



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**CIVIL DIVISION**

**CIVIL SUIT NO. 284 OF 2012**

**(ORIGINAL CLAIM)**

**NATIONAL SOCIAL SECURITY FUND**

**BOARD OF TRUSTEES.....PLAINTIFF/RESPONDENT**

**-VERSUS-**

**JANET NYANDIKO.....DEFENDANT/APPLICANT**

**(COUNTER CLAIM)**

**JANET NYANDIKO.....PLAINTIFF/APPLICANT**

**-VERSUS-**

**NATIONAL SOCIAL SECURITY**

**FUND BOARD OF TRUSTEES.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**GIDEON KYENGO.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**AGGREY NYANDONG' .....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**EPHANTUS NJERU.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**PETER NDUNGU.....5<sup>TH</sup> DEFENDANT/RESPONDENT**

**EDWIN BARASA JUMA.....6<sup>TH</sup> DEFENDANT/RESPONDENT**

**SARAH SARKOI.....7<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. The undisputed facts leading up to the motion dated 12<sup>th</sup> October 2020 are as follows. On 25<sup>th</sup> June 2008, the **Board of Trustees of the National Social Security Fund** (the plaintiff in original claim, and hereafter **NSSF**) and **Janet Nyandiko** (the Defendant in original claim, hereafter **Janet**) entered into a Tenancy Purchase Agreement for the purchase by **Janet** from **NSSF** of a flat erected upon the land parcel described as **LR No. 140/193 Nyayo Estate, Embakasi** (hereafter the suit property). The purchase price was Ksh. 4500,000/- payable by an initial deposit of 10% and the balance by 180 equal monthly instalments of Shs. 56,684/-. It appears that the arrangement ran into problems and the **NSSF**, claiming that **Janet** had defaulted on instalment payments, sought by early June 2012 to repossess the suit property, apparently without success. On 8<sup>th</sup> June 2012 the **NSSF** filed this suit against **Janet** alleging breach of the tenant purchase agreement on the part of **Janet** and seeking payment of the outstanding purchase price stated to be Shs. 4,511,483.95, or in the alternative an order of eviction and/or vacant possession and mesne profits.

2. **Janet** duly filed her Defence and Counterclaim on 13.7.2012 denying the **NSSF**'s claim and averring in her counterclaim , wrongful

eviction from the suit premises by NSSF on 4.6.2012, during which she allegedly sustained injuries and incurred various losses as a result. Others joined as Defendants in the counterclaim for their alleged roles in the eviction are the 2<sup>nd</sup> to 7<sup>th</sup> Defendants. **Janet** sought a mandatory injunction to compel the said Defendants to reopen the premises and to restrain them from *inter alia* selling, transferring, disposing of or in any manner whatsoever interfering with her quiet possession of the suit premises, special and general damages.

3. She also filed a motion seeking interlocutory injunctive orders, which was allowed by **Odunga J** on 20.12.2012. The interlocutory injunction was granted subject to the condition that **Janet** was to deposit the outstanding arrears in Court within 30 days, and to continue making payment of instalments as they fell due. In default, the application would stand as dismissed. There is no evidence of Janet's compliance with these conditions, and it appears that in November 2014 the NSSF repossessed the suit property and subsequently confirmed to have sold it to one **Mohamed Abdulrazak Sheikh**. Janet's application dated 18<sup>th</sup> November 2014 seeking interlocutory orders against NSSF *inter alia* to restrain it from taking possession of the suit premises was found to have been overtaken by events and struck out by **Sergon J** on 13<sup>th</sup> July 2018, upon receiving confirmation of the sale of the suit premises to a third party, then not a party in the suit before the court.

4. Undeterred, **Janet** filed the motion dated 12<sup>th</sup> October 2020 which is the subject of this ruling. By the motion Janet seeks leave to amend her statement of Defence and Counterclaim in terms of the annexed draft amended statement of defence and counterclaim. The motion is expressed to be brought under Order 8 Rule 3 and Order 51 Rule 1 of the Civil Procedure Rules. On grounds, among others, that it would be prudent to enjoin **Mohamed Abdulrazak Sheikh** as the 8<sup>th</sup> defendant in the counterclaim to enable the court to have all the facts necessary for a just determination of the matter, the NSSF having admitted the sale of the suit property to the proposed 8<sup>th</sup> defendant.

