



Karomo & another (Suing as the Chairman and Secretary, respectively of the New Nyali Residents Association) & 3 others v Pamwhite Limited & another (Environment & Land Case 219 of 2020) [2023] KEELC 18322 (KLR) (20 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18322 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 219 OF 2020
NA MATHEKA, J
JUNE 20, 2023**

BETWEEN

**BENSON KAROMO & HUBERT SEIFERT (SUING AS THE CHAIRMAN AND SECRETARY, RESPECTIVELY OF THE NEW NYALI RESIDENTS ASSOCIATION) 1ST PLAINTIFF
IDEAL LOCATIONS LIMITED 2ND PLAINTIFF
KIRKE LIMITED 3RD PLAINTIFF
CONRAD PROPERTIES 4TH PLAINTIFF**

AND

**PAMWHITE LIMITED 1ST DEFENDANT
THE COUNTY GOVERNMENT OF MOMBASA 2ND DEFENDANT**

RULING

1. The application is dated November 16, 2022 and is brought under Orders 2 Rule 15 (1), 8 Rules 2 & 3 and 51 Rule 1 and Sections IA, 1B, 34 & 63 (e) of the [Civil Procedure Act](#) (Cap 21) Laws of Kenya seeking the following orders;
 1. That this Honourable Court be pleased to strike out with costs the Plaintiffs /Respondents' amended and further amended Plaints dated December 21, 2020 and January 22, 2021, respectively for having been filed without leave of the court and thus being scandalous and/or frivolous and/or vexatious and/or prejudicial and/or embarrassing and above all an otherwise abuse of the Court process.
 2. That purported amendments done to the Plaintiffs Respondents amended and further amended Plaints therefore be disallowed and/or expunged from the record and/or struck out.



3. That costs of this application be borne by Plaintiffs/Respondents herein in.
2. It is based on the following grounds that the Plaintiffs/Respondents herein filed this suit on 30th November, 2020 vide a Plaint dated November 26, 2020 seeking for a declaration that an approval issued to the 1st Defendant/Applicant by the 2nd Defendant, being approval No P/2020/201 for Commercial development of Festival City Shopping Centre on Plot No MN/I/3156 was illegal, null and void for having been issued by an unauthorized officer. That without leave of the court, the Plaintiffs/Respondents amended their joint Plaint on December 21, 2020 and again on January 22, 2021, yet such amendments required leave of the Court. That the matter is scheduled for Pre-trial directions on November 11, 2020 and for hearing on 7th and February 8, 2023
3. The Respondent stated that the Amended Plaint and the Further Amended Plaint which the 1st Defendant now seeks to be struck out were filed and served upon the 1st Defendant as follows: The Amended Plaint was filed on December 21, 2020 and served upon the 1st Defendant's erstwhile advocates, M/S Mathew Nyabena & Company Advocates, on December 21, 2020. Annexed herewith and marked as "HS 2" is a copy of the Amended Plaint duly served and bearing the stamp of the said advocates. The Further Amended Plaint was filed on January 22, 2021 and served upon the 1st Defendant's erstwhile advocates, M/S Mathew Nyabena & Company Advocates, on January 25, 2021. Annexed herewith and marked as "HS 3" is a copy of the Further Amended Plaint duly served and bearing the stamp of the said advocates.
4. The 1st Defendant waited for 1 year and 11 months to apply for the striking out of the Amended Plaint and the Further Amended Plaint, a wait that is extremely and very inordinate. Other than the delay of 1 year 11 months, the 1st Defendant filed the application on November 16, 2022 just a day to the date of pre-trial conference scheduled for November 17, 2022 when this case was due to be given a hearing date. The 1st Defendant is deliberately causing delay of this matter because of the undertaking which the Plaintiffs have given on paying damages to the 1st Defendant. The 1st Defendant's intention is to ultimately recoup as much damages as possible from the Plaintiffs should the case fail. That the Defendant has been constantly changing advocates occasioning delay of this case. Instead of focusing on expeditious hearing of this case on merits, the 1st Defendant has been focusing on side shows with the sole aim to deliberately delay this case.
5. That as at May 19, 2021 when the 1st Defendant filed its application dated May 13, 2021, the Amended Plaint and Further Amended Plaint were already on record and had been served upon the 1st Defendant as already discussed hereinabove. It cannot therefore be said that the application dated May 13, 2021 was a challenge to the Plaint as originally filed only. The said application was a challenge to the Plaint as originally filed, amended and further amended since all the 3 Plaint were already on record as at the date when the said application was filed. Even if the application by the 1st Defendant dated May 13, 2021 was only a challenge to the Plaint (as originally filed), the fact that the 1st Defendant opted to challenge the original Plaint only and left out the Amended Plaint and the Further Amended Plaint is an indication that the 1st Defendant did not have a problem with the Amended Plaint and the Further Amended Plaint. Having failed to seek the striking out of the original Plaint, Amended Plaint and Further Amended Plaint in one bout through the application dated May 13, 2021, the 1st Defendant is estopped from seeking similar orders after its application dated May 13, 2021 was heard on merits and dismissed.
6. That under Order 8 Rule 1(1) of the *Civil Procedure Rules, 2010*, the Plaintiff was allowed to amend the Plaint before pleadings were closed. The 1st Defendant's Statement of Defence was filed on February 18, 2021. Annexed herewith and marked as "HS 10" is a true copy of the 1st Defendant's Statement



