



REPUBLIC OF KENYA



KENYA LAW
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**Mutua & 10 others v Attorney General & 5 others (Environment & Land
Case 275 of 2018) [2023] KEELC 956 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 956 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 275 OF 2018**

JG KEMEI, J

FEBRUARY 16, 2023

BETWEEN

DANIEL GATUMA MUTUA 1ST PLAINTIFF
**ELIAS KIRIMI ANDREW RIUNDU & PAMELA KAWIRA
NJIRU 2ND PLAINTIFF**
PETER WAITHAKA MWANGI 3RD PLAINTIFF
**FRANCIS MURIITHI KAMAU & MARGARET WANJIRU
GAKURU 4TH PLAINTIFF**
**CHRISTOPHER MWANGI MUCHOKI & AGNES MUTHONI
NGORU 5TH PLAINTIFF**
KENNETH MUGWE WAHOME 6TH PLAINTIFF
JOHN GITHAIGA WANJIRU 7TH PLAINTIFF
JOSEPH KIMANI GAITHO 8TH PLAINTIFF
LUCIA NJERI MAINA 9TH PLAINTIFF
JOSEPH KANG'ETHE NDUNG'U 10TH PLAINTIFF
**FRANCIS M. R. WACHORI & ZIPPORAH MBARI
WACHORI 11TH PLAINTIFF**

AND

ATTORNEY GENERAL 1ST DEFENDANT
THIKA DISTRICT LAND REGISTRAR 2ND DEFENDANT
T MASHAERI MAKORI 3RD DEFENDANT



**JACKSON WACHIRA WANGONDU T/A MWAMUKI INVESTMENT
B 4TH DEFENDANT**

**JOSEPH WANJOHI MBURU T/A MBURU MWENDIA
INVESTMENT 5TH DEFENDANT**

**WILLIAM NJURUMBA MUHIA T/A MBURU MWENDIA
INVESTMENT 6TH DEFENDANT**

RULING

1. Vide a Motion dated the 15/3/2022 the Applicants moved the Court and sought the following orders;
 - a. Spent
 - b. That the Applicants be granted leave to amend their Plaint dated the 12.11.2018 as per the draft amended Plaint annexed hereto.
 - c. That the amended Plaint annexed hereto be treated as the Applicants amended Plaint and that the same be deemed as having been duly filed and served together with related documents and the matter proceeds to hearing.
 - d. That the Respondents be at liberty to file their amended statements of defence to the amended Plaint within 14 days if they so wish.
 - e. That the cost of this application be in the cause.
2. The application is based on the grounds annexed together with the Supporting Affidavit Daniel Gatuma Mutua sworn on his behalf and that of the co – Plaintiffs. He deponed that the joinder of 67 plot owners in the suit has necessitated the need for the amendment. That the 67 parties bought 67 plots demarcated from parcels Nos Thika/Mun/Block6/1106-1109 (formerly unsurveyed residential plot No C. That the 67 plots owners are represented by the 12th, 13th and 14th Proposed Plaintiffs who had hitherto been sued as 4th 5th and 6th Defendants. That there is need to amend the Plaint to remove some of the prayers which have been overtaken by events hence the application herein. Finally, that the amendments are brought to serve the interest of justice and to assist the Court to determine the real issues in controversy between the parties.
3. The application is opposed through the Replying Affidavit sworn by the 3rd Respondent on the 28/4/2022 where he deponed inter alia that the amended Plaint has not introduced the parcels nor enjoined the owners of plot Nos Thika/mun/block6/1106, 1107 & 1109 as parties to the suit; save for parcel 1108, the 3rd Respondent is not the registered owner of parcels 1106,1107 & 1109; the 4th 5th & 6th Defendants are not his representatives; that the Applicants failed to file the motion within 30 days as directed by the Court and thus this application ought to be dismissed.
4. Parties filed written submissions which I have read and considered.
5. The key issue for determination is whether or not the application is merited.



6. The statutory provisions of section 100 of the *Civil Procedures Act* give the Court general power to amend proceedings as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

7. Order 8, rule 5 of the *Civil Procedures Rules*:

“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.”

8. Amendments to a Plaintiff may be commenced by a party or even the Court having moved itself suo moto.

9. The principles upon which amendments to pleadings may be made are as set out and stated in the Court of Appeal decision in *Eastern Bakery versus Castelino* (1958) EA 461. The principles were summarised as hereunder:

- a. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.
- b. There is no injustice caused to the other side if it can be compensated with costs.
- c. The Court will not refuse an amendment simply because it introduces a new case.
- d. 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 of the suit.
- e. The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.
- f. The principles applicable to amendments of Plaintiffs are equally applicable to amendments of written statements of defence.
- g. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles.

10. In the case of *Central Kenya Limited Vs. Trust Bank Limited and 5 others*, CA No. 222 of 1998 the Court had this to say: -

“... that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”



11. I have perused the pleadings in this suit including the proposed amended Plaint and the cause of action of the Plaintiffs is that they are the bonafide purchasers of 67 parcels which they acquired through the 13, 14 and 15 Plaintiffs who were the original allottees. It is commonly agreed that the 3rd Defendant is the registered owner of the parcel 1108 which is being challenged by the Applicants. The Applicants aver that parcels 1106, 1107 & 1109 are still with the 2nd Respondent. It is not clear at this preliminary stage who the registered owner of the said titles are/is.
12. Given the totality of the affidavit evidence placed before me I am satisfied that the orders to amend the Plaint are merited.
13. The application is allowed.
14. Costs shall be in the cause.

DELIVERED, DATED AND SIGNED AT THIKA THIS 16TH DAY OF FEBRUARY, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Njuguna HB Gitau Mwara for 1st – 11th Plaintiffs

1st – 6th Defendants - Absent

Court Assistants – Esther / Kevin

