



**Kimathi & 2 others v Nyambu (Being Sued as the Legal Representative of the Estate of Simon Muriuki Karangi) (Environmental and Land Originating Summons E015 of 2022) [2024] KEELC 13866 (KLR) (19 December 2024) (Ruling)**

Neutral citation: [2024] KEELC 13866 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MERU  
ENVIROMENTAL AND LAND ORIGINATING SUMMONS E015 OF 2022  
CK YANO, J  
DECEMBER 19, 2024**

**BETWEEN**

**FRANCIS KIMATHI ..... 1<sup>ST</sup> APPLICANT  
JACOB MWENDA ..... 2<sup>ND</sup> APPLICANT  
PETER NTURIBI ..... 3<sup>RD</sup> APPLICANT**

**AND**

**REAL NYAWIRA NYAMBU (BEING SUED AS THE LEGAL REPRESENTATIVE OF THE ESTATE OF SIMON MURIUKI KARANGI) ..... RESPONDENT**

**RULING**

1. The application for consideration is the notice of motion dated 12<sup>th</sup> February, 2024 by the applicants seeking leave to amend their Originating Summons in terms of the draft amended Originating Summons annexed to the supporting affidavit. The application is brought under Order 8 Rule 4 and 5 of the Civil Procedure Rules and Articles 10 and 159 of *the Constitution* of Kenya, 2010.
2. The application is premised on the grounds that the applicant instituted this suit against the respondent, that the applicant’s Originating Summons did not plead the issue on customary trust which was an inadvertent error by the counsel on record, and that it is in the best interests of the parties herein that leave be granted to the applicants to amend their pleadings to include and plead the issue of customary trust.
3. The application is supported by the affidavit sworn by Brenda K. Gikundi, the applicant’s advocate who deposed that she was instructed by the applicants to institute a suit against the respondent and she prepared the pleadings and filed the same in court and served the respondent herein. That thereafter, she realized that due to an inadvertent mistake, she did not include two other applicants who were part of the suit. The deponent has annexed a draft amended Originating Summons marked “BKG 1”. The



deponent stated that it is necessary that the amendment is done to include the two applicants in the suit to enable the court to reach a fair and just determination and avoid unnecessary parallel suits. That the respondent will not suffer any prejudice if the leave sought is granted.

4. The application is opposed by the respondent who filed grounds of opposition as follows-;
  1. The intended amendment seeks to introduce new causes of action that are incapable of being dealt with by way of Originating Summons and would require a substantive suit.
  2. That the intended amendment will introduce causes of action against persons who are not parties to these proceedings and there is no prayer to join them as parties, and in particular, the persons alleged to have committed breach of trust and the National Bank of Kenya.
  3. That the issues introduced in the intended amendment cannot be tried together with the claim for adverse possession.
5. The respondent wants the application dismissed with costs.
6. The application was canvassed by way of written submissions. The applicants filed submissions dated 15<sup>th</sup> March 2024 while the respondent's submissions are dated 22<sup>nd</sup> September, 2024.
7. I have considered the application, the grounds of opposition and the submissions filed together with the authorities relied on. This is an application for amendment of the Originating Summons dated 28<sup>th</sup> September 2022. The courts will normally allow amendments of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party/parties and on such terms as to costs or otherwise as may be just. The relevant provisions of law is to be found under Order 1 Rule 3 and 5 of the Civil Procedure Rules that grants a court general powers to allow a party to amend pleadings and it provides as follows-;

“3(a) 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 pleading.

  - (2) Where an application to the court for leave to make an amendment such as mentioned in sub-rule (3) and (4) or (5) is made after any relevant period of limitation current at the date of filing the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just to do so.
  - (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 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 other person intending to sue or intended to be sued.”
8. The general power to amend pleadings is donated by section 100 of the [Civil Procedure Act](#) while Order 8 Rule 5 states 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.

(2) This rule shall not have effect in relation to a judgment or order.

9. It is clear from the above provisions of the law that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue between the parties. That discretionary power must however, be exercised judiciously and not whimsically. It is also clear that the court may, in its discretion, allow amendment to correct the name of a party notwithstanding that the effect of such an amendment will be to substitute a new party.
10. In this case, the amendment sought seeks to introduce new parties and a new cause of action on customary trust. The respondent has not demonstrated what prejudice, if any, he will suffer if the application for amendment is allowed. Instead, the respondent introduced issues of fact in form of previous suit through submissions. In my view, that was improper. On the contrary if such leave to amend is granted, it would avoid a multiplicity of proceedings over the matter. I fail to understand what injustice would result to the respondent by allowing the amendment. The trial has not even started in the matter. In my view, the respondent can adequately be compensated by costs.
11. In the case of Eastern Bakery Vs Castalino (1958) EA 461 it was stated as follows-;  

“It will be sufficient, for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs...”
12. The upshot is that I allow the notice of motion dated 18<sup>th</sup> February, 2024 as prayed. The applicants are directed to file and serve the amended originating summons within 14 days of this ruling. I also give the respondent 14 days from the date of service to file his amended response, if any.
13. Orders accordingly.

**DATED, SIGNED AND DELIVERED AT MERU THIS 19<sup>TH</sup> DAY OF DECEMBER, 2024.**

**in the presence of**

Court Assistant – Tupet

Ms Gikundi for applicants

Ms Gumato for respondent

**C.K YANO**

**JUDGE**

