



Wanjala & others v Musioma & 4 others (Environment and Land Case Civil Suit 300 of 2004) [2023] KEELC 17049 (KLR) (18 April 2023) (Ruling)

Neutral citation: [2023] KEELC 17049 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 300 OF 2004**

**LN MBUGUA, J
APRIL 18, 2023**

BETWEEN

NEWTON WANJALA & OTHERS PLAINTIFF

AND

JOSEPH SIRO MUSIOMA 1ST DEFENDANT

CRESENT CONSTRUCTION COMPANY LIMITED 2ND DEFENDANT

KAIRU ENTERPRISES 3RD DEFENDANT

PAN AFRICAN BANK LTD (IN LIQUIDATION) 4TH DEFENDANT

COMMISSIONER OF LANDS 5TH DEFENDANT

RULING

1. Before me is the Chamber summons application dated 10.01.2023, where the Plaintiffs seeks leave to amend their plaint in response to new issues raised by the 3rd and 4th Defendants in their statements of defence. They also seek leave to file a defence to the 3rd Defendant's counterclaim as well as leave to file a further list of witnesses and documents.
2. The Plaintiffs also seek orders that the 1st and 3rd Defendants do provide to the Plaintiffs' advocates copies of CR12 of their respective companies Ngecha Properties Limited and Kairu Enterprises.
3. The application is based on grounds on its face and on the 1st Plaintiff's supporting affidavit sworn on 10.01.2023. He deposes that the Plaintiffs were previously represented by Mr. Waithaka Wachira Advocate who passed on; and they appointed Juda Ndiso Advocates to act for them. The said Advocates informed them of a Counterclaim and suit against the Plaintiffs filed by the 3rd Defendant which was not served on them, hence it is just that they be allowed to defend themselves.



4. It was argued for the plaintiffs that the suit was initially between the Plaintiffs and the 1st and 2nd Defendants but there are very many people who have been enjoined in the suit, hence the need to narrow down the issues and witnesses who can give evidence, adding that the 3rd Defendant's Counterclaim raises very serious issues and it was not served on them but they got a copy from the Court record.
5. The 3rd Defendant filed grounds of opposition dated 14.02.2023 in opposition to the application, where they argue that there is no draft amended plaint attached, so the court cannot define what Plaintiffs want to bring on board. He also argues that the suit was filed in 2004, so the Plaintiff's conduct is critical, pointing out that leave to amend plaint was granted way back on 29.6.2004, but the amended plaint was only filed on 10.12.2009, (5 years later).
6. It was submitted that it is only when the case was confirmed for trial that the Plaintiffs filed the instant application, so it is meant to halt proceedings. He also argues that in their amended plaint, the Plaintiffs want to be declared as lawful owner of the suit properties while the 3rd Defendant wants the Plaintiffs' titles to be revoked, so there is no need of any further documentation.
7. Counsel for the 1st and 2nd Defendants as well as counsel for the 4th defendant did not file any documents in respect of the application, but they aligned themselves with the submissions of the 3rd defendant.
8. In rejoinder, Counsel for the Plaintiff submitted that the draft amended plaint was availed in court and gave an undertaking that they would serve it on the parties. He also stated that he was not on record for the Plaintiffs in 2009, the Advocate who was on record passed on.
9. The issue for determination is whether the plaintiffs prayer to amend the plaint, to file a defence to the Counter claim and to avail further documents and witness statements as well as to be supplied with a certain document is merited. It is noted that the proposed further amended plaint was not filed in CTS (Court's digital filing platform). In *Garley Enterprises Ltd v Agricultural Finance Corporation & another* [2018] eKLR, the Court held that the mode of effecting proposed amendments as prescribed under the order 8 rule 7 of the *Civil Procedure Rules* was;

“... pre- supposes the proposed draft will be annexed to the application to enable the court ascertain whether these provisions have been complied with or not. Therefore the failure to comply accordingly renders the application fatally defective...”
10. The Court of Appeal for East Africa in the locus classicus case of *Eastern Bakery v Castelino* (1958) EA 461 held that amendments sought before the hearing should be freely allowed if they can be made without injustice to the other side.
11. In *Evans Njenga Muritu v Continental Developers Limited & Another* [2019] eKLR, the court held that:

“.... the amendment was sought close to 11 years later... there has certainly been an inordinate delay which leads me to the conclusion that the application amounted to an abuse of the court process...”
12. This suit was filed about 19 years ago. As rightly indicated by the 3rd defendant, the parties were allowed to amend their pleadings on 29.6.2004. The plaintiffs were mute on the issue raised by 3rd defendant that they only filed the amended plaint on 10.12.2009!.



13. Way back on 30.6.2021, counsel for the plaintiff had addressed the court as follows;

“ We will be seeking leave to amend the plaint..”

That desire to amend the plaint appears to have been acted upon close to one and a half years later when the current application was brought forth in January 2023 and only after the court gave firm directions to the effect that the case shall not be adjourned again. To this end, I find that prayer “B” to amend the plaint is not merited.

14. A perusal of the file however reveals that the 3rd defendant did file an Amended Statement of defence and Counterclaim on 11.6.2019. The issue of service of the said pleading has been questioned, with the plaintiff contending that they were never served with the said pleading.

15. A pleading is the foundational document in which a claimant sets out their claim. If indeed the 3rd defendant has a Counterclaim which was not served, then it is only fair and just that the defendant in that Counterclaim be given an opportunity to defend the suit. In terms of the provisions of Order 7 rule 5 of the *Civil Procedure Rules*, the defendant in the Counterclaim would be entitled to file further witness statements and documentary evidence.

16. It appears that this is a case where parties are filing documents as and when they deem it fit. In the case of *Evans Omari Sianyo v Nation Media Group Limited* [2011] eKLR. It was stated that in the interests of the whole community, legal business should be conducted efficiently, and courts can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age.

17. If this court was to allow prayer “B” amendment of the plaint, the other parties thereof would be at liberty to amend their pleadings accordingly and this will go on and on creating confusion. Whatever issues have been raised in the Counterclaim can well be captured in the defence.

18. In the circumstances, I allow the application dated 10.1.2023 in terms of prayers No. C & D only. The court declines to allow prayer E which can be dealt with during the Pretrial process.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 18TH DAY OF APRIL, 2023 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

Njuguna for 3rd Defendant

M/s Muchiri also appearing alongside Mr. Njuguna for 3rd Defendant

Mwangi and Mr. Angwenyi for 1st & 2nd Defendants

Kipchirchir Cheptumo for the 4th Defendant

Osoro for the 11th Interested Party

Newton Wanjala the Plaintiff (1st Plaintiff)

Court assistant: Joan

