of the Civil Procedure Rules and submit that this Court has the power to allow amendments of pleadings at any stage of the proceedings.
 43. The Defendants/Applicants rely on the judicial decisions of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022]eKLR, *Inter Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd* [2021] eKLR and seek that their application be allowed as prayed.
 44. The Plaintiff/Respondent reiterates his averments in his Replying Affidavit and submits on the following issues;
 - a. Whether the Defendants/Applicants deserve to be allowed to further amend their amended statement of Defence and Counterclaim.
 - b. Who is entitled to the costs of the application?
 45. The Plaintiff/Respondent relies on Section 100 of the *Civil Procedure Act*, Order 8 Rule 5 of the Civil Procedure Rules, *Halburys Laws of England 4th Edition (re-issue) vol. 36 (1)* and submits that the Defendants/Applicants are seeking to further amend their amended Statement of Defence and Counterclaim when the trial has reached an advanced stage.
 46. The Plaintiff/Respondent also submits that the intended amendment seeks to introduce a totally new line of defence and a new claim in the Counterclaim.



47. The Plaintiff/Respondent further submits that the Defendants/Applicants are intending to fill up the gaps in their amended Statement of Defence and Counterclaim through the evidence they gathered during mediation.
48. It is the Plaintiff/Respondent's submissions that the Court should not allow the Defendants/Applicants to amend their pleadings after the failed mediation process as this will prejudice him and will amount to total abuse of the Court process.
49. The Plaintiff/Respondent seeks that the Defendants/Applicants application be dismissed with costs.

Analysis and Determination.

50. I have considered the application, the response thereto and the rival submissions filed by the parties.
51. The only issue that arises for determination is whether the Defendants/Applicants should be granted leave to further amend their amended Statement of Defence and Counterclaim.
52. Order 8 of the Civil Procedure Rules gives the Court discretion to allow for the amendment of pleadings. Order 8 Rule 3 of the Civil Procedure Rules in particular provides 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.
 - (2) Where an application to the Court for leave to make an amendment such as is mentioned in sub rule (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 sub rule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under sub rule (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 sub rule (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 sub rule (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.”
53. In the Plaintiff, the Plaintiff/Respondent avers that he is the registered owner of land parcel No. Kericho/Kimulot/413 which he had bought in the year 1974.



54. The Plaintiff/Respondent also avers that the Defendants/Applicants who are his siblings begun to claim the suit property in the year 2015 demanding that the land be subdivided amongst them.
55. The Plaintiff/Respondent further avers that the Defendants/Applicants proceeded to subdivide land parcel No. Kericho/Kimulot/413 into land parcels No's Kericho/Kimulot/2277, 2278, 2279 and 2280.
56. The Plaintiff/Respondent seeks that an order of injunction be issued against the Defendants/Applicants herein to restrain them from interfering with his use and occupation of land parcel No. Kericho/Kimulot/413 and an order be issued cancelling the titles that arose upon the subdivision of land parcel No. Kericho/Kimulot/413 among other orders.
57. The Defendants/Applicants filed their Statement of Defence dated 20th March, 2018 which was later amended on 20th May, 2022 to include a counterclaim.
58. In their amended Statement of Defence and Counterclaim, the Defendants/Applicants deny that the Plaintiff/Respondent is the owner of land parcel No. Kericho/Kimulot/413 and claim that the said property is family land.
59. The Defendants/Applicants also admit that land parcel No. Kericho/Kimulot/413 was subdivided in the year 2016 after family members agreed that the land be subdivided.
60. In their Counterclaim, the Defendants/Applicants admit that they are the registered owners of land parcel No's Kericho/Kimulot/2277, 2278 and 2279 which parcels were the resultant subdivisions of land parcel No. Kericho/Kimulot/413.
61. The prayers that the Defendants/Applicants seek in their Counterclaim are for an order of eviction and a permanent injunction be issued against the Plaintiff/Respondent.
62. In the proposed amendments, the Defendants/Applicants admit that the Plaintiff/Respondent is the registered owner of land parcel No. Kericho/Kimulot/413 and state that the said land was purchased by their late father.
63. The Defendants/Applicants also state that they have jointly used the suit property for a period of over forty years. They further state that the Plaintiff/Respondent took a loan facility from Kenya Commercial Bank Limited, charged the suit property, defaulted in repayment of the loan and the suit land was sold at a public auction to one Francis Cherongony (deceased).
64. The Defendants/Applicants also stated that when they learnt of the sale, they approached Francis Cherongony (deceased), bought back the land from him and therefore the suit property remained in the name of the Plaintiff/Respondent.
65. The Defendants/Applicants set out particulars of fraud and seek that the Court makes a declaration that the Plaintiff/Respondent holds land parcel No. Kericho/Kimulot/413 in trust for them and issues an order that the suit property be subdivided in equal portions between them and the Plaintiff amongst other orders.
66. It is important to note that the Plaintiff/Respondent had given his evidence on 8th March, 2022 before the Defendants/Applicants were granted leave to amend their Statement of Defence.
67. The Plaintiff/Respondent's evidence was that he was the owner of land parcel No. Kericho/Kimulot/413 which he had charged to Kenya Commercial Bank after taking a loan.



68. It was his evidence that he was unable to repay the loan and the bank sold the suit property to Cherongony. It was also his evidence that he later bought back the suit property from Cherongony.
69. It is noteworthy to mention that the Defendants/Applicants proposed amendments are eerily similar to the evidence given by the Plaintiff/Respondent.
70. In the judicial decision of Angelina Chepng'etich Kimaiti v Tom Mong'are Nyariki & another [2021] eKLR, the Court held as follows;

“As to the first issue, amendments of pleadings can be allowed at any stage before Judgment. But it is most ideal to allow pleadings before tendering of evidence starts in order to avoid the recalling of witnesses which may at times be inevitable particularly where the amendments introduced affect the evidence already tendered. The only amendments that can be allowed after the witnesses are put on the witness box are minor amendments, say those to do with clerical errors, correct spelling of people’s names, places, anomalies in the dates, typographical errors, spelling mistakes, minor inaccuracies in measurements or quantities, slight inexactness in colours, impressions and such other minor things which do not substantially alter the substratum of the case. Such are excusable. But it would be an abuse of the process of the Court to allow a party to amend his case after evidence has been adduced so that the amended pleadings suit the evidence on record. This, in my view, is not what the provisions of order 8 Rule 3 of the Civil Procedure Rules were meant to achieve.” [Emphasis Mine]

71. In the above cited judicial decision, the Court held that amendments of pleadings can be allowed at any stage of the proceedings. The Court also held that the kind of amendments that are allowed after witnesses have testified are in the realm of minor amendments and examples of the same given.
72. The Court further held that it would be an abuse of the Court process if a party is allowed to amend their pleadings to suit the evidence on record.
73. In the present case, it is my view that the Defendants/Applicants proposed amendments are essentially being made to suit the evidence of the Plaintiff/Respondent. Allowing the said amendments at this stage of the proceedings will be prejudicial to the Plaintiff/Respondent who has already testified.

Disposition.

74. Consequently, I find that the Defendants/Applicants application dated 31st October, 2023 lacks merit and it is hereby dismissed with costs.
75. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT KERICHO THIS 7TH DAY OF NOVEMBER, 2024.

L. A. OMOLLO

JUDGE.

In the presence of: -

Mr. Too for the Defendants/Applicants.

The firm of Motanya for the Plaintiff/Respondent.

Court Assistant; Mr. Joseph Makori.