5. The affidavit in support of the motion was sworn by **Janet** and is to the effect that the NSSF had in 2018 admitted to have sold the suit property to the third party who is the proposed 8<sup>th</sup> defendant in the counterclaim; that certain matters arising since are pertinent to the determination of the case; that it would be prudent to allow Janet to amend her statement of defence and counterclaim to enjoin the proposed 8<sup>th</sup> defendant, to enable the court arrive at a just determination of the case ; and that no prejudice will be occasioned to the 1<sup>st</sup> to 7<sup>th</sup> defendants in the Counterclaim.

6. The motion was opposed through the replying affidavit sworn by **Austin Ouko**, described as the acting General Manager Corporate Affairs and Corporation Secretary of NSSF. The lengthy affidavit restates the history of the matter and emphasizes that the proposed 8<sup>th</sup> Defendant is an innocent purchaser whose joinder herein is unwarranted as he is not a necessary party, and that his joinder will not assist the Court in the determination of the controversy herein. The deponent's view is that the motion is devoid of merit and ought to be dismissed with costs.

7. On 11<sup>th</sup> February 2021 the Court directed that the parties canvass the motion by way of written submissions. The parties duly complied.

8. Counsel for **Janet**, relying on the case of **Eastern Bakery v Castelino (1958) E.A.461** submitted that the general rule is that amendments ought to be freely allowed if they do not occasion injustice to the adverse party and that there can be no injustice if such party can be compensated by costs. It was submitted that the proposed amendments arise from the same cause of action and will assist the Court determine the real question in controversy. Contained in the Applicant's submissions, there is what is clearly erroneous reference to the Law Reform Act and Fatal Accidents Act which evidently have no relevance herein. It seems that the references resulted from cut-and-paste errors as indeed some of other submissions therein appear to have no relation to the instant matter. The Applicant cites the Court of Appeal decision in **Joseph Ochieng & 2 others (Trading as Aquiline Agencies) v First National Bank of Chicago (1995) eKLR** as to the principles applicable in an application of this nature. He submitted that the constitutional right to a fair hearing in Article 50 of the Constitution entails the right of a party to amend its pleadings and that the amendment proposed herein accords with the purpose stated in the provisions of Order 8 Rule 5 of the Civil Procedure Rules namely, the determination of the real question in controversy and that the Defendants in the Counterclaim can be compensated through costs. The Court was urged to allow the amendments.

9. Counsel for NSSF submitted as follows. The motion before the court lacks merit as the applicant has no cause of action against the intended 8<sup>th</sup> defendant in the counterclaim. Counsel submitted, based on the provisions of Order 1 Rule 10(2) of the Civil Procedure Rules, that the main consideration where joinder of a new party to a suit is sought, is whether the party proposed to be enjoined is a necessary and proper party, and without whose joinder the court would be unable to effectually and completely adjudicate upon the questions in the suit. Calling to his aid the case of **Pizza Harvest Limited v Felix Midigo [2013] eKLR** wherein **Havelock J** (as he then was) cited with approval the English decision in **Amon v Raphael Tuck & Sons 1956 1 All ER 273**, counsel argued that joinder of a party is premised on the intent that such party should be bound by the result of the action and that the question sought to be settled cannot be effectually and completely settled without such party being enjoined .

10. Counsel for NSSF also referred the court to the cases of **Good News Church of Africa v Board of Management, Eldoret Secondary School [2020] eKLR** and **Martin Wesula Machyo v Housing Finance Company of Kenya Ltd & Another (2015) eKLR**, the latter where the court cited the decision of the Court of Appeal in **Central Kenya Limited v Trust Bank Limited (2000)2 EA 365**. Counsel argued that the proposed 8<sup>th</sup> defendant in the Counterclaim being an innocent purchaser for value and against whom no reasonable cause of action has been disclosed in the draft amended defence and counterclaim is not such party. Pointing to averments in the said draft, Counsel asserts that the key and other issues disclosed are primarily between **Janet** and NSSF and tied to the question whether the NSSF was entitled to repossess the suit property and therefore the joinder of the proposed 8<sup>th</sup> defendant is not necessary for determining effectually and completely the said question. Finally, it was submitted that the application for amendment is an afterthought, brought after a delay of three years and is without merit. He urged that it be dismissed with costs.

