



Ongong & another v Paragon Electronic Limited (Environment & Land Case 1205 of 2016) [2023] KEELC 17062 (KLR) (27 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17062 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1205 OF 2016**

**AA OMOLLO, J
APRIL 27, 2023**

BETWEEN

ESTHER ADHIAMBO ONGONG 1ST PLAINTIFF

CARILUS OSAMBO ADEMBA 2ND PLAINTIFF

AND

PARAGON ELECTRONIC LIMITED DEFENDANT

RULING

1. Before the court is an application described as dated February 9, 2023 filed by the plaintiff seeking to further amend the plaint. The plaintiff has submitted on the nature of the amendment sought to be introduced which is to quantify the rental income. The plaintiff argues that amendments should be allowed freely to enable the court reach a just determination of the dispute.
2. The defendant through its counsel opposed the application vide the grounds of opposition filed and dated March 7, 2023. The grounds listed the following:
 1. The application is fatally defective and bad in law.
 2. The application does not meet the threshold and grounds for amendments of pleadings.
 3. The proposed amendments would occasion great prejudice to the opposing party which could not be made good by costs.
 4. The proposed amendment would introduce claims that are ex facie time barred.
 5. The proposed amendment is an abuse of process of court given that the information said to form the basis of the amendment has manifestly been in possession of the plaintiffs for over three years.
 6. The plaintiffs are guilty of laches.



3. Mr. Ataka learned counsel urged that the motion was defective because it is undated and it was not served. He added that the plaintiff also failed to attach a draft amended plaint contrary to the practice. In support of this argument, he cited *Cleophas Omondi v Dismas Wamaya* (2018) eKLR at paragraph 8 which states thus;

“I have looked at the suit as filed, the application, the response made, and the rival submissions. The Respondent made a relevant point namely: that the draft amended plaint was not attached to the application. This omission is not trivial. Such draft amended plaint is meant to clearly show the court the kind of amendments being effected. And this is necessary because not all kinds of amendment can be allowed. An amendment that for instance changes the entire character or nature of the suit cannot be granted. In a case like this one, it was even more crucial to avail the draft amended plaint because the Defendant is already suspicious that the amendment is intended to achieve objectives different from those expressed.”

4. The defendant submitted further that prayer D of the amended plaint on record already has a provision for quantifying the rent. It also stated that the intended amendment is time barred. The defendant urged the court to dismiss the application with costs.
5. In brief rejoinder, Mr. Munyua learned counsel for the applicant stated that their application is dated. That he had forwarded to the defendant’s counsel a draft and failure to upload the copy in the court system is an error that can be cured. He concluded by submitting that none of the claim sought to be introduced is time barred and urged the court to grant the orders sought.
6. The copy of the application uploaded in the court system is undated. However, it was accompanied with a dated certificate of urgency and supporting affidavit both dated February 9, 2023. The defendant filed grounds of opposition in responses inferring that it knew what was before court that required answering. Therefore, the omission is such that is curable by the provisions of article 159(2)(d) of the *Constitution* which states that;

“Justice shall be administered without undue regard to procedural technicalities.”

7. The defendant submitted that the amended plaint on record has provided for rental income. I have perused the amended plaint filed on March 3, 2017 and note that indeed in the reliefs sought under prayer d, the plaintiff has sought to be granted total rent arrears to be determined by a surveyor. Rental income is special damages which must be specifically pleaded. The manner of pleadings sought to be introduced is within the knowledge of counsel for the Defendant who is submitted was sent a copy of the draft further amended plaint. The service of the copy of the draft further amended plaint makes this case distinguishable from the circumstances of the *Cleophas Omondi case*. Besides causing delay, the defendant did not elaborate any prejudice they are likely to suffer if the amendment is allowed. In any event, they are at liberty to further amend their defence to cure any prejudice.
8. On the submissions that the amendment sought to be introduced is time-barred, that is question to be raised as a defence. It cannot form a ground for refusing an amendment. Order 8 rule 3(1) of the *Civil Procedure Rules* grants thus court discretion to allow amendment at any stage of the proceedings on such terms as to costs or otherwise as may be just.
9. The hearing in this case has not yet commenced. I find no reason to refuse the application. Consequently, I allow the application on the following terms;

a. The plaintiff is granted leave to further amend the plaint within 14 days hereof.



b. The further amended plaint shall be filed and served within the 14 days provided in (a) above.

c. The defendant granted corresponding leave to further amend their defence and counter-claim within 14 days of receipt of the further amended plaint.

d. Costs of this application awarded to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 27TH DAY OF APRIL 2023

A. OMOLLO

JUDGE

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