



Mawa Family Limited v Amica Savings and Credit Co-operative Society Limited & another (Civil Case 2"B" of 2022) [2024] KEHC 13474 (KLR) (30 October 2024) (Ruling)

Neutral citation: [2024] KEHC 13474 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MURANG'A
CIVIL CASE 2"B" OF 2022
CW GITHUA, J
OCTOBER 30, 2024**

BETWEEN

MAWA FAMILY LIMITED PLAINTIFF

AND

**AMICA SAVINGS AND CREDIT CO-OPERATIVE SOCIETY
LIMITED 1ST DEFENDANT**

BENSURE AUCTIONEERS 2ND DEFENDANT

RULING

1. This Ruling is in respect of two applications which were filed by the parties herein separately but which were by and large inter-related. The court therefore issued directions on 3rd July 2023 that the applications will be heard together.
2. The defendants were the first to file their application Vide a Notice of Motion dated 24th August 2022. They sought declarations that some documents filed by the plaintiff in its list of documents dated 1st March 2022, namely, a Valuation Report dated 16th December 2021 and a certificate of search relating to land parcel No. LR Murang'a Municipality Block 11/34 dated 10th February 2022 and 14th February 2021 be expunged from the record as they amounted to illegally obtained evidence.
3. The defendants also sought to strike out averments in paragraphs 5,10(a) 4(c);12,13,14,15 and 16 and prayers (I) 4 (II) in the plaint dated 1st March 2022 and averments in paragraphs 3,5,6,9,10 and 17 of the plaintiff's witness statement dated 1st March 2022 which in their view were based on illegally obtained evidence.
4. The 2nd application was filed by the plaintiffs on 17th October 2022 seeking courts leave to amend its plaint dated 1st March 2022 as per the draft amended plaint annexed to the application. The plaintiff prayed that the draft amended plaint be deemed as duly filed upon payment of requisite court fees and



that if the application was allowed, the defendant be granted leave to amend their defence within 14 days of the court's orders.

5. The two applications were prosecuted by way of written submissions which were highlighted before me on 29th April 2024 by learned counsel Ms Phoebe Juma who appeared for the plaintiff and learned counsel Mr. Masai who represented the defendants.
6. After considering the two applications, I have decided that for good order, I should first deal with the plaintiff's application since its outcome is likely to have a bearing on my determination of the defendant's Notice of motion dated 24th August 2022.
7. As stated earlier, the plaintiff in its application dated 17th October 2022 sought this court's leave to amend its plaint dated 1st March 2022. The application was supported by an affidavit sworn on 17th October 2022 by one of its directors, Ms. Josephine Mukami Maina and a second affidavit sworn on 6th September 2022 by a Mr. Joel Mwangi Muchai.
8. The depositions in these two affidavits, read together with the draft amended plaint annexed to Ms. Josephine Mukami's affidavit, reveals that the proposed amendments seek to introduce averments or allegations which were not contained in the original plaint but which sought to buttress its claim that the sale of its two properties namely LR No. Murang'a Municipality Block 11/34 and LR No. Loc. 11/Maragi/7959 in the exercise of the 1st defendant's statutory power of sale was illegal. The deponents aver that no public auction took place on 7th December 2021 contrary to the advertisement published by the defendants and that its property LR No. Murang'a Municipality Block 11/34 was irregularly sold by private treaty on the following day, a fact which was concealed to the plaintiff.
9. In addition, the proposed amendments seek to enjoin three additional parties to the suit on grounds that the proposed parties were necessary parties to the suit; that the proposed 2nd plaintiff was the one to who the loan facility subject matter of the suit was advanced while the proposed 3rd defendant was the purchaser of the security said to have been illegally and fraudulently sold by the 1st defendant in the purported exercise of its statutory power of sale. The proposed 4th defendant is the Land Registrar, Murang'a.
10. Further, the proposed amendments seek to introduce other prayers not contained in the original plaint. These are:
 - i. A Declaration that no valid/ legal auction was held by the 1st and 2nd defendants on 7th December 2021 .
 - ii) A declaration that the sale of the property LR. Muranga' Municipality Block 11/34 to the 3rd defendant on held on 8th December 2021 was irregular, unlawful and illegal.
 - iii. Cancellation of certificate of lease of land parcel Murang'a Municipality Block 11/34 issued to the 3rd defendant and reverted to the 1st plaintiff.
 - iv. An order directing the Murang'a Land Registrar to cancel title of property LR Murang'a Municipality Block 11/34 issued to the 3rd defendant and have it revert to the 1st plaintiff.
 - v. Reinstatement of the plaintiff's loan owed to the 1st defendant.
 - vi. An order directing the 1st defendant to reconcile its accounts and render a true and accurate account of the loan amount due to it from the plaintiff and 2nd plaintiff.
 - vii. The plaintiffs be allowed reasonable time to continue servicing their loan until they are cleared.