- of Defence. That under Order 2 Rule 13 of the [Civil Procedure Rules, 2010](#), pleadings close 14 days after filing of defence. It therefore follows that by the time the Amended Plaintiff was filed on December 21, 2020 and Further Amended Plaintiff was filed on January 22, 2021, the 1st Defendant had not filed its Defence and the pleadings had not closed. Accordingly, no leave of Court was required to amend the Plaintiff.
7. That Order 8 Rule 2 of the [Civil Procedure Rules, 2010](#), an application seeking to disallow an amendment must be filed within 14 days after service on a party of an amended pleading. In the instant case, the Amended Plaintiff was served upon the 1st Defendant on December 21, 2020 while the Further Amended Plaintiff was served upon the 1st Defendant on January 25, 2021. The 1st Defendant's application was filed on November 16, 2022 which is one (1) year and 10 months later, way beyond the 14 days provided for in Order 8 Rule 2(1) of the [Civil Procedure Rules](#).
 8. There is no prejudice which the 1st Defendant will suffer if the Amended Plaintiff and Further Amended Plaintiff are allowed to be on record because as at February 18, 2021 when the 1st Defendant filed its statement of Defence, the Amended and Further Amended Plaintiffs had already been served upon the 1st Defendant who had the opportunity to respond to the same. The 1st Defendant did not object to the Amended Plaintiff and Further Amended Plaintiff despite being aware of the same. Any prejudice which the 1st Defendant may suffer can be cured by allowing the 1st Defendant to file an Amended Defence. On the other hand, if the application is allowed, the Plaintiff will suffer immense prejudice since the Plaintiff will not have a chance to bring out the issues contained in the amendments.
 9. This court has considered the application and the submissions therein. The Applicant states that the Plaintiffs/Respondents herein filed this suit on November 30, 2020 vide a Plaintiff dated November 26, 2020 seeking for a declaration that an approval issued to the 1st Defendant/Applicant by the 2nd Defendant, being approval No P/2020/201 for Commercial development of Festival City Shopping Centre on Plot No MN/I/3156 was illegal, null and void for having been issued by an unauthorized officer. That without leave of the court, the Plaintiffs/Respondents amended their joint Plaintiff on December 21, 2020 and again on January 22, 2021, yet such amendments required leave of the Court.
 10. Order 8 Rule 3 of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of court as follows: -
 - (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. Further, Order 8, Rule 5 gives the court the general power to amend.
 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.
 11. While the argument of the Respondent that Order 8 Rule 1 (1) is particular that amendments of pleadings may be done without leave at any time before close of pleadings is plausible, the purpose of allowing amendment of pleadings is to enable the court to determine the real issues in controversy between the parties once and for all. For the court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs.



