



Blue Bell Properties Ltd v County Government of Mombasa (Environment & Land Case 29 of 2016) [2023] KEELC 18924 (KLR) (19 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18924 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 29 OF 2016**

**LL NAIKUNI, J
JUNE 19, 2023**

BETWEEN

BLUE BELL PROPERTIES LTD PLAINTIFF

AND

THE COUNTY GOVERNMENT OF MOMBASA DEFENDANT

RULING

I. Introduction

1. Before this Honorable Court for determination is the Notice of Motion application dated 22nd March, 2022 by Blue Bell Properties Limited, the Plaintiff/Applicant herein. It was brought under the dint of the Provisions of Section 19(3)(i & J) of the Environmental and land Court Act No. 19 of 2011, Order 8 Rule 3, Sections 1A, 1B, 3A and 63 of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya.
2. Upon being served, the Defendant filed a Notice of Preliminary Objection dated 2nd November, 2022. At the same time, the Defendant filed a Replying affidavit opposing the said application hereof.
3. Notwithstanding the legal ratio founded in the now famous case of “Mukisa Biscuits Manufacturers – Versus - Westend Distributor Ltd [1969] EA 696”, on matters of preliminary objections, in the given circumstances of this case and for good order the Honorable Court directed that the whole issues raised from the aforestated application and the objections be dealt with together.

II. The Plaintiff’s/Applicant’s Case

4. The Plaintiff/Applicant sought for the following orders:-
 - a. This Honourable court be pleased to grant the Plaintiff leave to amend the Plaint herein in terms of the attached Amended Plaint.



- b. The attached Amended Plaintiff be deemed duly filed and served upon payment of the requisite court fees.
 - c. The Plaintiff be allowed to substitute the witness statement of Ms. Akhtar Butt with that of Haroon Butt.
 - d. Costs.
5. The application by the Plaintiff/Applicant was premised on the grounds, testimonial facts and the averments of the 12 Paragraphed Supporting Affidavit of Haroon Butt, sworn and dated on 22nd March, 2022 together with a single annexure marked as “HB” annexed herein. The Deponent averred that:-
- a. He was a director of the Plaintiff/Applicant Company hence well versed with the facts herein and duly authorized by the Plaintiff/Applicant to swear this Affidavit.
 - b. The Plaintiff/Applicant filed the suit herein in February 2016 and served the same upon the Defendant/Respondent who entered appearance on 18th May, 2017.
 - c. At the time of filing the suit, the Plaintiff/Applicant sought a mandatory injunction compelling the Defendant/Respondent to reconstruct and erect the Plaintiff/Applicant's irregularly demolished Residential Premises on the Plaintiff/Applicant's parcel of land situate in the District and Municipality of Mombasa containing by measurement nought decimal four one (0.41) of an acre or thereabouts being known as Sub - division Number 1371 (Original Number 836/6) of Section I Mainland North also known as Plot No.1371/1/MN Mkomoni Rd, Mombasa. (Hereinafter referred to as “The Suit Property”).
 - d. The Plaintiff/Applicant had reconsidered the feasibility of the Defendant/ reconstructing the Plaintiff/Applicant's demolished house and now wished to amend its Plaintiff and instead seek compensation for the demolished house and apply the same compensation to reconstruct the demolished house.
 - e. The Plaintiff/Applicant had also not quantified the amount of special damages being the costs of the items which were destroyed during the unlawful demolition of the house and wished to quantify the same.
 - f. The intended amendment would enable the Court conclusively determine the real issues in controversy between the parties.
 - g. In view of the foregoing, it was therefore in the interests of justice that the Court allowed this application so that the matter may be determined fully and on its merit.
 - h. The proposed amendments would enable the Court determine the real dispute between the parties and to do justice in this matter. The amendment was proposed in good faith and the Defendant/Respondent would not suffer any prejudice whatsoever.
 - i. Mrs. Akhtar Butt who was at the time of filing of this suit under treatment for cancer passed away in March 2021 and there was need to replace her witness statement with that of the other director, Mr. Haroon Butt.
 - j. It was only just fair and proper that this Application be allowed to enable the matter proceed for determination on merit.



