



**Kaoko v Barclays Bank of Kenya (Commercial Case E002 of 2021)
[2023] KEHC 218 (KLR) (25 January 2023) (Ruling)**

Neutral citation: [2023] KEHC 218 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
COMMERCIAL CASE E002 OF 2021
RE ABURILI, J
JANUARY 25, 2023**

BETWEEN

GORDON ORUPE KAOKO PLAINTIFF

AND

BARCLAYS BANK OF KENYA DEFENDANT

RULING

1. This ruling determines the plaintiff's application dated August 10, 2021 seeking leave of this court to amend the plaint further, the plaintiff also seeks that the draft amended plaint be deemed to be duly filed subject to payment of court filing fee and that costs be provided for.
2. The grounds upon which the application is predicated are that the amendment is necessary to ensure all issues arising between the parties are determined finally; that the plaintiff be allowed to amend a topographical error apparent on the face of the orders sought in the plaint as the same will be detrimental to him; that the amendment sought will enable the plaintiff establish the chain of custody of the suit property since the time the bank exercised its statutory power of sale to date; and finally that the amendment sought will not prejudice the defendant in any way.
3. The application is supported by an affidavit sworn by the plaintiff herein Mr Gordon Orure Kaoko on August 10, 2021 annexing the draft amended plaint reiterating the grounds.
4. The defendant filed grounds of opposition dated September 1, 2021 opposing the application for amendment and contending that the amendments are not necessary for determining the real question in controversy between the parties but rather aimed at defeating efficient and speedy determination of the suit; that the proposed amendments are malafides, intended to severely prejudice the defendant's rights to an easy conclusion of this suit. Further, that the plaintiff's application proposing the said amendments has been filed late, years after the suit was instituted with no explanation for the delay and finally, that the amendments proposed are merely explanations and an abuse of the court process.



5. The application was argued orally with the applicant's counsel Mr Sala reiterating the contents of the application, grounds and supporting affidavit adding that the application was filed timeously and in good faith. He also filed a list of authorities which speak to amendment of pleadings and urged the court to allow the application as prayed.
6. Opposing the application, the defendant's counsel Mr Kwaka submitted relying on the grounds of opposition referred to above and added that the matter was filed in 2009 and that no efforts have been made to set it down for hearing. That the defence was filed on May 12, 2010 and that in 2018, the court issued notice to show cause why the suit should not be dismissed for want of prosecution and that after the plaintiff filed an amended plaint on November 28, 2018, the defendant also filed an amended defence. That the plaintiff is not interested in the expeditious disposal of this suit; that the orders sought can be satisfied during discovery and that the amendments are predicated on allegations of the defendant having sold the charged property which the defendant has denied. Counsel urged this court to decline the application and dismiss it.
7. In a rejoinder, Mr Sala submitted that it was not correct to say that the plaintiff had not set down the suit for hearing as it was set down for hearing four times before it was transferred from the Environment and Land Court to this court. That the amendments are necessary as they seek for valuation of the property which prayer was not in the earlier amendment. Counsel submitted that although the suit was filed in 2009, it was transferred and initiated before the Commercial Court of the High Court in 2021.

Analysis and Determination

8. I have considered the application for amendment of the plaint and the opposition thereto. I have also considered the oral submissions by counsel for the respective parties and the rival positions taken.
9. The issue for determination is whether the prayer for amendment of the plaint is merited.
10. Before I determine that issue, I must make some observations which are from the court record and which are uncontroverted. It is correct to say that the suit herein originated in the sister superior court of the Environment and Land Court, *vide* ELC Case No 680 of 2015 and the original plaint having earlier on been amended on November 28, 2018 and filed in court on November 30, 2018. The suit was then later transferred to the High Court by Ombwayo J of ELC *vide* an order made on February 9, 2021 on a date that the same was due for hearing, on account that the suit was purely of a commercial nature. The defendant too filed its amended defence.
11. Therefore, is the application for amendment of plaint merited?
12. The law as regards the grant of leave to amend is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side; and there is no injustice if the other party can be compensated by costs.
13. The applicant submits that the proposed amendments is necessary to enable the court settle all issues in the dispute and that no prejudice will be occasioned to the defendant if the orders are sought. The defendant on the other hand accuses the plaintiff of bad faith and delay and that in any case, the amendments are not necessary since they are predicated on the assumption that the property was sold which is not the case.
14. In *Ochieng and 2 others v First National Bank of Chicago* (1995) eKLR, the Court of Appeal clearly set out the principles upon which courts may grant leave to amend pleadings. These are 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; and
 - 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.
15. The above-mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned. What that means is that the court has a very wide berth in granting leave to amend. This position was stated in the case of *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR.
16. The statutory provisions on amendments of pleadings is settled under Order 8 of the *Civil Procedure Rules*. Order 8 rules 5 & 3 provides that:
- 5. (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.
 - 3. (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.
 - (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.



17. In Nairobi HCC Civil No 2715 of 1987 *Lakhamshi Khimji Shah & another v Ajay Shantilal Shah & 2 others* [2010] eKLR it was held that for an application for leave to amend the pleading,
- i. The application should be made timely
 - ii. The application should be made in good faith
 - iii. The court should examine the nature and extent of amendments
 - iv. The court must ensure there is no new or inconsistent cause of action
 - v. That no injustice will be occasioned to the other party
18. The application was filed on August 11, 2021 whereas the transfer of this suit from ELC to the High Court was made on February 9, 2021, on a date when the suit was fixed for hearing and in July 2021, the plaintiff informed the court (Ochieng J) that he desired to amend the plaintiff so the court gave timelines for the same.
19. As to whether there has been delay, the suit has been around for quite a while and there is no dispute about that. The parties had even had the suit certified ready for hearing after complying with pretrial requirements.
20. On the merits of the amendments sought and whether they will help resolve all the issues involved in the suit, I observe that this is a commercial dispute revolving around land and that it is in the best interest of all parties that the issues raised be canvassed fully. Further, that after the amendment, the defendant will have the opportunity if need be, to file a further amended defence hence no prejudice will be occasioned.
21. Article 50(1) of the *Constitution* on fair hearing and the principles set out in *Ochieng and Others v National Bank of Chicago* Civil Appeal No 147 of 1991 guide a court in allowing application for amendments. I find no bad faith on the part of the plaintiff.
22. In the end, I find that the application sought is merited. I allow it and make the following orders:
- a. The plaintiff is granted leave to file a further amended plaintiff.
 - b. The further amended plaintiff together with all further documents and witness statements if need be to be filed and served within 7 days from the date of this ruling.
 - c. However, the document having not been duly filed, the court will not adopt the draft amended plaintiff, but directs the plaintiff/applicant to further amend the plaintiff as per the provisions of Order 8 rule 7 of the *Civil Procedure Rules* accordingly.
 - d. The defendant is granted corresponding leave to amend, file and serve a further amended defence together with all documents and witness statements if any within 7 days from the date of service of the further amended plaintiff.
 - e. The plaintiff shall have seven days of receipt of the further amended defence to file and serve a reply to a further amended defence.
 - f. As to costs of the instant application, this court in exercise of its discretion under section 27 of the *Civil Procedure Act* directs that costs of the application shall abide the outcome of the main suit.
23. Mention on....to confirm compliance and to give directions on the hearing of the suit.



24. Orders accordingly.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 25TH DAY OF JANUARY, 2023

R.E. ABURILI

JUDGE

