



TSS Investments Limited v Kenya Revenue Authority; Commissioner of Lands (Third party) (Civil Suit 239 of 2015) [2023] KEELC 16700 (KLR) (28 March 2023) (Ruling)

Neutral citation: [2023] KEELC 16700 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 239 OF 2015
LL NAIKUNI, J
MARCH 28, 2023**

BETWEEN

TSS INVESTMENTS LIMITED PLAINTIFF

AND

KENYA REVENUE AUTHORITY DEFENDANT

AND

COMMISSIONER OF LANDS THIRD PARTY

RULING

I. Introduction

1. The Plaintiff/Applicant herein, TSS Investments Limited moved this Honorable Court by filing a Notice of Motion application dated March 25, 2022 under the provision of sections 1A, 3A and order 8 rule 2 of the [Civil Procedure Rules, 2010](#).

II. The Plaintiff/Applicant's case

2. The Plaintiff/Applicant sought for the following orders.
 - a. Spent.
 - b. Spent.
 - c. The Plaintiff be granted leave to amend the Plaintiff dated July 5, 2006 in accordance with the draft Amended Plaintiff annexed to this application.
 - d. The costs of this application be in the cause.



3. The application is based on the grounds, testimonial facts and the averments made out in the Supporting Affidavit of Nurein Tahir Sheikh Said, one of the directors for the Plaintiffs/Applicant company. He averred that it was the Plaintiff's case that it was the registered owner of all that parcel of land known as Land Reference Numbers Mombasa/Block XXI/585 (Hereinafter referred to as "The Suit Land"), while the Defendant had filed a Counterclaim contending that it was the registered owner of the parcel but claimed that the land parcel was Land Reference Number Mombasa/Block XXI/501.
4. It was deponed that the Plaintiff through its Advocate learnt that the titles to Mombasa/Block XXI/585 and/or Mombasa/Block XXI/501 were revoked by the Land Registrar Mombasa on June 6, 2011. The deponent stated that they only learnt of the said revocation on July 5, 2022 vide a Gazette Notice No 6333 which was attached to the Defendant's supplementary list of documents dated January 26, 2022.
5. It was further deponed that there would be no prejudice suffered since the Land Registrar would be represented in the suit by the Hon. Attorney General who was already on record. The deponent argued that the amendment sought would enable the Plaintiff's right to fair hearing and access to justice otherwise the suit would be defeated on a technicality.

III. The Responses by the Defendant

6. The Defendant responded to the application vide a 15 Paragraphed Replying Affidavit sworn by Mr Pius Nyaga, the Legal Officer for the Defendant together with annexures. He deponed that the proposed amendment was a delaying tactic by the Plaintiff, as the revocation was done on June 6, 2011 which was 11 years ago. Even where the Plaintiff learnt of the revocation vide the Defendant's supplementary documents dated January 26, 2022, the Plaintiff ought to have made this application immediately. The Defendant outlined the proceedings of the Court on the two occasions that the matter came up after the filing of the said Gazette Notice, and argued that the Plaintiff was not deserving of the Court's discretion since they had not offered any credible explanation for the inordinate delay in filling the application. It was further deponed that the proposed amendments amounted to a new cause of action on the revocation of title which was different from the cause of action in this suit. The deponed also argued that the Plaintiff stood to suffer no prejudice if the suit was allowed to proceed as currently as from the pleadings filed and urged court to dismiss the application.

IV. Submissions

7. On July 19, 2022 when all the parties were present in Court they were directed to have the Notice of Motion application dated September 28, 2022 be disposed off by way of written submissions. Pursuant to that all the parties complied with the stringent timelines. Thereafter, Court reserved the deliver its ruling on notice accordingly.

A. The Written Submissions by the Plaintiff/Applicant

8. On September 28, 2022 the Counsel for the Plaintiff/Applicant, the Law firm of Messrs Muriu Mungai & Company filed their written submissions in support of the application on September 28, 2022. Mr Kongere Advocate submitted on whether the proposed amendments ought to be allowed. He averred that the Defendant complained that the amendment had been sought eleven (11) years after the revocation of the title deed. He wondered how they would take action on something they were not aware about. In any case, the Defendant only became aware of the matter in the year 2021 and hence as a result they proceeded to file the Supplementary List of documents. The Counsel argued that if the Defendant had been aware of the revocation since the year 2011, it was in bad faith it concealed the material facts from the Plaintiff and Court. By so doing, they let the matter to proceed whose



outcome had long been determined extra – judicially. The Counsel held that delay was never a ground for refusing an application for amendment. To buttress on this point they cited the case of Marshall T Osanya Municipal Council of Mombasa (2006) eKLR where Court seem to be agreeing on this position thus:-