III. The responses by the Defendant/Respondent

6. On 2nd November, 2022, while opposing the filed application by the Plaintiff/Applicant herein, the Defendant/Respondent filed a Notice of Preliminary Objection and a Replying Affidavit. The objections raised by the Defendant/Respondent was based on the following grounds:
 - a. The Application herein sought to introduce a new suit through the new prayers sought by the Plaintiff, contrary to the mandatory provisions of Section 3(1) of the *Public Authorities Limitation Act* (PALA) Cap 39 Laws of Kenya.
 - b. The Application herein was fatally defective and a perfect candidate for dismissal.
 - c. The Plaintiff's Application and the entire suit herein was fatally defective, bad in law and could therefore not stand in Law.
7. As indicated, the Defendant/Respondent also opposed the application through a 14 Paragraphed Replying Affidavit sworn by the Legal Director of the Defendant/Respondent, MR. JIMMY WAFULA sworn on 2nd November, 2022 where he averred that:
 - a. The Plaintiff lodged this suit in the year 2015 wherein the following prayers were sought-
 - i. An Order of Mandatory Injunction compelling the Defendant to reconstruct and erect the Subject Residential Premises on the Plaintiff's parcel of land situate in the District and Municipality of Mombasa containing by measurement naught decimal four one (0.41) of an acre or thereabouts being known as Sub-division Number 1371 (Original number 836/6) of Section I Mainland North also known as Plot 1371/I/ MN Mkomani Rd, Mombasa.
 - ii. General and Special Damages (to be compelled)
 - iii. Costs of this suit plus interest at Court rates
 - iv. Any other relief the Honourable Court may deem fit and expedient to grant
 - b. Having read the instant Application, it was evident that the Plaintiff/Applicant sought to introduce a new suit against the Defendant/Respondent by substantively changing the prayers sought to wit-
 - i. The Plaintiff/Applicant wished to amend its Plaint and seek compensation for the demolished house instead of a mandatory injunction compelling the Defendant/ Respondent to reconstruct the demolished house.
 - ii. The Plaintiff/Applicant also sought special damages of the items which were not pleaded in the Plaint herein.
 - c. Consequence of the above was that the entire suit herein shall be substantively altered and the suit herein shall take a new form and/or shape.
 - d. The above offended the mandatory provisions of mandatory provisions of Section 3(1) of the *Public Authorities Limitation Act* (PALA) Cap 39 Laws of Kenya, which provides as follows-

Limitation of proceedings



1. No proceedings founded on tort shall be brought against the Government or a local authority after the end of TWELVE MONTHS from the date on which the cause of action accrued.
- e. It was clear beyond peradventure that the Plaintiff/Applicant was time barred and could not seek to introduce new factors to the case after the lapse of twelve months.
- f. Although the Applicant had a right to amend their pleadings the same must be done without undue delay in order to meet the interests of justice and not to drag the Defendant/Respondent through unnecessary and endless litigation.
- g. Contrary to the above, the Application herein had been brought after seven years after the cause of action arose. The same was an afterthought and aimed at delaying this matter and unfairly extort the Defendant/Respondent.
- h. In any case, the Plaintiff/Applicant's reasons for amendment of pleadings in the instant Application never in any way assist the Court to determine the real questions in controversy. Therefore, the Plaintiff/Applicant could not suffer any prejudice if the suit remained as it was.
- i. The Plaintiff/Applicant had merely stated that the prayers sought were no longer feasible to him and on that unsustainable reason, the entire substance of the suit ought to be altered to the detriment of the Defendant/Respondent.
- j. Although the Court had the discretion to allow the Application, such discretion must be exercised judiciously while balancing the rights of both the Plaintiff/Applicant and the Defendant/Respondent and not at the whim of any party that changed their mind towards the conclusion of the suit.
- k. In the circumstance, it was in the interest of justice that the Plaintiff/Applicant's instant Application be dismissed with Costs to the Defendant/Respondent.
- l. Further evidence shall be adduced at the hearing hereof.

IV. Submissions

8. On 13th November, 2022 while all the parties were present in court the Honourable Court directed that both the application dated 22nd March, 2022 and the Preliminary Objection dated 2nd November, 2022 be disposed of by way of written submissions. On 6th February, 2023 the Court having satisfied itself that the submissions had been filed and parties had complied with accordingly, it proceeded to reserve the delivery of the ruling date on Notice.

A. The Written Submissions By The Plaintiff/applicant

9. On 2nd February, 2023, Learned Counsel for the Plaintiff through the firm of Messrs. Prof Albert Mumma & Company Advocates filed their written submissions dated the same day. Mr. Agwara Advocate commenced the submission by providing an introduction and a brief background of the case as stated out from the filed pleadings herein. The Learned Counsel submitted that before the Honourable Court was the Plaintiff/Applicant's Notice of Motion Application dated 22nd March 2022 ostensibly seeking leave of this Honourable Court to amend the Plaint as filed herein and substitute the Plaintiff/Applicant's witness in the case. The Defendant/Respondent had opposed the Application through its Replying Affidavit sworn on 2nd November 2022 as well as a Preliminary Objection dated 2nd November 2022.



