



**Mwangi & 2 others v Kimanga & another (Civil Suit 507 of 2011)
[2023] KEHC 17668 (KLR) (Civ) (25 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 17668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

CIVIL

CIVIL SUIT 507 OF 2011

JN MULWA, J

MAY 25, 2023

BETWEEN

LUCY WAITHRA MWANGI 1ST PLAINTIFF

JOHN IRUNGU GITHINJI 2ND PLAINTIFF

JULIUS KARIUKI MWANGI 3RD PLAINTIFF

AND

STEPHEN MAINA KIMANGA 1ST DEFENDANT

HON. ATTORNEY GENERAL 2ND DEFENDANT

RULING

1. Before the court is the 1st Defendant/Applicant's Notice of Motion dated 26th October 2022 brought under order 8 rule 3, 5 & 8 and order 1 rule 15 of the [Civil Procedure Rules](#) as well as Section 3A of the [Civil Procedure Act](#). The Applicant seeks the following orders: -
 1. That leave be granted to the 1st Defendant to amend its defence in terms of the Amended defence hereto attached.
 2. That the 1st Defendant be granted leave to bring on board a third party and file its defence and counterclaim as per the annexed draft Amended Defence and Counterclaim.
 3. That upon leave being granted, the draft Amended Defence and Counterclaim be deemed as duly filed.
 4. That Costs be in the cause.



2. The Application is based on the grounds set out on its face and supported by the Affidavits sworn on 26th October 2022 by the 1st Defendant Stephen Maina Kimanga and his Advocate, Jonathan Omangi.
3. The 1st Defendant's advocate avers that it is necessary to amend the 1st Defendant's Defence filed on 27th December 2011 to include a counterclaim against the Plaintiffs so as to assert his rights in the suit. He claims that it is in the interest of justice that the orders sought be granted.
4. The 1st Defendant in his Affidavit that he and his two co-directors of Fig Tree Hotel Ltd, passed a resolution dated 23rd March 2020 to file a defence and counterclaim on behalf of the intended third party namely "The Board of Directors Fig Tree Hotel Limited". He contends that it is necessary to do so since Fig Tree Hotel Ltd was at the center of the criminal case, which is the subject of the Plaintiff's malicious prosecution claim herein. This is because the Plaintiffs were accused of stealing money belonging to the Hotel while employed therein. In his view therefore, amendments and counter-claim by the intended third party will bring this matter to conclusion once and for all. He also avers that the amendment will not occasion any prejudice to the Plaintiffs.
5. The Plaintiffs responded through a Replying Affidavit sworn on 17th January 2023 by Lucy Waithera Mwangi, the 1st Plaintiff herein. The Plaintiffs contend that the orders sought are time barred and an indirect attempt to change the character of the suit after parties have already complied with pre-trial directions and set the matter down for hearing. They argued that the matters pleaded in the proposed amended defence regarding unauthorized diversion of money are based on transactions that occurred in 2007, which is over 16 years ago. In their view therefore, if the application is allowed, they would be greatly prejudiced as it would be unfeasible for them to obtain evidence in that regard.
6. In addition, the Plaintiffs aver that the Amended Statement of Defence purports to 'join' a Third Party irregularly without issuing a third party notice. They alleged that the amendment only seeks to clog and cloud the issues before Court and is a deliberate tactic to delay the proceedings of the main suit.
7. The Application was canvassed by way of oral arguments by counsel for the parties herein. Mr. Omangi for the 1st Defendant/ Applicant submitted that Order 1 and 2 of the Civil Procedure Rules give the court unfettered discretion to add any party to a suit where necessary. He submitted that there is a nexus between the intended interested party and the 1st Defendant hence the reason why it is necessary to bring it on board. Further, he argued that the amendments are necessary since at paragraph 5 of the Plaintiff, the Plaintiffs claim that they were charged despite there being no evidence linking them to the theft. Further, counsel urged that the delay in the prosecution of this suit has not been attributed to the 1st Defendant and in any event, parties will be at liberty to file any amended pleadings if the order sought is granted.
8. Mr. Githiri for the Plaintiffs reiterated the averments in the Plaintiffs Replying Affidavit in his oral arguments. Particularly, he restated that the inordinate delay of eleven years in bringing the application for amendment has not been explained. Counsel urged the court to note that the 1st Defendant had the records all along, since filing his defence, yet he did not deem it fit to amend the defence to include a counterclaim until now. In his view, the application is for dismissal.
9. In a brief rebuttal, Mr. Omangi admitted that no new document is being introduced as the documents sought to be relied on were filed with the defence. Mr. Omangi also stated that the reference to a third party is a typing error since they seek to bring on board an Interested Party as opposed to a third party.
10. The court has carefully considered the Affidavits in support and in opposition of the application as well as the oral arguments made by counsel for the parties. The only issue that falls for determination is whether the 1st Defendant's application is merited.