11. The court has considered the material canvassed in respect of the motion. Although invoking only the provisions of Order 8 Rule 3 of the Civil Procedure Rules (and Rule 5 of the same Order in submissions), Janet's motion is essentially one brought for leave to enjoin an additional defendant as envisaged in Order 1 Rule 10(2) of the Civil Procedure Rules. Order 8 Rule 5 provides for the court's general power to allow or order the amendment of any document "*for the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings*". The instances when this general power may be invoked are infinite, but the overriding

consideration is almost always whether the amendment sought will aid the determination of the real question in controversy between parties.

12. Order 1 of the Civil Procedure Rules specifically makes provision for the joinder of parties and amendment of pleadings to enjoin new parties. Order 1 Rule 10(2) of the Civil Procedure Rules provides as follows:

**“(2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.** (Emphasis supplied).

13. As the provision states, joinder of a new party can be allowed at any stage of the proceedings. The Court has wide discretion in allowing amendments to enjoin new parties, the object being the facilitation of the effectual and complete adjudication of all questions raised in the suit before it. In **Eastern Bakery Vs Castelino [1958] EA 461**, at p.462 the Court espoused the principles which ought to guide the courts when dealing with applications for amendments by stating:

**“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 side can be compensated by costs.... The court will not refuse to allow an amendment simply because it introduces a new cause .... But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by amendment the subject matter of the suit...**

**The court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon Vs Neal (1887)*, 19 Q.B.D. 394; *Hilton Sutton Steam Laundry*, [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side. *Chittaley, & Rao p. 1313*”.**

14. In reiteration of the above principles the Court of Appeal in **Attorney General v Kenya Bureau of Standards & Another [2018]eKLR** and in **Ochieng and Others v First National Bank of Chicago Civil Appeal No. 147 of 1991** the Court held that the power of the court to allow amendments is intended to determine the true substantive merits of the case; that the amendments should be timeously applied for; that the power to amend can be exercised by the court at any stage of the proceedings; 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 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 the Limitation of Actions Act, subject nevertheless to the court’s power to allow an amendment notwithstanding the expiry of the period of limitation.

15. In **Central Kenya Limited Vs Trust Bank Ltd. & Others Nairobi Civil Appeal No. 222 of 1998;(2000)2EA 365** the Court of Appeal restated these general principles and adverting to the general power to amend held that: -

**“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2 6<sup>th</sup> Ed. At P.2245 , of AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao , in which the learned authors state:**

**“that 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 right is affected and that the amendment can be allowed without injustice to the other side”.**

16. It is evident that the Janet’s proposal to enjoin the 8<sup>th</sup> defendant has been prompted by the NSSF’s alleged sale of the subject matter of the suit to the proposed 8<sup>th</sup> defendant. The applicant has maintained that the said proposed defendant is a necessary party and that his presence will enable the effectual and complete determination of issues arising herein. Not so, says NSSF, the proposed party is an innocent purchaser for value with no role in this suit where the contest is between the NSSF and **Janet**, and in addition no reasonable cause of action is impleaded against him in the draft amended defence and counterclaim.

17. A perusal of the said draft reveals that the cause of action between the NSSF and **Janet** remains essentially unchanged save for paragraphs 48-49, 52-55 and particulars of repairs pleaded under paragraph 51 though belonging to paragraph 49, which I propose to address in the final orders. And though the draft pleading does not qualify as a prototype of elegant drafting, it nevertheless contains averments disclosing some reasonable cause of action against the NSSF and the proposed defendant at paragraphs 50-51,56-59,61-62. The gist of these averments is that the alleged sale and transfer of the suit property to the proposed 8<sup>th</sup> defendant was tainted with fraud and illegality. Ultimately, in prayer (b) of the draft pleading the relief sought against the proposed 8<sup>th</sup> defendant is:

**“An order declaring that the purported transfer of the suit premise known as L.R. NO. 140/93 situated in Nyayo-estate Embakasi to the 8<sup>th</sup> defendant by counterclaim was a sham and fraudulent and the same should be cancelled.”**

18. I associate myself with the sentiments expressed by the learned Judge in **Technomatic Limited t/a Promopack Company v Kenya Wine Agencies Limited &Another (2014) eKLR** that a new party intended to be enjoined:

**“(M)ust be a necessary party ...a proper party, in the case of a defendant there must be relief flowing from that defendant to the plaintiff, the ultimate order or decree cannot be enforced without his presence in the matter, (and) his presence is**

necessary to enable the Court to effectively adjudicate upon and settle all the questions involved in the suit’.