10. The Factual background of the matter was that the Plaintiff/Applicant filed the suit herein in February 2016 and served the same upon the Defendant/Respondent who entered appearance on 18th May, 2017. At the time of filing the suit, the Plaintiff/Applicant sought a mandatory injunction compelling the Defendant/Respondent to reconstruct and erect the Plaintiff/Applicant's irregularly demolished Residential Premises on the Plaintiff/Applicant's parcel of land situate in the District and Municipality of Mombasa containing by measurement nought decimal four one (0.41) of an acre or thereabouts being known as Subdivision Number 1371(Original Number 836/6)of Section I Mainland North also known as Plot No. 1371/1/MN Mkomoni Rd, Mombasa.
11. The Learned Counsel submitted that the Plaintiff/Applicant had reconsidered the feasibility of the Defendant/Respondent reconstructing the Plaintiff/Applicant's demolished house and restoring it to its former self and it was clear that the same would not be feasible and a such the Plaintiff/Applicant now wished to amend its Plaint and instead seek compensation for the demolished house and apply the same compensation to reconstruct the demolished house. At the time of filing the suit, the Plaintiff/Applicant had also not quantified the amount of special damages being the costs of the items which were destroyed and carted away during the unlawful demolition of the house and wished to quantify the same to enable the Court consider and determine the matter once and for all.
12. The Learned Counsel argued that the Plaintiff/Applicant further sought leave to amend its witness following the untimely demise of Mrs. Akhtar Butt who was at the time of filing of this suit undergoing treatment for cancer and passed away in March 2021 and as such there is need to replace her witness statement with that of the other director Mr. Haroon Bult. The Defendant/Respondent was opposed to the Plaintiff/Applicant's Application under the false belief that the proposed amendments would introduce a fresh cause of action which according to the Defendant/Respondent was time barred.
13. It was the Learned Counsel's humble submission that the Plaintiff/Applicant's application as filed was merited and ought to be allowed as it was trite law that this Honourable Court ordinarily freely allow amendments to pleadings to enable parties plead the whole of their case without regard to legal technicalities which could be applied to impede substantive hearing and determination of the case on merit.
14. In his submissions, the Learned Counsel raised the following four three (3) issued for Court to consider in its determination:-

Firstly, was on whether this Honorable Court should grant leave to the Plaintiff/Applicant to amend the Plaint. The Learned Counsel cited the provision of Section 19 (1) of the [Environment and Land Court Act](#), No. 19 of 2011 which provides that:

“Procedure and powers of the Court (1) In any proceedings to which this det applies, the Court shall act expeditiously, without undue regard to technicalities of procedure. (2) The Court shall be bound by the procedure laid down by the [Civil Procedure Act](#).”

15. The Learned Counsel further relied on the provision of Order 8 Rule 1 of the Civil Procedure Rules, 2010 which provides:

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.



16. The Learned Counsel further submitted that Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010, expressly provides that this Honorable Court has discretion to allow amendment of pleadings at any stage before judgment for purpose of determining the real question or issue in controversy between the parties. The Court's record and the pleading before Court would readily confirm that the amendment sought by the Plaintiff herein did not in any way introduce a new cause of action or alter the character of the suit and therefore, the amendments ought to be allowed. The principles that guide the court in considering an application for amendment of pleadings were settled by the Court of Appeal in the celebrated case of "Central Kenya Limited – Versus - Trust Bank limited (2000)2 E..A 365 as follows:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.” (Emphasis supplied).

17. The Learned Counsel also cited the case of Institute For Social Accountability & Another – Versus - Parliament of Kenya & 3 others [2014] eKLR it was observed:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

18. The Learned Counsel further referred the court to Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition, which provides as follows concerning amendment of pleadings:-

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be muddled it should be allowed if made in good faith provided costs can compensate the other side: that the proposed amendment must not be immaterial or useless or merely technical: that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of the substantially different character which could more conveniently be made the subject of a fresh action...”

19. In the case of “Kuloba – Versus – Oduol (Supra), Visram J (as he then was observed):-

“...Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under Order VIA rule 3 of the Rules as it is a claim emanating from the same set of facts...”

20. The Learned Counsel argued that it was quite clear from the above cited provisions of the law, case law and treatises that the discretion of a trial court to allow amendments of pleadings in the circumstances of this case was wide and unfettered except it should be exercised judicially upon the foregoing defined principles. In light of the foregoing, discussions, the Plaintiff/Applicant had demonstrated the need to amend the Plaint and exhaustively plead its case for hearing and determination by this Honourable



Court. The amendment should be allowed as the Defendant/Respondent had not demonstrated any prejudice which it could possibly incur if the amendments were allowed.

21. The issues raised by the Defendant/Respondent in both its Replying Affidavit and the Notice of Preliminary Objection in opposition to the Application for amendment herein were matters which had been substantively considered over the years by our Superior Courts with a unanimous finding that the same did not offer sufficient ground to bar amendments to pleadings when sought before the matter was heard and determined as is the case herein. The amendment would not prejudice the Defendant/Respondent as reiterated in the case of “Ocean Foods Limited – Versus - Osotspa Company Limited & 2 Others [2020] eKLR while citing the case of Central Kenya Ltd vs Trust Bank Ltd & 5 Others [2000] eKLR, that:

“the guiding principles in applications for amendment of pleadings and stated that the overriding consideration in such an application is whether the amendments are necessary for the just determination of the dispute between the parties and whether by allowing the amendment, the opposite party will be prejudiced or suffer injustice that cannot be compensated by way of costs.”

