



In re Estate of John Sylvah Olwochi (Deceased) (Succession Cause E008 of 2024) [2025] KEHC 11839 (KLR) (5 August 2025) (Ruling)

Neutral citation: [2025] KEHC 11839 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
SUCCESSION CAUSE E008 OF 2024**

MS SHARIFF, J

AUGUST 5, 2025

IN THE MATTER OF THE ESTATE OF JOHN SYLVAH OLWOCHI (DECEASED)

BETWEEN

ROSE NAKHUNGU OLWOCHI PETITIONER

AND

ARNOLD MURMUBA OLWOCHI CAVEATOR

AND

SAMSON ONGURA AUNYASI INTERESTED PARTY

RULING

Background

1. The Applicant seeks by Notice of Motion dated 3 December 2024, leave to amend his Application filed on 21 August 2024. The application is supported by an affidavit of the applicant different from the initial one.
2. The proposed amendment involves; a change of subject matter from East Bukusu / South Kanduyi / 12414, to East Bukusu / South Kanduyi / 4002 (now 12044 and 12045), East Bukusu/ South Nalondo/95 (now 3801 and 3802) and Ndivisi/ Khalumuli/1177 (now 4093 and 4094).
3. The Application is predicated on the grounds on the face of it and further supported by an Affidavit sworn on even date by M/S Omundi Bw' Onchiri, counsel for the caveator.
He avers that in light of several issues being left out by mistake, it is necessary and vital for the motion dated 3rd December 2024 to be allowed so as to assist the court to determine the issues in dispute.
4. The Petitioner, Rose Nakhungu Olwochi, opposed this application vide Grounds of Opposition dated 3rd February 2025. She deposed that the application is incompetent and fatally defective. That the



intended amendment seeks to change the subject matter of the application dated 21st August 2024 which would defeat the opposition raised by the petitioner in her replying affidavit 3rd September 2024, to the prejudice of the petitioner.

5. She contested that the applicant is seeking by backdoor to introduce a new application as the intended application is further supported by an affidavit different from one in support of the application dated 21st August 2024.
6. The Interested Party, Mr. Samson Ongura Aunyasi, opposed the application through a sworn Replying Affidavit dated 17th February 2025. He contends that the application dated 3rd December 2024 constitutes an abuse of the court process and is intended to frustrate his peaceful possession of land parcel number East Bukusu/South Kanduyi/12414, which he has lawfully occupied and developed since 2006.
7. He contends that he legally purchased the land from the petitioner through a duly witnessed agreement, and that the land does not form part of the estate of the deceased, John Sylvan Olwochi. He further argues that the application introduces new issues and changes the subject matter from the original application dated 21st August 2024, to which he is a stranger, and lacks any credible connection between the disputed land and the estate of the deceased.

Submissions

8. The application for leave to amend was canvassed by both oral and written submissions.

In its written submissions dated 21st February 2025, the applicant submitted that the orders sought in his application if granted will not prejudice the Petitioner and the Interested Party in any way whatsoever. He contended that neither of the replies of the Petitioner nor the Interested Party demonstrated the nature of prejudice that was likely to be occasioned to them should the amendments be allowed. He further reiterated that the Orders sought will assist this Hon. Court to determine issues in the dispute. Reliance of his submissions was based on the following authorities and legal writing;

- a. The scholarly work of Bullen and Leake and Jacob's precedents of pleadings 12th Edition 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.....
- b. In *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA.365, the Court of Appeal held as follows: -
 - “, A party is allowed to make such amendments as may be Necessary for determining the real question in controversy or to avoid a multiplicity of suits ”
- c. In *Republic v Land Disputes Tribunal Meru Central District* (2009) eKLR,
 - “ Where the Court allowed amendment to a substantive notice of motion to tally with the statement of facts in a judicial Review application in order to preserve the subject matter for hearing on merit.”
- d. In *Peter M. Echara v Priscilla N. Echara* (1998) eKLR
 - . “That any defect in a motion is curable by granting leave to amend”.



- e. In *George Gikubu Mbutia v Consolidated Bank of Kenya Limited & another* (2016) eKLR
- “That parties to a suit have a right to amend their pleadings at any stage of the proceedings before Judgment and that Courts should liberally allow such amendments”.
9. Vide her written submissions dated 25th February 2025, the Petitioner submitted that the amended application introduces a new cause of action; parcel NO East Bukusu/ South Kanduyi / 12414 has been roped in while the initial subject matter of the previous application, has been completely removed. That this introduction of novel cause of action is further cemented by the fact that the intended amended application is also supported by a affidavit whose contents are different from the ones in the initial affidavit.
 10. She further submits that while taking cognizance of the fact that an affidavit cannot be amended, the fresh affidavit in support of the application speaks to new facts and that this tactic by the applicant ought not be condoned
 11. Reliance was placed on the holding of Prof. (DR) Nixon Sifuna in the case of *Jaribu Credit Traders Limited v Fidelity Bank Limited & another* [2024] KEHC 3412 (KLR) where when faced with a similar issue and in dismissing the application for amendment held as thus; -

