



**Osundwa & another v Koitie & 2 others (Environment & Land Case
368 of 2016) [2023] KEELC 17967 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17967 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 368 OF 2016**

**MD MWANGI, J
MAY 30, 2023**

BETWEEN

VINCENT MUMIA OSUNDWA 1ST PLAINTIFF

BEATRICE MILIYO MUMIA OSUNDWA 2ND PLAINTIFF

AND

MRS KOITIE 1ST DEFENDANT

ISHMAEL KOITIE 2ND DEFENDANT

BURHANI DEVELOPMENT LIMITED 3RD DEFENDANT

RULING

(In respect of the Defendants' Notice of Motion application dated 22nd November, 2022 seeking leave to amend the Defence and include a counterclaim)

Background

1. The Application for determination before this Court is the Defendants' Notice of Motion dated the 22nd November, 2022 seeking for leave to amend the Defence and include a Counterclaim.
2. The Application is premised on the grounds on the face of it and further supported by the Affidavit of Ishmael Kibet Koitie, deposed on the 22nd November, 2022. The deponent avers that the intended amendments were necessitated by change of circumstances and have been made in good faith and within reasonable time.

Plaintiffs' Grounds of Opposition

3. The Plaintiffs opposed the aforesaid Application by way of grounds of opposition dated 17th January, 2023. The Plaintiffs contended that the application was incurably defective, misconceived and hinged



on wrong principles of law and procedure. Further that there has been undue and unreasonable delay in filing the application in response to the Plaintiffs' amended Plaint filed in the July, 2022.

4. The Plaintiffs further argued that the intended counterclaim of trespass was time-barred as the alleged trespass first occurred in 1985 when the Plaintiffs took possession of the suit property pursuant to an agreement with the deceased and they have been in continuous and interrupted possession ever since. That the Plaintiffs' claim in the main suit is that they are proper and beneficial owners of the suit property and therefore the Applicants are not entitled to make a claim for damages until the main suit is determined. The application should therefore be dismissed with costs.

Court's Directions

5. The Court directed that the parties canvass the application by way of written submissions. However, none of the parties had complied with the said directions at the time of writing this ruling.

Issues for Determination

6. In this Court's opinion, the only issue for determination is whether the Applicant's Notice of Motion for amendment is merited.

Analysis and Determination

7. The law as regards amendments of pleadings 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 an award of costs.
8. A wider footage on the issue was given in the case of *Ochieng and 2 others v First National Bank of Chicago* (1995) eKLR, where the court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings 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. the 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 and amendment notwithstanding the expiry of current period of limitation.
9. The above mentioned parameters are not exhaustive as far as the grant of leave to amend pleadings is concerned. The court has a very wide berth in granting leave to amend.
10. It follows therefore that the basis for allowing amendments is to enable the court to determine the true and substantive merits of the case. Even where there is delay in bringing the application, such an amendment can still be allowed.
11. I have perused the draft amended Defence and counter-claim annexed to the Defendants' application and do find that it will serve the purpose of assisting the court in determining the real questions in



controversy between the parties herein. There is also the aspect of preventing the filing of a multiplicity of suits over an issue that can be conveniently determined alongside the Plaintiffs' case. I do not see the prejudice to be suffered by the Plaintiffs and which cannot be compensated by an award of costs.

12. As to whether the amendments sought to be introduced are time barred, Order 8 Rule 3(2) allows the court, if the court thinks it is just so to do, to grant leave notwithstanding the fact that the application is made after any relevant period of limitation has expired. This provision further buttresses the basis of amendment of pleadings being to determine the real issues in controversy.
13. The Court considers it just and appropriate that the Defendants' application be allowed with corresponding leave to the Plaintiffs to reply appropriately including making further amendments to their pleadings if they so wish. Accordingly, the orders of the court are as follows:
 - a. The Defendants are hereby granted leave to amend their Defence in terms of the draft annexed to the application dated 22nd November, 2022, and file the same within 7 days of the date hereof.
 - b. The Defence and Counter-claim together with Bundle of Documents and Witness Statements to be relied upon by the Defendants be served within 14 days from the date of filing.
 - c. The Plaintiffs are granted leave to file a reply to the Amended Defence and Counter-claim within 14 days of service.
 - d. The costs of this application shall be in the cause.

It is so ordered.

DATED,SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023.

M.D. MWANGI

JUDGE

In the virtual presence of:

Mr. Cheluget for the Defendant/Applicant.

Mr. Kimani Mungai for the Plaintiff.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