22. The Learned Counsel averred that the amendment would not in any case prejudice the Defendant/Respondent or cause any injustice to the Defendant/Respondent. However, the Plaintiff/Applicant would suffer injustice if the application was not allowed. The subject Application was brought with the sole intention of ensuring that justice was served and it was the interest of justice the application be allowed since if the amendments sought were allowed, then the Defendant/Respondent could have sufficient time to respond to the issues raised. On the issue of time, the Learned Counsel relied on the Court of Appeal case of “Ochieng and Others – Versus - First National Bank of Chicago Civil Appeal Number 147 of 1991 where the Learned Judge stated 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.”

23. The Learned Counsel submitted that the application is brought in good faith and the Plaintiff/Applicant never intended to delay this matter as alleged by the Defendant/Respondent as the delay was more detrimental to the Plaintiff/Applicant than to the Defendant/Respondent. It was important to note that the Plaintiff/Applicant had not sought to amend the facts of the case save for the prayers sought to allow the Court do substantive justice to the parties herein without unnecessary back and forth and the need to engage in further proceedings should the Court find in favour of the Plaintiff/Applicant in this matter.

24. Secondly, on the issue on whether this Honorable Court Should grant the Plaintiff/Applicant leave to substitute witness. The Learned Counsel submitted that the Defendant/Respondent was not opposed to this prayer hence he submitted that the Honorable court grants the prayer as sought. In ensuring that matters were expedited and determined without technicalities it was prudent that this Honorable Court allowed this particular amendment to substitute the Witnesses. In the case of “Meera Umoja Kenya Ltd - Versus - David Gikara High Court Civil Case No.63 OF 2015, the Court considered the efficacy in substituting witnesses and rendered itself as follows:-

“Further, the Plaintiff’s advocate has also indicated that the statement of proposed witness is similar to statement filed by the original witness and the proposed witness is conversant with the issues before court. If that be the case, it means the nature of evidence to be adduced will not change.



16. In addition to the above, the 1st Respondent/Defendant has not demonstrated prejudice that may be occasioned to him if the proposed witness is allowed to testify in place of the original witness.
17. This is a matter filed in the year 2015, about 5 years old now and allowing the application will expedite the matter as it will pave way for the for hearing to proceed instead of holding on to a witness who may have difficulties in attending court due to ill health. Expediting the matter would serve to benefit all parties herein.”
25. The Learned Counsel submitted that the witness statement of proposed witness was similar to statement filed by the original witness and the proposed witness was conversant with the issues before court and that being the case, it means the nature of evidence to be adduced would not change and prejudice the Defendant/Respondent in any way. The Plaintiff/Applicant sought to substitute the witness Mrs. Akhtar Butt on the account that at the time of filing the suit she was under treatment for cancer and she unfortunately passed away in March 2021 and thereby the Plaintiff/Applicant was not able to maintain the same witness. In noting that no prejudice would occur with the substitution of the witness in the matter, this Honorable Court should allow the prayer.
26. Finally, the Learned Counsel raised the issue on whether the Defendant/Respondent’s Notice of Preliminary objection was merited. The Learned Counsel argued that the Defendant/Respondent relied on the provision of Section 3(1) of the [Public Authorities Limitation Act](#) (PALA) Cap 39 of Laws of Kenya in their Preliminary Objection which Section provides:

“No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued.”
27. It was the humble submission of the Learned Counsel that the Preliminary Objection as filed was not only ill conceived but without any merit considering that the Defendant/Respondent unlawfully and without any colour of right proceeded to demolish the Plaintiff/Applicant’s suit property herein on 22nd October 2015, which formed the cause of action to the suit herein and the Plaintiff/Applicant filed the subject suit challenging the same demolition that took place on 9th March 2016. See paragraph 12 of the Plaint filed herein.
28. The Learned Counsel referred the Court to the case of “Mukhisa Biscuits Manufacturing Co. Ltd – Versus - West End Distributors Ltd (1969) EA 696”, it was now settled that a Preliminary Objection must only raise a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It could not be raised if any fact had to be ascertained or if what was sought was the exercise of judicial discretion.
29. It was the Learned Counsel’s submission that the Preliminary objection raised by the Defendant on the alleged basis of the provision of Section 3(1) of the [Public Authorities Limitation Act](#) (PALA) was one without merit for the reason that at the time of institution of the subject suit and filing of the Plaint by the Plaintiff the alleged statutory 12 months provided for in the law had not lapsed. As such it was not possible for the Defendant/Respondent to rely on the limitation of actions. There was no dispute that there already exists an action against the Defendant/Respondent, which action was filed within the statutory time frame and that the Plaintiff/Applicant only sought to amend the Plaint and the witness statement as the circumstances had since changed with a view of enabling the Court to substantively determine the dispute between the parties.



