Ngobi v Kenya Ports Authority & 2 others (Civil Case 87 of 2013)
[2025] KEHC 12372 (KLR) (3 September 2025) (Ruling)

Neutral citation: [2025] KEHC 12372 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT MOMBASA

CIVIL CASE 87 OF 2013

DKN MAGARE, J

SEPTEMBER 3, 2025

BETWEEN

BOB THOMPSON DICKENS NGOBI ..... PLAINTIFF

AND

KENYA PORTS AUTHORITY ..... 1ST DEFENDANT

MAERSK KENYA LIMITED ..... 2ND DEFENDANT

KENYA REVENUE AUTHORITY ..... 3RD DEFENDANT

RULING

1. The application dated 27/4/2025 was heard and slated for ruling today. The application sought the following prayers:

   a. ...

   b. That the Plaintiff be granted leave to amend his Plaint in terms of the Draft Further Amended Plaint annexed to the Application herein.

   c. That the cost of the Application be in the cause.

2. The matter brings out what is best and worst in civil litigation. If I recall, the last ruling I made in this matter was on 4.7.2023 for the application dated 25.4.2023. This application was thus made 2 years and two days after the last application was made. In the last application, I made the following orders:

   Therefore, I allow the application in the following terms: -

   i. The Plaintiff is hereby authorized to access Motor Vehicle Registration Number Highlander CHS JTEES42A092133819 and value the same through Automobile Association of Kenya AA) and file a further list of documents related thereto and testimony be produced only in respect thereto.

ii. The defendants are directed to release to the plaintiff directly or through his authorized agents the Motor Vehicle Registration Number Highlander CHS JTEES42A092133819 forthwith to facilitate transit to Uganda, subject to (iii) and (iv) below.

iii. The release order will be made subject to payment or undertaking to pay the freight and shipping charges, demurrage, and other charges due or getting appropriate waivers, if any.

iv. The plaintiff to comply with requirements of the law in relation to transit goods.

v. The 3rd Defendant to issue the Plaintiff with a zero manifest to enable conclusion of the matter.

vi. The Plaintiff's case be reopened only in the next hearing date to produce any document from his exercise.

vii. The orders issued herein shall automatically lapse by 6/11/23.

viii. Costs in the cause.

3. The matter was heard after my transfer on 3.4.2025, on a date specifically set apart by the court to travel to Mombasa to hear this matter among other part-heard cases from the last decade. On the date for fixing the matter for judgment, the plaintiff alerted the court that he had on 28.04.2025 filed an application for amendment. The court gave directions on the said application and set the ruling for today.

4. The application is supported by the affidavit of Bob Thomson Dickens Ngobi, the plaintiff, sworn on 27.04.2025. He sought to remove goods from the vehicle and seek compensation for a sum of USD. 37,471. His grounds are that he can amend any time before final judgment. The basis for the application for amendment is that under the *Traffic Act*, Cap 347 Laws of Uganda, there is an age limit of 15 years for imports. Reliance was placed on submissions filed.

5. He submitted that the general rule is that amendment of pleadings can be allowed at any stage during trial and the same is to be done upon such terms as may be just. Reliance was placed 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), where the high court, [I. Lenaola Judge, Mumbi Ngugi Judge And D. S. Majanja JJ, as they then were, held as follows:

18. 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.

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.

6. Further, they submitted that the principles for granting amendment of pleadings, were addressed in the case of St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] KEHC 2539 (KLR), by R. Nyakundi J, as follows:

> 21. A wider footage on the same issue was given in a more recent case of Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991 the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows
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> a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
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> b. The amendments should be timeously applied for;
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> c. Power to amend can be exercised by the court at any stage of the proceedings;
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> 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;
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> 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 and amendment notwithstanding the expiry of current period of limitation.

7. He submitted that the proposed amendments merely clarify the cause of action without introducing new facts or evidence, thereby promoting substantive justice by allowing the case to be determined on its merits. The 3rd Defendant's objection on grounds of delay is unfounded and aimed at preventing the Plaintiff from raising the real issues.

8. It was their submission that the correct position of law is that courts have emphasized that the right to be heard is fundamental and will readily allow amendments to pleadings to resolve the real issues in dispute, provided such amendments do not cause irreparable prejudice or fundamentally alter the nature of the case. Reliance was placed on the cases of KK Lodgit Limited v Geminia Insurance Company Ltd & another [2021] KEHC 6048 (KLR) Kiai Mbaki & 2 others v Gichuhi Macharia & another [2005] KECA 143 (KLR).

9. The second defendant filed grounds of opposition and submissions. They stated that the same issues were raised in the application dated 25.04.2023. The court directed release of the subject window, which the court extended. The matter proceeded on 3.4.2025 on the extended re- opened case. It was their position that the application is unduly late, irregular and prejudicial to the second respondent.