11. The application was contested through a replying affidavit sworn on 1st March 2023 by Pius Hiira, the 1st defendant's Credit Manager. In his lengthy affidavit which looked more like written submissions than an affidavit, Mr Hiira deponed, in a nutshell, that the proposed amendments lacked any legal basis as they were anchored on information deponed to by Mr. Joel Mwangi Muchai in his affidavit dated 6th September 2022 which was derived from an alleged conversation between him and Mr. Joel Mwangi ; that the affidavit was inadmissible in evidence for breaching the rules of admissibility of electronic evidence.
12. Moreover, Mr. Hiira deponed that if the amendments were allowed, they would automatically oust the jurisdiction of this court; that the proposed amendments amounted to a fresh suit and some of the prayers sought to be introduced were legally untenable. He contended that the application constituted an abuse of the court process and ought to be dismissed.
13. Having carefully considered the application, the affidavits sworn in support and in opposition to the Motion as well as the parties rival written and oral submissions together with the authorities cited by both parties, I take the following view of the matter.
14. The law governing amendment of pleadings is provided for in Section 100 of the [Civil Procedure Act](#) (CPA) which is replicated in Order 8 Rule (3) Civil Procedure Rules (CPR).

Section 100 of the CPA stipulates 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.”

Order 8 rule 3 (1) is in the following terms:

“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.”

Order 8 Rule 5 (1) CPR reiterates the purpose of amendment of pleadings and provides as follows:

“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.”

15. From the foregoing provisions of the law, it is evident that this court has wide and unfettered discretion to allow amendment of pleadings at any stage in the proceedings before Judgment on such terms as it deems fit.

I must hasten to add that the policy of the law as can be discerned from many decided cases is that amendment to pleadings should be freely allowed so as to enable parties raise all issues in controversy between them so that they can be exhaustively and finally determined. Leave to amend pleadings should however not be granted if sought in bad faith or if the proposed amendments will introduce a new cause of action that would substantially change the nature or character of the suit or if the proposed amendments would cause injustice or prejudice to the opposite party which cannot be properly compensated by way of costs.



See: Eastern Bakery V Castlelino [1958] EA 461; JMK V MWM & Another [2015]eklR; Elijah Kipngeno Arap Bii V Kenya Commercial Bank[2013] eklR amongst others.

16. In addition, leave to amend may also be refused if the proposed amendment is not necessary for determination of the real question in dispute between the parties, for instance, if it was irrelevant or would only raise a technical point or if it was demonstrated that the amendment if allowed would cause undue delay to trial of the suit.
17. Having laid down the principles that would guide a Court in exercising its discretion to determine whether or not to grant leave to amend, I will now turn to the merits or otherwise of the current application.

The plaintiff has asserted in his supporting affidavit that after filing the plaint dated 1st March 2022, it came across information showing that one of the properties it had charged as security for the loan advanced by the 1st defendant was not sold in a public auction on 7th December 2021 in exercise of the 1st defendant's statutory power of sale as advertised in the Statutory Notice; that the property was sold by private treaty on 8th December 2021.

Without making any finding in order not to prejudice hearing of the suit which is yet to commence, I note that this claim by the plaintiff has not been explicitly denied by the 1st defendant. The 1st defendant has only challenged the admissibility of evidence contained in the affidavit sworn by Mr. Joel Mwangi Muchai.

18. In my view, contrary to the 1st defendant's submissions, the proposed amendment if allowed will not introduce a new cause of action or change the nature or character of the plaintiff's suit since it will only raise an additional allegation to those contained in the original plaint which challenge the manner in which the 1st defendant exercised its statutory power of sale.
19. In my opinion, the proposed amendment is necessary as it will bring to the fore the real question in controversy between the parties which is whether or not the 1st defendant's sale of one of the plaintiff's properties namely LR No. Murang'a Municipality Block 11/34 in exercise of its statutory power of sale was irregular or unlawful or was done in accordance with the law.
20. As stated earlier, the other proposed amendments seek to introduce new prayers in the suit and joinder of three more parties.

The 1st defendant has submitted that if the amendments were allowed, some of the proposed new prayers will oust the jurisdiction of this court which will henceforth vest in the Land and Environment court; that some of the proposed prayers were legally untenable as they invite this court to re-write terms of the charge instruments executed by the parties.

21. In my considered view, the proposed additional reliefs flow from the plaintiff's claim that the 1st defendant unlawfully exercised its statutory power of sale over one of its properties. The proposed new reliefs are the remedies the plaintiff seeks to correct the alleged breach of the law committed by the defendants. Whether or not the proposed reliefs are legally tenable or capable of being granted is a substantive issue which can only be canvassed during hearing of the suit and a determination made by the trial court after considering the merits or otherwise of the plaintiff's suit.
22. Regarding the amendment proposing to enjoin an additional plaintiff and two defendants to the suit, the proposed 2nd plaintiff is the deponent to the plaintiff's supporting affidavit and has claimed that being the plaintiff's director, she is the one to whom the 1st defendant advanced the loan facility in



question but used properties registered in the plaintiff's name as security. This claim has not been disputed by the 1st defendant in his replying affidavit.