30. The Learned Counsel referred the Honourable Court to the great Lord Denning in his character when faced with a similar issue of allowing an amendment in the case of Mitchell – Versus - Harris Engineering Co. (1967)12 Q.B 703 at p. 718 stated as follows:

“Some of the Judges in those cases spoke of the Defendant having a “right” to the benefit of the Statute of Limitations: and said that “right” should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff. Take the statute here in question. It is Section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty “the action shall not be brought” after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the Plaintiff must issue his writ within three years from the date of the accident. But there is nothing the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute ... In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the Defendant has no right to have it remain defective. The court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the court. It is a matter of practice and procedure.”

31. The Learned Counsel argued that the Plaintiff/Applicant never intend to institute a new action and therefore the Defendant/Respondent was totally misguided in raising the instant preliminary objection. This Honourable Court ought to dismiss the preliminary objection with costs. The amendments sought by the Plaintiff/Applicant were within the same facts already pleaded in the Plaintiff in which case the Defence and the objection of limitation of action does not hold. The Application for leave to amend never constitute institution of new suit and so the Defendant could not object on the basis of limitation of actions and therefore, the preliminary objection was without merit.
32. In conclusion, the Learned Counsel submitted that the justice of this matter dictated that the Plaintiff/Applicant’s Application herein be allowed to enable this Honourable Court administer substantive justice to the parties herein and conclusively determine the subject dispute.

B. The Written Submissions By The Defendant/respondent

33. On 24th February, 2023, the Learned Counsel for the Defendant through the Law firm of Messrs. Muturi Gakuo & Kibara Advocates filed their written submissions dated the same day. M/s. Oruta Advocate commenced the submissions by providing an introduction and brief facts of the case. The Learned Counsel submitted that the submissions were in opposition to the Plaintiff/Applicant's application dated 22nd March, 2022 and in support of its Notice of Preliminary Objection dated 2nd November, 2022.
34. The Background being that the Plaintiff/Applicant herein filed an application dated 22nd March, 2022 seeking leave of this Honourable Court to amend its Plaintiff as filed and substitute its witness. The Defendant/Respondent opposed the said application through a Replying Affidavit and Notice of Preliminary Objection both dated 2nd November, 2022. In its Replying Affidavit, the Defendant/Respondent contended that Application herein offended the provisions of Section 3(1) of the *Public Authorities Limitation Act* (PALA) Cap. 39 Laws of Kenya which provided that (1) No proceedings



founded on tort shall be brought against the Government or a local authority after the end of Twelve Months from the date on which the cause of action accrued. Additionally, the Defendant/Respondent averred that the Plaintiff/Applicant sought to introduce a new suit by introducing new prayers in the amended Plaint.

35. In his submission, the Learned Counsel relied on the following two (2) issues for determination:-

Firstly, on whether the Application was time barred. The Learned Counsel referred the Court to the provision of Section 3 (1) of the *Public Authorities Limitation Act* (P.ALA) Cap 39 Laws of. Kenya, which provides as follows-

Limitation of proceedings

- (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of Twelve Months from the date on which the cause of action accrued.

36. Although the Plaintiff/Applicant had a right to amend their pleadings the same must be done without undue delay in order to meet the interests of justice and not to drag the Defendant/Respondent through unnecessary and endless litigation. According to the Counsel, the conditions of amendment of pleadings were laid out in the case of *Central Bank of Kenya Limited – Versus - Trust Bank Limited* (2002)2 EA 365 where the Court of Appeal held that-

“Amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits. The court then went on to state that the amendments or joinder would be allowed provided

- a. there had been no undue delay,
- b. that no vested interest or accrued right was affected and
- c. no injustice or prejudice would be occasioned to the other side that could not be properly compensated for in costs.”

37. The contention by the Learned Counsel was that these conditions were echoed in the case of *Institute for Social Accountability & another – Versus - Parliament of Kenya & 3 others* [2014] eKLR in which the Court held:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”



38. Contrary to the above, the Counsel asserted that the Application herein had been brought seven years after the cause of action arose. According to him, the same was an afterthought and aimed at delaying this matter and unfairly extort the Defendant/Respondent. Moreover, the application was time barred. As such, it was untenable and should be dismissed with costs. Further, he cited the case of “Kassam – Versus - Bank of Baroda (2002) eKLR the Court stated:-

“The power of amendment is to be jealously exercised in all the circumstances of each individual case so that a party may not turn his suit or defence into a gamble at the opponent's expense.”