12. According to the Defendant, the Plaintiff Amended Plaintiff was filed out of time that is after the close of the pleadings without the leave of the court. They submitted that by the time the amended plaintiff was filed pleadings had closed and that the Plaintiffs required the leave of the court before filing the Amended Plaintiff
13. Order 2 Rule 13 of the [Civil Procedure Rules](#) provides as follows:

“The pleadings in a suit shall be closed fourteen days after service of the reply or defence to counterclaim, or, if neither is served, fourteen days after service of the defence, notwithstanding that any order or request for particulars has been made but not complied with.”
14. Order 8 Rule 1(1) of the [Civil Procedure Rules](#) states as follows:
 - (1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.”
15. I have perused the court record and find that 1st Defendant replying affidavit was filed on December 15, 2020 further replying affidavit on February 18, 2021 It is therefore true, as submitted by the 1st Defendant that the pleadings in this matter should ideally have closed by December 29, 2020 being fourteen (14) days from December 15, 2020 after the serving of the replying affidavit upon the Plaintiffs. This court takes note that the 1st Defendant’s Statement of Defence was filed on February 18, 2021 after the Further amended plaintiff was filed. Strictly speaking all pleadings filed after that from any party required leave of the court.
16. Be that as it may, Section 1A of the [Civil Procedure Act](#) provides for the overriding objective of the [Civil Procedure Act](#) and the rules made thereunder and provides as follows:

1A

 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.
17. Section 1B of the same [Act](#), on the other hand provides for the duty of court and states:
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and



(e) the use of suitable technology.

18. In *Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another v Francis Babati Diwani & 2 others* (Supra), the Court in this regard noted that;

“Striking out of a pleading, especially where the Rule does not expressly provides so, which has been filed out of time is an extreme measure which is resulted to in the clearest of cases where the court, after considering all the facts and circumstances of the case, comes to the conclusion that a party is abusing the process of the court.”

19. In addition, Madan JA in *D.T. Dobie & Company (Kenya) Limited v Joseph Mbaria Muchina & another* (1980) eKLR stated thus;

“A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

20. Further, the Court of appeal in *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & others* (2013) eKLR, held as follows:

“... it is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardships and unfairness.”

21. The above decision of the Court of Appeal shows that the strict compliance with form should not be adhered to at the altar of substance, additionally the court in exercising such discretion on whether or not to order striking out of any pleading that is non-compliant with the rules ought to be alive to its obligations under Article 159 of *the Constitution* of Kenya, 2010 to see to it that justice is administered without undue regard to procedural technicalities. In my view I am convinced that in the interest of justice and the stage of this suit that no prejudice would be suffered by the Defendant if the Amended Plaintiff and further amended Plaintiff is allowed.

22. In the case of *Central Kenya Ltd v Trust Bank & 4 Others*, CA No 222 of 1998, the court stated that, the guiding principle in amendment of pleadings and joinder of parties is that:

“all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”

23. On the issue of amendment of pleadings in the case of *AAT Holdings Limited v Diamond Shields International Ltd* (2014) eKLR, the court cited the principles as set out by the Court of Appeal in *Central Kenya Ltd Case No 222 OF 1998* as shown below;

- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits provided there has been no undue delay.



- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

24. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In the case of *Isaac Awuondo v Surgipharm Ltd & Another* (2011) eKLR the Court of Appeal had the following to say:

In *Moi University V Vishva Builders Limited - Civil Appeal No 296 of 2004* (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *HD Hasmani v Banque Du Congo Belge* (1938) 5 EACA 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd*[1974] EA 75 at P 76 Duffus P said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

25. I have also perused the proposed Amended Plaintiff and further Amended Plaintiff I see that no prejudice will be suffered by the parties should the amendments be allowed. I take note that this matter was filed in 2020 and the Defence on February 18, 2021 after the Further Amended Plaintiff. The same are hereby allowed. In these circumstances, it is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated November 16, 2022 is unmerited and I dismiss it with costs.

26. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 20TH DAY OF JUNE 2023.

N.A. MATHEKA

JUDGE