10. The Respondents submitted that the amendment sought seeks to introduce new particulars, which in their view amounts to a marked departure from the original claim. They argued that such an amendment would inevitably necessitate the reopening of the case. It was further their contention that no satisfactory explanation had been proffered, notwithstanding that the Applicant had been afforded ample opportunity to do so.

11. They filed submissions stating that the application is made too late in the day as judgment is slated for 16.09.2025. It was their case that parties, including the applicant had filed submissions and were only waiting for determination. It was submitted that the amendment of the pleadings is at the discretion of the court. However, same issues were dealt with when dealing with the application dated 25.04.2023. The instant application was thus an afterthought.

12. The second defendant submitted that the ruling of 4.07.2023 was self-explanatory. The orders issued were extended to 31.12.2023. The issue of 15 years was thus live and dealt with. Reliance was placed on the case of Milly Glass Works Limited V Kenya Railways Corporation & Another [2020] KEELC 1487 (KLR). In that case, Munyao J held as follows:

> 10. The general rule on amendments was well articulated by O'Connor J, in the case of Eastern Bakery vs Castelino (1958) EA 461, where the judge stated as follows at p462: -
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> "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: Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side".
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> 11. I am in agreement with the above dictum. I will only add that the more advanced the matter is, the more difficult it may be for a party to be allowed to amend his pleadings. In as much as an amendment may be sought at any time of the proceedings, and that would include an amendment after the hearing of the suit, my view is that at this level of the proceedings, an amendment that is not superficial in nature, say, to properly describe a name of a party or the subject matter of the suit, but is substantial, may be difficult to procure. This is because there is a high probability of there being prejudice to the other party, for that party will have closed his case and may not have a chance to re-open, in order to challenge any new matter intended to be raised in the new pleadings. Special circumstances indeed need to exist for the court to allow an amendment after parties have already presented their evidence and closed their respective cases.

13. They submitted that the application is a substantial departure from the original claim. The amendment is not superficial and meant to aid the cause of justice. They submitted it was filed after undue and unreasonable delay. The case was meant to fill huge gaps in the Applicants' cases and fill gaps they discovered at the very end. Reliance was placed on the case of Muhoro v Nairobi City County (Environment & Land Case, E141 of 2021) [2024] KEELC 5380 (KLR) (18 July 2024) (Ruling), where J held as follows:

> Finally, and before departing from this issue, it is also imperative to underscore that litigation, including application for amendment, must be conducted with due diligence and parties, including their legal counsel, must not indulge in actions and/or omissions, whose purport is to delay, obstruct and/or better still defeat the due process of the court; as well as to defeat the expeditious disposal of Disputes.
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> 44. In any event, it is common knowledge that justice delayed is justice denied and hence it behoves the parties to ensure that court process is undertaken in a manner that gives meaning to and breathes Life into the provisions of Article 159 (2) (b) of *the Constitution*, 2010.

45. In the case of Said National Land Commission v Attorney-General & 5 others; Kituo Cha Sheria & another (Amicus Curiae) (Advisory Opinion Reference 2 of 2014) [2015] KESC 3 (KLR) (2 December 2015) (Advisory Opinion), the Court of Appeal stated and held as hereunder: " Justice shall not be delayed" is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases. The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with thelearned Judge's conclusion that thesuit in the High Court was not properly handled by the appellant's advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

14. The 3rd Respondent filed grounds of opposition dated 10.06.2025. They argued that the Application is an abuse of the court process, having been brought after inordinate delay, at a stage when the trial had already closed and the matter was pending judgment. They further pointed out that the orders now sought had previously been granted by this Court on 18.10.2023 and were subsequently extended to 31.12.2023.

15. They continued that the Applicant failed to comply therewith, in spite of the extension. It was their position that the Applicant cannot invoke the aid of the Court to benefit from his own indolence, as court orders are not issued in vain. They contended that the prayers sought would in effect necessitate the reopening of the case, to the prejudice of the 3rd Defendant who is already facing compensatory orders. On this basis, they urged that the Application dated 27.4.2025, be dismissed with costs.

16. The first defendant is not party to the case; their role having been terminated. these many years ago.

Analysis

17. This is a fairly straight forward application for amendment. The only question is whether it is merited. It is important to go to the brief background of the case to enable the court reach a fair and just decision.

18. The suit herein had been filed on 19.07.2013, and has been in court ever since. The last application was filed on grounds relating to the 15-year statutory limit for importation into Uganda. The said period was said to be about to lapse while the motor vehicle, a Toyota highlander, chassis number JTEES42A092133819, remains at the port. Subsequently as per order VI in the former ruling, the plaintiff's case was reopened only in the next hearing date to produce a document resulting from my ruling. I heard the parties on 3.04.2025.