39. Although the Learned Counsel conceded that amendment of pleadings was a right of a party but asserted that it should be exercised with due diligence. To him, the Plaintiff/Applicant was gambling with his suit at the expense of the Defendant/Respondent herein. He underscored that a period of seven (7) years of unexplained delay was unreasonable rendering the application time barred. Resultantly, the learned Counsel urged this Honorable Court to dismiss the Plaintiff/Applicant's Application for this reason.

40. Secondly, on whether the Amended Plaint introduced a new cause of action. The Learned Counsel submitted that in the case of “Institute for Social Accountability (Supra) the Court stated as follows:

“.....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side”

41. The Learned Counsel submitted that having read the Amended Plaint, it was evident that the Plaintiff/Applicant sought to introduce a new suit against the Defendant/Respondent by substantively changing the prayers sought to wit-

- (a) The Plaintiff wishes to amend its Plaint and seek compensation for the demolished house instead of a mandatory injunction compelling the Defendant to reconstruct the demolished house.
- (b) The Plaintiff also seeks special damages for the items which were not pleaded in the Plaint herein.

42. To buttress his point, the Learned Counsel relied on the case of:- “Lewar Ventures Limited – Versus - Equity Bank (Kenya) Limited [2022] eKLR, the Court stated as follows with regard to introduction of a new suit in amended pleadings:

“The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.”

43. In the instant application, the Learned Counsel argued that the Plaintiff/Applicant sought to introduce new-issues that were not pleaded in the Plaint. According to him, this would not only be prejudicial to the Defendant/Respondent but would also give the case a whole new dimension. As such, this application was an abuse of the court process and should fail in its entirety. In any case,



the Plaintiff/Applicant's reasons for amendment of pleadings in the instant Application never in any way assist the Court to determine the real questions in controversy. Therefore, the Plaintiff/Applicant should not suffer any prejudice if the suit remains as was.

44. In conclusion, the Learned Counsel submitted that equity aid the vigilant not the indolent. The conditions for amendment of pleadings had not been satisfied by the Plaintiff/Applicant herein. The application had been brought with undue delay. Seven (7) years had lapsed since the suit was instituted and no satisfactory reason was given for the delay. The amendment also sought to introduce new issues which would alter the substance of the case. For those reason therefore the Defendant/Respondent prayed that the Plaintiff/Applicant's Application dated 22nd March, 2022 be struck out /or dismissed with costs.

V. Analysis And Determination

45. I have keenly assessed and read through the pleadings filed by both the Plaintiff/Applicant and the Defendant herein, the written submissions, the myriad of cited authorities by the parties, the relevant provisions of *the Constitution* of Kenya, 2010 and the statutes.
46. For the Honorable Court to arrive at an informed, just, fair and reasonable decision, it has crystallized the subject matter emanating from the filed Notice of Motion application dated 22nd November, 2022 by the Plaintiff/Applicant and the Preliminary objection by the Defendant dated 2nd November, 2022 into the following three (3) issues for its determination
- a. Whether the Preliminary objection raised by the Defendant dated 2nd November, 2022 meets the laid -down threshold for such objection based on Law and precedents.
 - b. Whether the Notice of Motion application dated 22nd March, 2022 by the Plaintiff/Applicant meets the threshold for the amendment of Plaint dated 23rd January, 2019 and should it be granted as per provisions of the law.
 - c. Who will bear the Costs of the Notice of Motion application dated 22nd March, 2022 and preliminary objection dated 2nd November, 2022.

Issue No. A). Whether The Preliminary Objection Raised By The Defendant Dated 2Nd November, 2022 Meets The Laid -down Threshold For Such Objection Based On Law And Precedents.

47. Under this sub – heading, it is critical that the Honorable Court first and foremost deal with the issue of the preliminary objection raised by the Defendant/Respondent prior to proceeding on further with all the other issues. Legally speaking, an objection has very serious consequences. Ideally, should the objection succeed, then the application and perhaps the suit by the Plaintiff/Applicant then collapses. Thus, the issue to deal with is the issue of whether the Preliminary objection on point of law as stated out in the case of “Mukisa Biscuits (Supra) where the court observed that: -

“ A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion...”