“I hold that an Application is not to be amended like the institutive/constitutive or primary pleadings referred to hereinbefore. Unlike those, it is strictly speaking not a pleading; and if a pleading, then it is a pleading sui generis. In fact, a pleading within a pleading.”
 12. The Interested Party relied on his written submissions dated 17th March 2025. He submitted that Order 8 of the *Civil Procedure Rules* applies to amendment of principal pleadings and not amendment of applications. Therefore, it is of the view that an application is not part of the pleadings that are amendable. That if the application dated 21st August 2024 is defective and does not disclose all material facts that are being introduced as amendments, it should be struck off or withdrawn by the caveator to enable them to file a new application with all the facts and issues. Reliance was also placed on *Jaribu Credit Traders Limited v Fidelity Bank Limited & another* [2024] KEHC 3412 (KLR).
 13. The Interested party also submits that the amended application supported by a new affidavit should be struck off as the filing of the same constitutes an absolute abuse of the court process in light of Section 3A of the *Civil Procedure Act*.
 14. While Order 8 Rule 5 of the *Civil Procedure Rules* and Section 100 of the *Civil Procedure Act* generally permit amendment of pleadings to resolve underlying controversies or correct defects, this provision only applies to principal pleadings (plaint and defence) and not to applications.
 15. Order 51 of the *Civil Procedure*, the principal order on applications which is quite extensive on the same, has no provision on the amendment of applications. This omission is significant.
 16. Amendment of pleadings should generally be permitted provided no new cause of action is introduced in the amended application. I place reliance on the case of *Institute for Social Accountability & another v Parliament of Kenya & 2 others; Commission for the Implementation of the Constitution (Interested Party)* (Petition 71 of 2013 & 16 of 2023 (Consolidated)) [2014] KEHC 7356 (KLR) (Constitutional and Human Rights) (23 January 2014) (Ruling).



- ‘...19. Rule 18 of the Rules clearly stipulates that the court may permit an amendment at any stage of the 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.’
17. A similar position was taken in the case of *Cherop v Bowen* (Civil Case E009 of 2022) [2025] KEHC 4064 (KLR) (28 March 2025) (Ruling) where the court held;
- “...
10. The legal parameters governing the amendment of pleadings from the above cited cases can be summed up that the amendment should:
- a. Not introduce new or inconsistent cause of actions or issues;
 - b. Be made timeously;
 - c. Not affect any vested interest or accrued legal right and
 - d. Not prejudice or cause injustice to the other party.”
18. In *Jaribu Credits Limited v Fidelity Bank* (ruling dated 15 March 2024), the High Court underscored that an Application and its supporting affidavit form a self-contained package not amendable under Order 8 Rule 5 or Section 100, given the absence of an amendment provision in Order 51 which governs civil Applications;
- “With regard to Applications, I hold that an Application should together with its Supporting Affidavits and annexure if any, be self-contained and self-executing. Unlike a Complaint and Defence, that have to be accompanied with witness statements and documents bundle, an Application together with its Supporting Affidavit is a stand-alone package, just like hand in glove.
- ...I hold that an Application is not to be amended like the institutive/constitutive or primary pleadings referred to hereinbefore. Unlike those, it is strictly speaking not a pleading; and if a pleading, then it is a pleading sui generis. In fact, a pleading within a pleading.

Analysis And Determination.

19. This Court must determine whether the intended amendment changes the cause of the suit and whether, such amendment of the interlocutory Application and its supporting affidavit is permissible under the *Civil Procedure Act* and Rules.
20. There is no express statutory provision permitting the amendment of an interlocutory Application. Had Order 51 contemplated that an application could be amended, then, the legislature would have expressly made a provision for the manner, form and grounds for such amendment.
21. I do find that the Applicant seeks not to correct a minor error but effectively to alter the substance of his Application as originally filed by replacing the subject property East Bukusu/ South Kanduyi / 12414 with East Bukusu / South Kanduyi / 4002 (now 12044 and 12045), East Bukusu/ South Nalondo/95 (now 3801 and 3802) and Ndivisi/ Khalumuli/1177 (now 4093 and 4094). This is a complete overhaul of the application which is aimed at defeating the responses already filed by the respondent and the Interested party. The applicant wants to pull the rug under the feet of his adversaries. This is what constitutes abuse of court process. This court will not condone such conduct



that substantively re-drafts the original application and premises it on an affidavit that discloses new facts. Such an amendment is not permissible in law and cannot be allowed.

Conclusion

22. Premised upon the reasons disclosed hereinabove, the Applicant's Notice of Motion dated 3rd December 2024, seeking leave to amend the application dated 21st August 2024 is hereby dismissed for want of merit.
23. Costs are awarded to the Petitioner and the Interested Party assessed at Kshs 15,000 for each of them.

DELIVERED, SIGNED AND DATED AT BUNGOMA THIS 5TH DAY AUGUST 2025.

M.S. SHARIFF

JUDGE