23. The proposed 3rd defendant is the purchaser of the property sold by the defendants through the impugned sale while the proposed 4th defendant is the Land Registrar, Murang'a. Given the nature of the plaintiff's claim, I am satisfied that the joinder of the proposed parties is necessary to enable the court effectively and conclusively adjudicate and finally settle with finality all issues raised in the suit.
24. In any event, I am convinced that allowing the leave sought will not occasion any prejudice to the defendants and proposed defendants since the court has power to grant the existing defendants leave to amend their statements of defence and the proposed defendants will have an opportunity to file their statements of defence. Any inconvenience the 1st and 2nd defendants are likely to suffer if leave was granted can be adequately ameliorated by an award of costs. In addition, as stated earlier, hearing of the suit is yet to commence and there is no indication that allowing the amendments will cause undue delay in the hearing or conclusion of the trial.
25. For all the foregoing reasons, I find merit in the plaintiffs Notice of Motion dated 17th October 2022 and it is hereby allowed on terms that the plaintiff will amend its pleadings as per the draft amended pleadings annexed to the application. The amended pleadings shall be filed and served on the defendants within 14 days from today.

The 1st and 2nd defendants shall be at liberty to file an amended defence within 14 days of service of the amended pleadings.

The 3rd and 4th defendants shall file their statements of defence within 14 days of service.

26. Having taken into account all relevant factors, I award costs of the application to the 1st defendant since the 2nd defendant did not defend the application.
27. Having determined the plaintiff's application, I now turn to consider the defendant's application dated 24th August 2022.

I have already summarized the prayers sought in the application in the introductory part of this ruling and I see no need to rehash them here. Suffice is to say that the crux of the application is the defendants prayer that the court expunges from the original pleadings and the plaintiff's list of documents the valuation report dated 16th December 2021 and certificate of official search dated 14th February 2021 and 10th February 2022 for being illegally sanctioned making them illegally obtained evidence.

The defendants also seek striking out averments in several paragraphs and prayers in the original pleadings and several paragraphs in the plaintiff's witness statement on grounds that the same were based on illegally obtained evidence.

28. The application was opposed by the plaintiff vide the replying affidavit sworn by its director Josephine Mukami Maina on 17th October 2022.

In brief, the plaintiff denied the defendant's claim that the aforesaid valuation report and certificates of search were illegally sanctioned and therefore constituted illegally obtained evidence. The plaintiff asserted that the aforesaid documents were properly and lawfully obtained and should not be expunged from the court record as prayed.

29. After carefully considering the application alongside the written and oral submissions made by learned counsel on behalf of the parties, I find that prayer 6 of the application in which the defendants sought striking out of several paragraphs in the pleadings has now fallen by the wayside given this court's



determination of the plaintiff's application dated 17th October 2022. It is therefore not necessary for me to deal with the said prayer.

30. As regards the other prayers, both learned counsel made long and comprehensive submissions on whether ownership of the property said to have been auctioned passed to the purchaser at the fall of the hammer or after registration and transfer of the property to his name. They also made lengthy submissions on whether or not the plaintiff's right of redemption was extinguished at the fall of the hammer or after registration of the purchaser as owner of the property.

According to the parties' submissions, an answer to the two issues above will be what would determine whether or not the valuation report and certificates of search were legally or illegally obtained.

31. In my considered view, the parties in their submissions missed the real issue which the court was called upon to determine when considering the applicant's prayer for expunging of documents in the plaintiff's list of documents and striking out of paragraphs in the plaintiff's witness statement on grounds that they had been illegally obtained or were based on illegally obtained evidence. With due respect, these prayers were in my view misconceived and premature.

I say so because a court cannot determine in the context of an application such as the one before me whether or not the aforesaid documents were lawfully or illegally obtained. This is a matter of evidence which can only be adduced during the trial if the plaintiff actualizes its intention of relying on the said documents as evidence in support of its case. The court can only rule on the admissibility or otherwise of documents or any other evidence in the course of a trial if the party that wishes to rely on the documents applies for their admission as evidence in support of its case.

32. In view of the foregoing, I find that the defendants application dated 24th August 2024 lacks merit and it is hereby dismissed with costs to the plaintiff.

33. The upshot of this ruling is that the plaintiff's application dated 17th October 2022 is allowed on terms stated in paragraph 26 above with costs to the 1st defendant while the defendants' application dated 24th August 2022 is dismissed with costs to the plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MURANG'A THIS 30TH DAY OF OCTOBER 2024.

HON. C.W. GITHUA

JUDGE

In the presence of:

Ms. Susan Waiganjo, Court Assistant

No appearance for the parties