48. According to the Black Law Dictionary a preliminary objection is defined as being:
- “In case before the tribunal, an objection that if upheld, would render further proceeding before the tribunal impossible or unnecessary.....”
49. Additionally, I hereby wish to cite the case of “Attorney General & another – Versus - Andrew Mwaura Githinji & another [2016] eKLR:- as it explicitly extrapolates in a more concise and surgical precision what tantamount to the scope, nature and meaning of a preliminary objection “inter alia:-
- (i) A preliminary objection raised a pure point of law which is argued on the assumptions that all facts pleaded by other side are correct.
 - (ii) A preliminary objection cannot be raised if any fact held to be ascertained or if what is sought is the exercise of judicial discretion; and
 - (iii) The improper raise of points by way of preliminary objection does nothing but unnecessary increase of costs and on occasion confuse issues in dispute.
50. It is trite law that a preliminary objection can be brought at any time at least before the final conclusion of the case. Ideally, all facts remaining constant, it should be filed at the earliest opportunity of the subsistence of a case, in order to pave way for the smooth management and determination of the main dispute in a matter.
51. In the instant case, the Defendant/Respondent has raised a preliminary objection based on the provision under Section 3 (1) of the [Public Authorities Limitation Act](#) (PALA) Cap 39 Laws of Kenya. The section of the law provided that (1) No proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued. Therefore, the Defendant/Respondent argued that from this provision of the Law, the application was barred by statutory limitation and that the Plaintiff/Applicant sought to introduce a new cause of action hence new suit by introducing new prayers in the amended Plaint.
52. Based on this averments, I am satisfied that the objection has basis in law as it raises matters of pure points of law. As stated, the Defendant/Respondent is contending the period when the Plaintiff’s brought this suit to court which do not need evidence to establish. They are also capable of ending the suit if they are established.
53. However, prior to proceeding further, the Honorable Court wishes to pose a question as to whether the suit before it is time barred or better still whether the issue of Limitation of Action applicable as a defence in this case.? To answer that question, this Court takes note that Section 3(1) of the [Public Authorities Limitation Act](#) (PALA) Cap 39 of Laws of Kenya in their Preliminary Objection. There is no dispute that the Plaintiff/Applicant filed in February 2016. The Defendant/Respondent contends that with the amendment the Plaintiff/Applicant has applied to the court the Plaintiff/Applicant seeks to introduce a new suit against the Defendant/Respondent by substantively changing the prayers sought to wit-
- a. The Plaintiff wishes to amend its Plaint and seek compensation for the demolished house instead of a mandatory injunction compelling the Defendant to reconstruct the demolished house.
 - b. The Plaintiff also seeks special damages of the items which were not pleaded in the Plaint herein.



54. According to the Plaintiff/Applicant the preliminary objection raised by the Defendant/Respondent on the alleged basis of Section 3(1) of the *Public Authorities Limitation Act* (PALA) is one without merit for the reason that at the time of institution of the subject suit and filing of the Plaint by the Plaintiff the alleged statutory 12 months provided for in the law had not lapsed. As such it is not possible for the Defendant to rely on the limitation of actions. There is no dispute that there already exists an action against the Defendant, which action was filed within the statutory time frame and that the Plaintiff/Applicant only seeks to amend the Plaint and the witness statement as the circumstances have since changed with a view of enabling the Court to substantively determine the dispute between the parties. This Honorable Court fully concurs and agrees with the line of arguments raised by the Plaintiff/Applicant herein. There is no suit that is being filed herein but mere seeking to amend an already existing pleadings. I have noted from the pleadings and inferences, that the Plaintiff/Applicant actually moved Court under the provisions of Order 8 Rule 3 (1), (2) (3) & (4) and not Order 8 Rule 3 (5) of the Civil Procedure Rules, 2010 which would connote adding or introducing a new cause of action. Thus the objection based on the issue of limitation of action and introduction of new suit is unfounded, baseless and unmeritorious.
55. In saying so, I am guided by the case of ‘Mitchell – Versus - Harris Engineering Co. (1967)12 Q.B 703 at p. 718 stated as follows:

“Some of the Judges in those cases spoke of the Defendant having a “right” to the benefit of the Statute of Limitations: and said that “right” should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff. Take the statute here in question. It is Section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty “the action shall not be brought” after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the Plaintiff must issue his writ within three years from the date of the accident. But there is nothing the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute ... In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the Defendant has no right to have it remain defective. The court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the court. It is a matter of practice and procedure.”

56. Therefore, I reiterate and take instructive note of the fact that the suit has already been filed and what the Plaintiff seeks is just an amendment of pleadings already filed before this court. For these reasons, the Preliminary objection by the Defendant/Respondent must fail.

Issue No. B). Whether The Notice Of Motion Application Dated 22Nd March, 2022 By The Plaintiff/ applicant Meets The Threshold For The Amendment Of Plaint Dated 23Rd January, 2019 And Should It Be Granted As Per Provisions Of The Law.

57. Under this Sub heading, the main substratum is on the amendments of pleadings. As already stated above, the legal principles on amendment of pleadings are provided for under the provision of Order 8 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. Procedurally, before the close of pleadings, the



leave of Court is not required as opposed to when there has been closure of pleadings. The principles upon which a Court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases already developed by various Courts with the passage of time.

58. Being a *pari material* issue, it is pertinent that the Court reproduces the provision of Order 8 herein. Order 8 Rule 3 provides that:

Amendment of pleading with leave [Order 8, Rule 3.]

- (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.