19. In answering the question, What makes a person a necessary party, **Devlin J** (as he then was) stated in **Amon v Raphael Tuck & Sons Ltd (1956)1 ALLER 273 (as quoted in Pizza Harvest Case)** that:

**“The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party”.**

20. This dispute was previously between the NSSF and Janet, as counsel rightly submitted, but all that changed with the entry of the third party who has seemingly acquired rights over the subject matter of the suit. The three parties assert their respective rights to the suit property which cannot be determined in isolation without occasioning injustice. This reality informed the striking out of Janet’s earlier motion by **Sergon J** because a third party in possession of the suit property was not a party to the motion. In my view, given the circumstances of this case, the proposed defendant would stand to suffer more serious prejudice from non-joinder, probably prompting a fresh suit, if orders adverse to his title to the suit property were ultimately made herein without affording him a chance to ventilate his defense. Upon hearing all parties, the Court will be able to determine and settle all the questions arising as to the propriety of the repossession and sale of the suit property as well as the parties’ respective claims thereto effectually and completely. Once enjoined the proposed defendant will have the opportunity to make a defence and be compensated through costs if successful. There is no evidence that costs would not be adequate compensation.

21. The court is therefore of the considered view that the proposed defendant is a necessary party in this case. And while it is true that the application to amend could have been made as early as January 2018 when **Janet** received information concerning the alleged sale of the suit property to the proposed defendant, the delay, without more, cannot in the circumstances of this case defeat the motion. Moreover, the NSSF and other existing Defendants in the Counterclaim have not demonstrated that the amendment will occasion them injustice. The NSSF instead elected to emphasize possible prejudice to the proposed 8<sup>th</sup> defendant. The existing Defendants will be entitled to amend their pleadings accordingly if the amendment is allowed, and eventually to costs in the event that the dispute resolves in their favour.

22. I think I have said enough to demonstrate that the motion dated 12th October 2020 has merit. That however is not to say that the motion will be granted in its entirety. The sole reason given by the Applicant for bringing the amendments is the joinder of the proposed 8<sup>th</sup> Defendant and in Janet’s words, to bring out certain relevant matters arising *since* the alleged sale of the suit property to the said party. The matters pleaded at paragraphs 48-49, 52-55 and particulars of repairs pleaded under paragraph 51 though obviously belonging to paragraph 49 not only relate to incidents that allegedly took place in 2014 and hence prior to the alleged sale, but also seek to introduce a new claim on repairs. These amendments have not been justified during the canvassing of the instant motion and no explanation has been given for the delay of six years in bringing the application concerning them.

23. The court therefore while allowing the application to amend the Defence and Counterclaim as per draft will exclude therefrom the amendments reflected at paragraphs 48-49, 52-55 and particulars of repairs pleaded under paragraph 51 advertent to paragraph 49 in the draft pleading. The amended Defence and Counterclaim is to be filed and served on all the parties herein within 14 days of today’s date. The NSSF and 2<sup>nd</sup> to 7<sup>th</sup> Defendants as well as the new defendant **Mohamed Abdulrazak Sheikh** will upon being served, file their respective defences or amended defences to the Amended Defence and Counterclaim within 21 days of service. The costs of the motion will abide the outcome of the suit.

24. Finally, this court notes that this suit has been pending since 2012. To expedite it, the court directs that upon the close of pleadings, the parties move diligently to comply with Order 11 of the Civil Procedure Rules with a view to perfecting the suit for trial. Such compliance must take no more than four months from the date of this ruling and subsequently the matter is to be placed before the Court for pre-trial directions not later than January 2022.

**DELIVERED AND SIGNED ELECTRONICALLY ON THIS 29<sup>TH</sup> DAY OF JULY 2021.**

**C.MEOLI**

**JUDGE**

**In the Presence of:**

**Mr Evayo h/b for Mr Sisule for the Respondents**

**Mr Odhiambo h/b for Mr Wangalwa for Applicant**

**C/A: Carol**