11. The general power to amend pleadings is donated by Section 100 of the [Civil Procedure Act](#) which provides that;

“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”.

12. Order 8 Rule 3 of the [Civil Procedure Rules](#) provides as follows regarding amendment of pleadings with leave of court: -

“[Order 8, rule 3] Amendment of pleadings with leave

- (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 sub-rule (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 sub-rule (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 sub-rule (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.”

13. Further, Order 8 Rule 5 stipulates that:

- “(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.
- (2) This rule shall not have effect in relation to a judgment or order.”



14. According to the annexed draft amended Defence marked “JO1”, the 1st Defendant seeks to introduce and/or join a company in which he is a director namely, “The Board of Directors Fig Tree Hotel Limited” as a third party in the suit. He has also annexed the intended third party’s proposed statement of Defence and Counterclaim. Counsel for the 1st Defendant claimed that he seeks to join the said party as an interested party and not a third party. He contended that the reference to a third party was a typographical error but did not amend the instant application to reflect that position. The court therefore has no option but to determine the application as presented before it as this cannot be regarded as a mere technicality of procedure that is curable under Article 159(2) (d) of the *Constitution*.
15. A third party is normally enjoined to a suit at the instance of a Defendant if the Defendant has a claim that relates to the original suit against such a party. This is done through the procedure set down under Order 1 Rule 15 of the *Civil Procedure Rules*, which the 1st Defendant herein has duly invoked in his application. Sub-rule 1 of the said provision stipulates that:
- “(1) Where a defendant claims as against any other person not already a party to the suit (hereinafter called the third party)—
- a. that he is entitled to contribution or indemnity; or
 - b. that he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or remedy claimed by the plaintiff; or
 - c. that any question or issue relating to or connected with the said subject-matter is substantially the same question or issue arising between the plaintiff and the defendant and should properly be determined not only as between the plaintiff and the defendant but as between the plaintiff and defendant and the third party or between any or either of them, he shall apply to the Court within fourteen days after the close of pleadings for leave of the Court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex parte supported by affidavit...” [Emphasis mine]
16. If the court is to go by the mandatory requirements of the above provision, which the 1st Defendant invoked, then his attempt to introduce a Third Party without first seeking leave of the court to do so cannot be allowed. Further, even assuming that the third party were to be enjoined to this suit at the instance of the 1st Defendant, it would not be the 1st Defendant’s duty to file on its behalf a Defence and counterclaim against the Plaintiffs as he is seeking to do. That is not what the law of third party proceedings envisages.
17. In addition, whereas this court has the discretion to permit amendments at any stage of the proceedings, it is also the duty of the court to ensure that such amendments do not prejudice other parties in the matter. The 1st Defendant filed his defence over eleven years ago and now that the matter has been set down for hearing, they suddenly seek to introduce a counterclaim against the Plaintiffs through an interested party. He personally avers that the same is based on documents that are already in the court’s record, indicating that he has always had access to this information and only recently decided to act on it as an afterthought. To that end, the court agrees with the Plaintiffs that the amendments are being sought in bad faith particularly because the 1st Defendant has not even explained how that escaped him all this while.



18. For the foregoing, the court finds that the orders sought in the 1st Defendant's application are untenable. The 1st Defendant's Notice of Motion dated October 26, 2022 lacks merit and is hereby dismissed with no orders as to costs.

Orders accordingly.

DELIVERED, DATED AND SIGNED IN NAIROBI THIS 25TH DAY OF MAY 2023.

JANET MULWA

JUDGE

