



**Kanoga & 2 others v Guardian Bank Limited & another (Civil Suit E019 of 2021) [2024] KEHC 15178 (KLR) (22 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 15178 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KIAMBU  
CIVIL SUIT E019 OF 2021  
DO CHEPKWONY, J  
NOVEMBER 22, 2024**

**BETWEEN**

**SIMON WARUI KANOGA ..... 1<sup>ST</sup> PLAINTIFF  
ROSE WANGUI WARUI ..... 2<sup>ND</sup> PLAINTIFF  
SIMKAN AGENCIES LIMITED ..... 3<sup>RD</sup> PLAINTIFF**

**AND**

**GUARDIAN BANK LIMITED ..... 1<sup>ST</sup> DEFENDANT  
JEREMIAH MUCHENDU T/A ICON AUCTIONEERS ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This is a ruling in respect of a Notice of Motion application dated 2<sup>nd</sup> December, 2023 which has been filed pursuant to Order 8 Rule 3 and 5 and Order 51 of the Civil Procedure Rules and therein the Applicant seeks the following orders:-
  - a. That this Honourable Court be pleased to grant the Plaintiff leave to amend Plaintiff dated 11<sup>th</sup> August, 2021 as per the Draft Amended Plaintiff annexed hereto and marked 'D1'.
  - b. That the Amended Draft Plaintiff marked 'D1' annexed hereto be deemed as duly filed upon payment of the requisite fee.
  - c. That the costs be in the cause.
2. The Application is based on the grounds as set out on its face and the Supporting Affidavit sworn by Simon Warui Kanoga on his own behalf and on behalf of the 2<sup>nd</sup> and 3<sup>rd</sup> Applicants on the instant date. It is the Applicant's case that the Plaintiff was filed on 11<sup>th</sup> August, 2021 and there is need to amend the pleadings so that they can include a claim for compensation of Kshs. 21,250,000/= for the unlawful seizure and sale of the 3<sup>rd</sup> Applicant's excavator. The Applicants also seek to amend the name of the 3<sup>rd</sup>



Applicant which has been misspelt. The Applicants contend that there will be no prejudice that will be occasioned to the Defendants and have urged the court to allow the same.

3. The Respondents opposed the Application through the Grounds of opposition dated 5<sup>th</sup> February, 2024 on the following grounds:-
  - a. That the pleaded basis of the application is not factual. In the premises, the application has not been presented in good faith and the Plaintiff are therefore undeserving of the exercise of the Honourable Court discretionary power in their favour.
  - b. That the proposed amendments effectively seek to introduce a new cause of action that would otherwise have been statute time barred and therefore if allowed would be prejudicial to the Defendants.
4. The court directed the application to be canvassed by way of written submissions whereby the Applicants filed theirs dated 30<sup>th</sup> May, 2024 while the Respondents filed theirs dated 12<sup>th</sup> June, 2024, all which the court has read through for consideration in its determination.

### **Analysis and Determination**

5. Having read through the Supporting Affidavit and Grounds of Opposition filed by the Respondents alongside the submissions filed by either party and find the main issue for determination is whether the application for amendment of pleadings has met the legal threshold.
6. The law on amendment of pleadings is provided for under Section 100 of the *Civil Procedure Act* as follows:-

(100) General power to amend

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 of the Civil Procedure Rules allows for amendment of pleadings in the following terms:-

- (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.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which



the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have 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.

7. It is trite that the principles for amendment of pleadings were explained by the Court of Appeal in the case of *Ochieng and Others –vs- First National Bank of Chicago*, Civil Appeal Number 147 of 1991 as follows: -

- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
- b. the amendments should be timeously applied for;
- c. power to amend can be exercised by the court at any stage of the proceedings;
- 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;
- 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 an amendment notwithstanding the expiry of current period of limitation.

8. The issue on amendment of pleadings was also discussed in the case of *George Gikubu Mbuthia –vs- Consolidated Bank of Kenya Ltd & Anor* (2016) eKLR where the Court of Appeal expressed itself as follows:-

“As regards the law, the High court readily accepted that the court has unfettered discretion to allow amendment of pleadings, which discretion must be exercised judiciously. It accepted too as a general position that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that court should liberally allow such amendments. However, he also noted situations when the court will refuse to exercise its discretion to allow amendments. Such cases include where a new or inconsistent cause of action is introduced; where vested interests or accrued legal rights will be adversely affected; where prejudice or injustice which cannot be properly compensated in costs is occasioned to the other.”

9. From both statute and case law, it is clear that amendments are made to correct errors or defects in the pleadings so as to determine the real question in controversy, and amend multiple suit.

10. The court has considered the Draft Amended Plaint that is annexed and filed in the Application as an annexure and notes that the amendments therein do not seek to introduce a new cause of action as alleged by the Respondents since the claim has already been set out in the Plaint? Therefore, this Court finds that it will not be prejudicial to the Defendants as they will have a chance to file an Amended Defence in response, if need be.

11. In the circumstances, the Notice of Motion application dated 2<sup>nd</sup> December, 2023 be and is hereby allowed with the following orders issuing:-



- a. The Plaintiff be and is hereby granted leave to amend Plaintiff dated 11<sup>th</sup> August, 2021 as per the Draft Amended Plaintiff annexed hereto and marked 'D1'.
- b. That the Amended Draft Plaintiff marked 'D1' annexed hereto be deemed as duly filed upon payment of the requisite fee.
- c. The Defendants are hereby granted leave to file and serve an Amended Defence in response, if need be, within fourteen (14) days upon service of the Amended Defence.
- d. Mention on 20<sup>th</sup> January, 2025 before the Deputy Registrar for Pre-trial Conference and other directions.

It is so ordered.

**RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 22<sup>ND</sup> DAY OF NOVEMBER, 2024.**

**D. O. CHEPKWONY**

**JUDGE**