“Likewise mere delay is not a ground for declining to grant leave. It must be such delay s is likely to prejudice the opposite party beyond monetary compensation in costs”

9. The Counsel argued that the Plaintiff could not be said to be indolent in making the application for amendment, when they only became aware of the revocation on July 5, 2022, while the Counsel on record was preparing for the hearing that was scheduled on July 26, 2022. This was only a delay of six (6) months from the time they were served with the Supplementary List of Documents. They relied on the decision of Charo v Municipal Council of Mombasa & two others (2022) KECA 137 (KLR) which held that waiting until the date set for hearing of the appeal to have filed an application for amendment was not a unreasonable delay.
10. On whether by this amendment it would be introducing a new cause of action. On that opposition by the Defendant, the Counsel’s contention was that the provision of Order 8 Rule 3 (5) of the Civil Procedure Rules, 2010 allowed a party to introduce a new cause of action through an amendment, as it avoided filing of multiplicity of suits and the dispensation of justice in an efficient and cost effective manner. To buttress his point herein, the Counsel relied on the cases of:- Eastern Bakery v Castelino (1958) EA 461 and Kenya Anti-Corruption Commission v Julius Mwamsae & 3 others [2020] eKLR, where it was held that:-

“The applicant is clearly aggrieved by that action hence the intention to introduce the Attorney General as a party to these proceedings. It may be argued that this is a new cause of action, which may be true, but it is a cause of action that it so closely connected to the Plaintiff’s claim and thus capable of being heard together with this suit.”

11. The Counsel averred that the proposed amendments would reflect the true position of the title in question and that litigation should not be premised on false and incorrect set of facts. The Counsel further contended that amendments that were sought before the matter was heard ought to be allowed unless its demonstrated that it would irreparably prejudice the other party, which in this case the Defendant could be compensated by an award of costs. In the long run, the Counsel urged court to allow the application as prayed.

B. The Written Submissions by the Defendant/Respondent

12. On October 31, 2022 the Learned Counsels for the Defendant/ Respondent, the Law firm of Messrs. Njoroge Regeru & Company Advocates filed their written Submissions dated October 18, 2022 in respect of the Plaintiff’s Notice of Motion dated July 6, 2022. Mr Thuo Advocate stated that in making these submissions he relied on the following:-
 - (a) Replying Affidavit sworn by Mr.Pius Nyaga on July 18, 2022
 - b. The Defendant’s List & Bundle of Authorities and Case Digest dated July 18, 2022.
12. The Learned Counsel commenced his submission by providing background facts to the matter as clearly set out from the filed pleadings. He stated that the facts that militated against the Application were set out in the Replying Affidavit aforesaid. In a nutshell, he averred that the current Application was one in a series of tactics aimed at delaying the hearing and determination of the suit. It was reiterated



that the proposed amendment was said to be triggered by a revocation of the title to the suit property, which revocation occurred over 11 years ago.

13. To support his point, the Learned Counsel referred Court to the case of *Kassam v Bank of Baroda (Kenya) Ltd* [2002] eKLR, whereby the Court decried the conduct of parties who file late Applications for amendment. The Court stated as follows: -

“Late application for amendment are liable to be rejected, if there has been unexplained delay in making the application. Any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion.”

14. In the instant case, the Plaintiff has filed an application for leave to amend the Plaintiff after 16 years of lethargy in prosecuting the suit. This is also 11 years after the event which is said to form the basis of seeking leave to amend. No cogent explanation had been given for such delay.

15. Similarly, he referred Court to the said case of *Kassam v Bank of Baroda (Kenya) Ltd (supra)* the Court stated decried the conduct of parties who seek amendments in reaction to an opponent’s move, stating as follows:-

“ [The Application for amendment] was filed in a manner which gives a legitimate impression that if the Plaintiff had not moved in this manner the Defendant would simply have stayed put and done nothing about its defence. Such a reactionary conduct of a party points to a bad view of that party unless he explains his waiting for the other side to move before he also moves. There is no explanation given in the instant matter for the conduct. It may be true that sometimes an amendment is sought after the party seeking it has seen the next line of action by his opponent; but in the absence of an explanation as to why voluntary amendment was sought without it being prompted by the other part’s move, the bona fides of the desire to amend is put in question ”

16. The Learned Counsel argued that in this case, the Plaintiff’s purported justification for seeking leave to amend was that it had come across a gazette notice filed by the Defendant/Respondent herein. His contention was that that gazette notice had been in the public domain for 11 years. It would appear the Plaintiff/Applicant intended to prosecute its case as if the gazette notice, which was in the public domain, did not exist. He affirmed that such reactionary conduct was not consisted with good faith.