19. The order releasing the entire vehicle has not been set aside. At the time the court was making the ruling of 4.7.2023, it was alive to the vagaries related to the 15-year rule. The applicant ended only assessing the vehicle and doing nothing more. The is why the court gave a fail-safe date. In spite of the order being given no action was taken the case was reopened only for the purpose ordered. The court did not reserve re-opening for any other purpose. There was no appeal from that order. Effectively, the court has already dealt with the 15-year rule. Indeed, parties agreed that the court is only dealing with the question of damages.

20. At the time of making the application for release of the vehicle, the prayer for amendment to include was one of the prayers that could have been made. It was not. The new cause of action is being introduced, over 12 years since the suit was filed. In the case of Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] KECA 31 (KLR), the court of Appeal [A.B. SHAH] posited as follows:

All in all, the conduct of plaintiffs' case has been so slovenly that it would be impossible now to have a fair trial if the proposed amendments were allowed and I would add that this court has adopted with approval a passage in the speech of Lord Griffths in the case of Ketteman (supra) in Ransley and Another vs K.N.C.C. Ltd Civil Application No. NAI 116 of 1988 (Unreported) and I reproduce the said passage:

> "Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of proceedings."

I would add that allowing an amendment to include a fresh claim of approximately 9 million shillings plus interest from 1984 would cause injustice not only to an individual but also to a banking institution which institution has moneys belonging to the ordinary people of this country. Even such institutions have to make provision for such claims and to ask them to make such a provisions some more than 6 years after the alleged event would be doing injustice to such institutions.

21. The Applicant was given the discretion of the court and received a release order for the vehicle. That order was never set aside. The effect of the order was issuing a mandatory order at the interlocutory stage. The materials ordered are not available except so far as the court can only confirm the release of the vehicle. The vehicle was imported over 14 years ago. The case has been in court for more than 12 of the said 14 years. The provision of 15 years has been in the books since 2018. This was introduced vide Traffic and Road Safety (Amendment) Act, 2018, where there was a ban on the importation of motor vehicles that are 15 years or older based on the date of manufacture. The applicant only reacted by filing the application dated 25.4.2023 and then slept on their rights. He cannot litigate in instalments. In the case of Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff) [2022] KEHC 2227 (KLR), the court, G V Odunga, J, as he then was, stated as follows:

> 40. In Gurbachan Singh Kalsi vs. Yowani Ekori Civil Appeal No. 62 of 1958 the former East African Court of Appeal stated as follows:
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> "Where a given matter becomes the subject of litigation in, and of adjudication by a court of competent jurisdiction, the court requires the parties to that litigation to bring forward their whole case, and will not, except under special circumstances, permit the same parties to open the same subject of litigation in respect of a matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case. The plea of res judicata applies, except in special cases, not only to points upon which the court was actually required by the parties to form an opinion and pronounce a judgement, but to every point which properly belonged to the subject of litigation, and which the parties exercising reasonable diligence, might have brought forward at the time...No more actions than one can be brought for the same cause of action and the principle is that where there is but one cause

of action, damages must be assessed once and for all...A cause of action is every fact which it would be necessary for the plaintiff to prove, if traversed, in order to support his right to the judgement of the court. It does not comprise every piece of evidence which is necessary to prove each fact, but every fact which is necessary to be proved."

41. In Apondi vs. Canuald Metal Packaging [2005] 1 EA 12 Waki, JA stated as follows:

> "A party is at liberty to choose a forum which has the jurisdiction to adjudicate his claim, or choose to forego part of his claim and he cannot be heard to complain about that choice after the event and it would be otherwise oppressive and prejudicial to other parties and an abuse of the Court process to allow litigation by instalments."

22. It is not in doubt that the court cannot throw a party who has been diligent under a bus. The applicant was aware as way back as 2018 about a 15-year importation rule. The issue became dire in 2023, when the application dated 25.04.2023 was filed. When the order was about to lapse in October 2023, the court was moved and extended the same to 31.12.2023. If there were any issues after 1.1.2024, the applicant should have moved the court. They proceeded for hearing and closed their case. The question of not summary dismissal was addressed in the case of D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another [1980] KECA 3 (KLR), the court of appeal addressed the question of amendment as follows:

> No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. Ifa suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.

23. The parties have closed their respective cases and filed submissions. The Applicant now seeks to introduce a new cause of action, which would prejudice the parties who have already proceeded with the hearing. Such an application is contrary to the subsisting orders of the Court. In the circumstances, I find no merit in the application.

Determination

24. Therefore, I allow the application in the following terms: -

    a. The application dated 27/4/2025 lacks merit and is accordingly dismissed with costs of USD 100 each of the second and third Defendants, payable within 30 days.

    b. Judgment shall be delivered on 18.09.2025.

DELIVERED, DATED AND SIGNED AT NYERI ON THIS 3RD DAY OF SEPTEMBER 2025. JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

DENNIS KIZITO MAGARE

JUDGE

In the presence of:

Ms. Angaya for Mr. Macharia for the Plaintiff

Mr. Ondego for the 2nd Defendant and holding brief for Ms. Chelagat for the 3rd Defendant

Court Assistant - Michael