



Kitsao & 34 others v Mombasa Cement Limited (Environment & Land Case 46 of 2010) [2023] KEELC 18039 (KLR) (14 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18039 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 46 OF 2010**

**EK MAKORI, J
JUNE 14, 2023**

BETWEEN

SAMUEL CHARO KITSAO & 34 OTHERS PLAINTIFF

AND

MOMBASA CEMENT LIMITED DEFENDANT

RULING

1. The applicants seek to amend their defence by Notice of Motion dated December 16, 2022.
2. The reasons for the amendment are that there is a judgment in Mombasa HCCC No 185/1991 which needs to be included in the amended defence which held that the repealed Mazrui Law Trust was unconstitutional hence reverting the land to the Mazrui which land the Plaintiffs are claiming. The said land is the subject of contest. Further, the defendant has leased the parcel of land claimed by the Plaintiff from the Mazrui after the judgment in Mombasa HCCC No 185 of 1991.
3. That there is no new cause of action intended to be introduced and no prejudice shall be suffered.
4. The Respondent submitted that the amendment is inordinately late. The Judgment sought to be brought to the attention of the Court was delivered way back on July 19, 2012 (Tuiyot J as he then was) and the Applicant was aware of it having relied on it in the Notice of Motion dated December 31, 2012. The lease too is an issue that has been within the knowledge of the Applicant who entered the same well after this suit was filed contravening the doctrine of lis pendens. Besides, the Plaintiffs have long closed their case and will be prejudiced at this point if amendments are allowed.
5. The issues for determination are whether the Court should allow amendments to the defence as pleaded and who should bear the costs of the application



6. The Court has discretion under Order 8 Rules 3 and 5 of the *Civil Procedure Rules* to do so. The decision in *Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago [1995]* is also relevant in that to allow for an amendment, the following principles have to apply:

' Mr Regeru quoted extensively from Bullen and Leake & Jacob's Precedents of Pleading 12th Edition to support his arguments in justification of the learned judge's order. The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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 made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; 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 a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.'

7. The summary of it is that:
- i. Power is to allow an amendment intended to determine the true substantive merits of the case.
 - ii. The amendment should be timeously applied for.
 - iii. Power to amend can be exercised at any stage of the trial.
 - iv. Where a late amendment is made, it should be in good faith.
 - v. The Plaintiff will not be allowed to reframe his claim by an amendment of the plaint. The defendant will be deprived of his right to rely on the limitation of the Actions Act however; the Court may still allow the amendment notwithstanding the expiry of the current period of limitation.
8. I have reviewed the materials and submissions from both parties, as well as the principles cited for consideration in the pleadings amendment. This case has been pending in our court system since 2010. When an application was made to strike out the entire suit based on the decision in the Mombasa HCCC No 185 of 1991 on December 31, 2012, the defendant was aware of the Judgment delivered by Tuiyot J (as he then was), dated July 19, 2012, which served as the basis for striking out the plaint. The lease entered into by the defendants in 2014 was also well within the defendants' knowledge and was done during the pendency of this suit, which act violates the doctrine of lis pendens. The plaintiffs



closed their case on June 22, 2015 which is 8 years ago. Nothing has been placed before this court to show why the delay to amend for the last 13 years. The defendant has never been desirous of defending the suit for the last 8 years since the plaintiff closed their case. It is my view that the delay is not in good faith, at least the history of the matter says so.

9. I can see from the file enough judicial energy and time have been expensed in this file. The parties have also laboured and spent monies to attend our corridors of justice. The plaintiffs have already closed their case. The Defendants over a decade ago knew of the facts forming the corpus intended for the amendments. Allowing the amendment of the defence as proposed at this stage means the matter starts de novo. It will surely have another tangent of delaying and further stifling justice. This Court will not allow that. I also disallow the further introduction of new witness statements and documents with the same reasoning. Application dated December 16, 2022 is hereby dismissed with costs.

**DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY IN OPEN COURT ON THIS
14TH DAY OF JUNE 2023**

EK. MAKORI

JUDGE

In the presence of:

Ms. Adoyo H/B for Ms. Mango for the defendants

Mr. Shujaa for the Plaintiffs

Court Clerk: Happy