17. The Counsel further cited the case of *Olympics Sports House Ltd v School Equipment Centre Ltd* (2012) eKLR, where the Court held that a violation of a right could not be wished away on grounds of compensation by an award of costs. The Court delivered itself thus:-

“ Any party cannot be condemned to take advantage in lieu of his crystalized right which can be protected by an order of injunction ”

18. The Counsel submitted that the delay in seeking the amendment was a violation of the Defendant/ Respondent’s right to a fair trial which included the right to have a dispute concluded expeditiously. Thus, he stressed that a violation of a right could not be wished away on grounds of compensation by an award of costs. Borrowing from the above authority on injunction, the Learned Counsel contended that the fact that the Defendant/Respondent in this case may be compensated by an award of costs was not enough to have the Defendant’s right to fair trial, which included the right to quick disposal of the suit, violated by the application for amendment.



19. In conclusion, the Learned Counsel stated that the Defendant/Respondent had demonstrated that the Plaintiff/Applicant application had no merit and urged Court to dismiss with costs to the Defendant/Respondent herein.

V. Analysis and Determination

20. I have carefully considered the issues raised from the filed application, the responses and the submissions by the parties and the relevant provisions of the Law. In order to reach a reasonable decision, the Honorable Court has framed two (2) issues for its determination. These are:-
- a. Whether the Notice of Motion applicated dated 28th September, 2022 seeking for leave to amend its Plaint dated July 5, 2006 to include the revocation of titles to Mombasa/Block XXI/585 and/or Mombasa/Block XXI/501 by the Mombasa Land Registrar on June 6, 2011 has any merit.
 - b. Who will bear the costs of the application.

Issue No. a). Whether the Notice of Motion applicated dated September 28, 2022 seeking for leave to amend its Plaint dated July 5, 2006 to include the revocation of titles to Mombasa/Block XXI/585 and/or Mombasa/Block XXI/501 by the Mombasa Land Registrar on June 6, 2011 has any merit.

14. Under this sub heading, the main issue to consider is the principles on amendment of pleadings. The granting or refusal of leave to amend any pleading is a matter where the Honorable Court has free and unfettered discretion to be exercised rationally and on well settled principles. The provision of order 8 rule 3 of the Civil Procedure Rules, 2010 governs the granting of leave for amendments. It states:
- (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 Sub rule (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 Sub rule if it thinks just so to do.
15. As a matter of course and common practice, amendments sought before hearing are generally allowed especially if there will be no injustice caused on the other party. An injustice would occur where a party cannot be adequately compensated by an award of costs. In the ordinary circumstances, amendments sought before the hearing of case ought to be freely allowed unless it could be demonstrated that the amendment sought would irreparably prejudice the other party. In this case, hearing has not commenced. It is not lost to the attention of this Honorable Court that this a fairly old suit having been filed on July 5, 2006. This application was filed on July 6, 2022, which is 16 years since the inception of the suit. The matter was first given a hearing date on November 20, 2018 but had never taken off as parties for reason or another failed to proceed. Indeed, its on record that the Plaintiff/Applicant were penulised to meet the Costs for the day.
16. From the face value, the main concern perpetrated by the Defendant/Respondent is the delay in concluding this case by the Plaintiff/Applicant. Undoubtedly, the Court totally agrees with the Learned Counsel for the Defendant/Applicant the matter had taken unnecessarily long to be heard



and finalised. As a policy, all matters should be expeditiously settled as based from the legal maxim and founded under article 159 (2) (a) of the *Constitution of Kenya, 2010* to wit:

“Justice delayed is Justice denied” comes in here to play.