59. Amendment should not work injustice to the other side. But an injury that can be compensated by way of costs is not treated as an injustice. Further, the Honorable Court should aim to avoid multiplicity of proceedings and all amendments that should avoid such multiplicity should be allowed. The foregoing precedent confirms that the Honourable court has a wide and unfettered discretion to allow amendment of a claim provided that it is not after an inordinate delay or if it would occasion prejudice to the other side or if it introduces a new or inconsistent cause of action to the proceedings.

60. As stated, there have been a plethora of cases on the issue of amendments of pleadings. Hence, the Court should not be perceived to be re – inventing the wheel. These includes the case of “Eastern Bakery – Versus - Castelino (1958) E.A 461 (U) at Page 462 and Civil case No. 7 of 2017, St. Patrick’s



Hills School Limited - Versus - Bank of Africa Kenya Limited” eKLR (2018) where courts held, “inter alia”:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs.....”

61. The same was later on buttressed by the case of: “Bramwell, LJ in “Tildesley – Versus - Harper” (1878), 10 Ch. D. at Page 296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”

62. It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final Judgement is delivered. Pursuant to the above position, in application of the said legal principles to the instant case, this Court agrees with the Plaintiff/Applicant while seeking the reliefs it has from the filed application to cause amendments to its already filed Plaint based on the prevailing circumstances. Concurrently, the plea by the Plaintiff/Applicant is supported by the fact that the power to amend pleadings is at the discretion of the Court. In that case the court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice. The Court has already decided and granted leave to join the Proposed Defendant in the suit hence an amendment of the Plaint is inevitably vital and of cardinal importance for the purposes of determining the real question in controversy between the parties.

63. Additionally, the case of “Molo and Another – Versus - Kenya Railways and Another (2002) 2 KLR 551 decided by Onyango Otieno J as he then was (now JA) on an application for amendment. The Learned Judge held “inter alia” that:-

- i. It is a well settled principle in law, that applications for amendments to pleadings before hearing are normally to be granted without much a do if they can be made without injustice to the opposing party.
- ii. The reason why amendments to pleadings are generally granted without much fuss particularly before hearing is because such amendments help to have all matters between the parties availed to court, so that the court, may be in a better position to have an informed view of the entire case. That ensures justice.
- iii. No time limit can be spelt out for an application for amendments as it is an application that can be made at any time even after these is heard but before Judgment.

64. Thus, this Honorable Court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3 of the Civil Procedure Rules, 2010. Besides, in order to balance the scale of Justice as it were, the Court will allow the Defendant corresponding leave and the opportunity to respond to the amendment if they so wished to do. Therefore, for these reasons, under this sub – heading the application for the Plaintiff/Applicant succeeds.



Issue No. C). Who Will Meet The Costs Of The Notice Of Motion Application Dated 22nd March, 2022 And The Preliminary Objection Dated 2nd November, 2022

65. The Issue of Costs is at the discretion of the Costs. Costs mean the award that is granted upon a party upon the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By the event it means the result of the said legal action and/or proceedings.
66. In this case, as Honorable Court finds that the Plaintiff/ Applicant has succeeded in prosecuting its application and fulfilling the conditions set down for the amendment of the Plaint herein. Hence, it follows that the Plaintiff/ Applicant are entitled to be awarded costs of the said application hereof.

VI. Conclusion and Disposition

67. Consequently, upon conducting an elaborate analysis of the issues set out herein, this Honorable Court is satisfied that the Plaintiff/Applicant has established a case from the reliefs sought from the application. Thus, specifically, the Honorable Court proceeds to grant the following orders:-
- a. That the Preliminary Objection dated 2nd November, 2022 raised by the Defendant be and is hereby overruled for lack of merit.
 - b. That the Notice of Motion application dated 22nd February, 2022 by the Plaintiff/Applicant be and is hereby allowed with costs.
 - c. That the Plaintiff/Applicant herein is granted leave to file and serve an Amended Plaint afresh upon the Defendant herein within the next twenty One (21) days from the date of delivery of this Ruling.
 - d. That upon service the Defendant within Fourteen (14) days to be at liberty to file and serve an Amended Defence thereof
 - e. That the Defendant herein granted 14 days leave to fully adhere with the case management requirements under Order 11 of the Civil Procedure Rules 2010 and thereafter the Plaintiff granted Seven (7) days to file and serve reply to the Amended Defence and Supplementary List of documents and witnesses.
 - f. That for expediency sake this matter to have been fixed and/or disposed of within the next One Hundred and Eighty (180) days from the date of this Ruling commencing from 27th February, 2024 and there be a mention on 25th September, 2023 for holding a Pre Trial Conference.
 - g. That Costs of the application awarded to the Plaintiff/Applicant herein.

It is so ordered accordingly

RULING DELIEVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED IN OPEN COURT AND DATED THIS 19TH DAY OF JUNE 2023.

HON. JUSTICE L.L. NAIKUNI (JUDGE)

ENVIRONMENT & LAND COURT AT MOMBASA

