



**Njoka v Joakim Kiarie Kamere t/a Kiarie Kamere & Co. Advocates; Ebrahim (Third party) (Civil Case 177 of 2017) [2024] KEHC 9489 (KLR) (Civ) (31 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 9489 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL**

**CIVIL CASE 177 OF 2017**

**CW MEOLI, J**

**JULY 31, 2024**

**IN THE MATTER OF JOAKIM KIARIE KAMERE ADVOCATE**

**AND**

**IN THE MATTER BETWEEN DAVIS NYAMU NJOKA AS CLIENT AND**

**JOAKIM KIARIE KAMERE AS ADVOCATE**

**BETWEEN**

**DAVIS NYAMU NJOKA ..... PLAINTIFF**

**AND**

**JOAKIM KIARIE KAMERE T/A KIARIE KAMERE & CO.**

**ADVOCATES ..... DEFENDANT**

**AND**

**ESMAIL HAJI EBRAHIM ..... THIRD PARTY**

**RULING**

1. Davis Nyamu Njoka (hereafter the Applicant) filed the Notice of Motion dated 2.05.2024 (the Motion) expressed to be brought under Order 8, Rules 3 and 4 of the *Civil Procedure Rules* (CPR) and seeking leave to amend the Originating Summons (the Summons) in the manner set out in the draft Amended Summons annexed to the Motion, and that upon leave being granted, the Amended Summons be deemed as having been duly filed and served on payment of the requisite fees.
2. The Motion is premised on the grounds on its face and the affidavit of the Applicant's advocate, Kelvin Mogeni. Counsel swore that the suit having been heard, directions were given for the filing of written submissions, that being the point when the advocate discovered a genuine inadvertence



in the Applicant’s pleadings. Namely, that the amount sought by the Applicant, hence the core issue in contention between the parties, was not pleaded in the Summons; that the Motion therefore merely seeks to amend the Summons to include the claimed sums already reflected in the Applicant’s documents on record and canvassed at the trial. The advocate stated that the Motion has been brought in good faith and is in no way intended to re-open the case.

3. To oppose the Motion, Joakim Kiarie Kamere T/A Kiarie Kamere & Co. Advocates (hereafter the Respondent) swore a replying affidavit on 16.05.2024. Stating that the Motion constitutes an abuse of the process of the court and has been filed in bad faith, the coming after the close of the trial and at the stage of final submissions. He further stated that the claim on special damages now sought to be introduced constitutes part of his defence, and the orders sought are prejudicial to the defence case. The Respondent additionally stated that in any event, the Motion which has been brought too late in the day, is purely intended to circumvent the ends of justice. The Respondent therefore prayed that the Motion be dismissed with costs.
4. Thus, the parties were directed to file and exchange written submissions on the Motion. To support the Motion, counsel for the Applicant anchored his submissions on the decision in *Bosire Ogero v Royal Media Services* (2015) eKLR and Order 8, Rules 3(1) and (2) and 4 of the *CPR*, on the amendment of pleadings. Counsel reiterated the contents of the supporting affidavit and urged the court exercises its discretion by granting the Motion. Adding that the Respondent will not be prejudiced in any substantial manner or at all.
5. In urging the court to dismiss the Motion, the Respondent’s counsel based his submissions on the decisions in *Evergreen Marine (Singapore), PTE Limited & Gulf Badar Group (Kenya) Limited v Petra Development Services Limited* [2016] eKLR and *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR concerning the principles that govern applications for leave to amend pleadings. Counsel proceeded to echo sentiments raised in the replying affidavit, and pointing out that the Respondent has since filed written submissions, in compliance with the directions previously issued by this court. Counsel further argued that the sums which the Applicant seeks to introduce through amendment of the Summons is in contention, and on those grounds, urged the court to dismiss the Motions with costs.
6. Esmail Haji Ebrahim (hereafter the 3<sup>rd</sup> Party) did not participate at the hearing of the Motion.
7. The court has considered the rival affidavit material and the submissions. The Motion seeks to amend the Summons, specifically prayer 2 which currently reads as follows:

“That the Defendant do release to the Plaintiff all sums held as purchase price received by the firm of Kiarie Kamere & Co. Advocates from the transaction for sale of portions of land of the parcel of land known as Land Reference No.s 1286/1 and 14282-Thika.” sic
8. The Applicant now wishes to amend the above prayer to include the special damages sought, thus:
  2. That the Defendant do release to the Plaintiff Kshs. 9,350,000 being all sums held as purchase price received by the firm of Kiarie Kamere & Co. Advocates from the transaction for sale of portions of land of the parcel of land known as Land Reference No.s 1286/1 and 14282-Thika.
9. The matter of amendment of pleadings is well settled. Order 8, Rule 3 of the *CPR* provides that:
  - (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 subrule (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 subrule if it thinks just so to do.
  - (3) An amendment to correct the name of a party may be allowed under subrule (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.  
...
  - (5) An amendment may be allowed under subrule (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.
10. Order 8, Rule 5 *CPR* on its part expresses that:
- (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.
11. From a reading of the foregoing provisions, it is clear that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered. For purposes of determining the real question or issue in controversy between the parties. The discretionary power donated by the Rules ought, however, to be exercised in a judicious and just manner.
12. Bullen Leak and Jacobs *Precedents of Pleadings*, 12<sup>th</sup> Edition page 127 states that:
- “...the power to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”
13. The Court of Appeal in the case of *Dakianga Distributors (K) Ltd v Kenya Seed Company Limited* [2015] eKLR taking cue from the above statements observed as follows:
- “A useful discussion on the importance of pleadings is to be found in Bullen and Leake and Jacob's *Precedents of Pleadings*, 12th Edition, London, Sweet & Maxwell (The Common Law Library No. 5) where the learned authors declare:-
- “The system of pleadings operates to define and delimit with clarity and precision the real matters in controversy between the parties upon which they can prepare and present their respective cases and upon which the court will be called upon to



adjudicate between them. It thus serves the two-fold purposes of informing each party what is the case of the opposite party which he will have to meet before and at the trial, and at the same time informing the court what are the issues between the parties which will govern the interlocutory proceedings before the trial and which the court will have to determine at the trial.”

14. Here, the question is whether the Applicant has brought his prayer for leave to amend his pleadings within the circumstances envisaged above. The Summons herein was originally filed on 22.08.2017 and was opposed by the Respondent by a replying affidavit sworn on 19.06.2018. The record further confirms that the matter proceeded to hearing on 30.04.2023 when the sole witness being the Applicant, testified. The Respondent, on his part having cross-examined the witness, opted to close his case without calling any evidence. The court then directed the parties to file final written submissions. Two days later, the Applicant moved this court by the instant Motion.
15. The amendment sought is in respect of special damages, which the Applicant seeks to introduce specifically in prayer 2) of his Summons. The question of the sums claimed by the Applicant in his pleadings was raised by the Respondent in the replying affidavit initially, and during the trial in cross-examination of the Applicant. It therefore appears that the Motion was a last-minute response to the outcome of cross-examination, and the realization on the part of the Applicant’s advocate, of the glaring omissions in their pleadings.
16. In the court’s view therefore, the instant Motion cannot be said to be one brought in good faith but rather, brought as an afterthought in a bid to seal perceived gaps in the Applicant’s pleadings and evidence. More so as neither the Applicant nor his advocate has sufficiently explained the delay in seeking to amend the prayer to include the sums sought, a material detail in contention, and at all material times within the knowledge of the Applicant.
17. Evidently, the Motion has been brought too late in the day; the suit having been instituted close to seven (7) years ago. The court is of the view that, given the timing of the Motion, the Respondent is likely to be prejudiced in his defence (which he might have to amend, possibly leading to the re-opening of the trial) and attendant further delay, if leave to amend were to be granted to the Applicant. All considered, the court does not feel assured that this is a proper case and stage to exercise its discretion in favour of the Applicant.
18. In the result, the Notice Motion dated 2.05.2024 must fail and is accordingly dismissed, with costs to the Defendant/Respondent.

**DELIVERED AND SIGNED ELECTRONICALLY AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY 2024.**

**C.MEOLI**

**JUDGE**

In the presence of:

For the Applicant: Ms. Gitonga h/b for Mr. Mogeni

For Respondent: Mr. Mandala

C/A: Erick