17. Be that as it may, there seem to be a plausible reason for this delay provided explained by the Plaintiff/Applicant herein. The Learned Counsel argued that in this case, the Plaintiff's purported justification for seeking leave to amend was that it had come across a gazette notice filed by the Defendant/Respondent herein. His contention was that that gazette notice had been in the public domain for 11 years. It would appear the Plaintiff/Applicant intended to prosecute its case as if the gazette notice, which was in the public domain, did not exist. He affirmed that such reactionary conduct was not consisted with good faith.
18. As a defence, the Plaintiff/Applicant contended that their Counsel became aware of Gazette Notice No. 6333 dated June 6, 2011 having seen it from Item 9 on the Supplementary list and bundle of documents dated January 26, 2021 and filed in court on February 11, 2022 by the Defendant/Respondent. The Plaintiff/Applicant had never been aware of this information there before until on July 5, 2022 while preparing for hearing of the suit set for July 26, 2022. The Court fully concurs with the Counsel for the Plaintiff/Applicant that they would never have taken any step on a matter which had never been within their knowledge. It is instructive to note and perhaps may remain as a matter of conjecture, that this particular document – the Gazette Notice, though a public document, may never have been within the knowledge or access or possession of any the parties herein nor the public. I say so as this may have been the reason that the Defendant/Respondents also found it needful to file it after all these years through the filed Supplementary Affidavit having suddenly discovered of its existence.
19. In all fairness, I strongly believe, the issue of the revocation of the title only came to the knowledge of the Defendant in the year 2021 and as result of that new discovery they sought leave to file a Supplementary List of Documents. From the given circumstances, there was no plausible reason then, why the suit should continue on wrong information in form of a revoked titles deed. I see no prejudice the amendment will occasion onto the Defendant/Respondent herein.
20. I have perused the Draft Amended Plaintiff. The amendment seeks to introduce the Land Registrar Mombasa as the 2nd Defendant. In my view, the Plaintiff ought to have sought leave for joinder or substitution or addition of party as envisioned in the provision of Order 1 Rule 10 of the *Civil Procedure Rules 2010*. This would have enabled the Defendant to respond to whether this new party – the Land Registrar ought to be a party to the proceedings. If the amendment is allowed, it will not clarify the issue for determination but rather become split issues that the court was already willing to hear and determine. He also argued that allowing the joinder of party which would cause more delay of the matter and taking it back to the pretrial proceedings despite of its age before the Court.
21. On this point, the Court has a different view altogether. It strongly holds that by allowing the proposed amendments shall not cause the Plaintiff/Applicant to subject this matter further delaying tactic taking the Court.
22. In the case of: *Joshua Kimani v Kiso Enterprises Limited & 3 others* (2020) eKLR, the Court held that:-

“The Learned Authors of Halsbury's Laws of England, 4th Edition (Re – issue), Vol. 36 (1) at Paragraph 76, state the following about amendments of pleadings:-

“...the purpose of amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document,



either on application by any party to the proceedings or of its own motion.....
The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if any on analysis of it, it is intended for first time thereby to advance a new ground of Defence, if the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side.....”

23. It is noted that the Defendant, has a Counter Claim dated October 26, 2006 and filed on October 27, 2006. I believe the bundle of documents dated January 26, 2021 was in support of the Counter claim. All said and done, in my view, I strongly hold that the proposed amendments whereby the issue of the revocation of the title deed to the suit land and the Land Registrar are being introduced to the matter would to some large extent facilitate the determination of the real question in controversy between the parties – the Plaintiff and the Defendant herein.
24. The discretion to amend as earlier stated ought to be carefully and jealously exercised. The Court fully agrees with the assertion advanced by the Learned Counsel for the Plaintiff and the legal ratio upheld in the case of *Julius Nzioki Wambua v Mohamed Salim Khamis & another* (2020), eKLR where the Court held that:-
- “The object of amendment of pleading is to enable the parties to alter their pleading so as to ensure that the litigation between them is conducted, not on the false hypothesis of facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of facts which the parties really and finally intend to rely on”
25. Despite of the few pointed out weaknesses apparent on the face of this matter being its age in Court and the process of joinder of parties, certainly this is one of those peculiar incidences and also being a land matter that the principles of the inherent powers of the Court and Overriding Objectives as founded under the provision of sections 1, 1A, 3, 3A of the *Civil Procedure Act*, Cap 21, Sections 3 and 13 of the Environment & Land Court Act, No 19 of 2011; Sections 101 of the *Land registration Act*, No 3 of 2012 and Section 150 of the *Land Act*, No 6 of 2012 and Article 159 (1) and 2) of the *Constitution of Kenya, 2010* comes to play while considering this application for amendment by the Plaintiff/Applicant. Besides, while considering the application for amendment of the Plaint herein, in the given circumstances afore stated, the Court is also guided by the principles of natural justice, equity and Conscience and fair hearing as elaborately enshrined under the provisions of Articles 10 (2) (b); 25 (c); and 50 (1) & (2) of the *Constitution of Kenya, 2010*. For these reasons the application becomes successful.
26. I have noted that the last adjournment was granted by Court on February 17, 2022, where the court noted with great concern on the matter age of the matter and stressed the need of it to be finalized expeditiously. The Court voiced its apprehension that it’s one of the matters that was causing backlog and it ought to be heard within 90 days from that time. This was taking that there were witnesses who had travelled from Nairobi to Mombasa to tender evidence. Judicial notice was taken to the effect that land matters were very sensitive and the Court cannot hear such witnesses virtually. The court proceeded to fine the Plaintiff/Applicant a costs to the tune of Kenya shillings forty three thousand (Kshs 43,000/=) as well as Court Adjournment Fess of Kenya Shillings Five Thousand (Kshs 5,000/=), which was to be paid before the next court date which was on May 18, 2022. Nonetheless, it is noted that todate the Plaintiff/Applicant is still to comply with the orders of court issued on February 17, 2022.



27. Arising from the intricacies, the surrounding facts and inferences of this case, I discern that the Land Registrar, Mombasa be joined in these proceedings so that they may effectually assist Court in arriving at an informed decision as it adjudicate on all the questions and issues in the matter.

Issue No. b). Who will bear the Costs of the application

28. It is now well established that issues of Costs are at the discretion of Courts. Costs mean the award that is granted to a party at the conclusion of a legal action, process and/or proceedings in any litigation. The Proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the event. By event here, it means the results or outcome of the legal action, process and/or proceedings herein. (See the Supreme Court case of *Jasbir Rai Singh Rai v Tarlochan Singh* (2014) eKLR; *Cecilia Ngayo v Barclays Bank of Kenya* (.....) eKLR and *Rosemary Wairimu Munene v Ibururu Dairy Co – operative Society* (2014) eKLR)
29. From the instant case, the result are that the Plaintiff/Applicant has been successful in prosecuting their Notice of Motion application dated September 28, 2022. However, taking that the matter is still proceeding on, the Costs to be in the cause.

VI. Conclusion & Disposition

30. The upshot of all this and based on the analysis of the framed issues, the Honorable Court based on the principles of preponderance of probability, finds that the application and the prayers sought to be satisfactory. Thus, I proceed to order as follows:-
- a. That the Notice of Motion application dated September 28, 2022 be and is hereby allowed as it is meritorious.
 - b. That leave be and is hereby granted to the plaintiff under order 1 rule 10 (1), (2), (3) & (4) of the *Civil Procedure Rules, 2010* to join the Land Registrar, Mombasa into this suit as a 2nd Defendant herein.
 - c. That an order be and is hereby made for the Plaintiff herein to file and serve the Amended Plaintiff as per the attached proposed Draft Amended Plaintiff by paying the pre requisite filing fees within the next fourteen (14) days from the date of the delivery of this Ruling hereof.
 - d. That an order made for the Defendant herein be and is hereby granted corresponding leave to file and serve Amended Defence and/or Counter Claim within the next fourteen (14) days from being served with the Amended Plaintiff by the Plaintiff.
 - e. That the Plaintiff herein directed to serve the Land Registrar with all the filed pleadings in this matter within the next seven (7) days after filing the Amended Plaintiff and thereafter the Land Registrar granted leave of Fourteen days to fully comply with the provisions of Orders 6, 7 and 11 of the *Civil Procedure Rules, 2010*.
 - f. That for expediency sake and taking the age of the matter, the same to be heard and disposed off within the next One Hundred and Eighty (180) days commencing from October 9, 2023. There be a second Pre – Trial Session/Conference at a mention on May 22, 2023 pursuant to the provision of Order 11 of the *Civil Procedure Rules, 2010*.
 - g. That the Plaintiff directed to ensure that there is adherence with the directions/orders granted by this Honorable Court on February 17, 2022 before the next Court proceedings without fail.
 - h. That costs of the application to be in the cause.



31 It is so ordered accordingly.

RULING DELIVERED THROUGH MICROSOFT VIRTUAL TEAMS, SIGNED AND DATED AT MOMBASA THIS 28TH DAY OF MARCH, 2023.

**HON. JUSTICE (MR) L.L NAIKUNI (JUDGE),
ENVIRONMENT & LAND COURT AT MOMBASA**

In the presence of:-

- a. M/s. Yumnah, Court Assistant.
- b. M/s. Ndirangu Advocate holding brief for Mr. Billy Kongere Advocate for the Plaintiff/Applicant.
- c. M/s. Wambaa Advocate holding brief for Mr. Garishon Thuo Advocate for the Defendant.
- d. No appearance for the 3rd Party.

