



Mwangangi v Kambo & 5 others; Kivuvani (Interested Party) (Environment & Land Case 336 of 2007) [2023] KEELC 19337 (KLR) (31 July 2023) (Ruling)

Neutral citation: [2023] KEELC 19337 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 336 OF 2007**

**AA OMOLLO, J
JULY 31, 2023**

BETWEEN

COL.ALEXANDER M. MWANGANGI PLAINTIFF

AND

VINCENT KAMBO 1ST DEFENDANT

FLOWER POWER LIMITED 2ND DEFENDANT

ELART ENTERPRISES 3RD DEFENDANT

**JOSEPH K TOWETT, TOWETT PETER TONUI, ANNA KAMAYA TOWETT
(ADMN OF THE ESTATE OF THE LATE DR. TAITAA) 4TH DEFENDANT**

**JOSEPH K TOWETT (ADMINISTRATOR OF THE ESTATE OF THE LATE
ELIZABETH CHEROTICH TOWETT) 5TH DEFENDANT**

CHRISTO KATSANTONI CHRISTIE 6TH DEFENDANT

AND

NELSON MWANZIA KIVUVANI INTERESTED PARTY

RULING

1. The Plaintiff filed a notice of motion dated 3rd February 2023 seeking for the following orders;
 1. Spent
 2. That the Honourable court be pleased to grant leave to the 3rd Defendant to file a counter-claim.
 3. That in the alternative to prayer 2 above, the Counter-Claim dated the 3rd day of February 2023 that is annexed hereto be deemed as properly filed and on record.



4. That this honorable Court do direct that defences to the counterclaim (if any) be filed in short course.
5. That the costs of this application be in the cause
2. The application was supported by an affidavit sworn by Dr. Joseph K. Toweett, outlining the grounds of the motion. The Applicant stated that the matter is partly heard however, the 3rd Defendant intends to file a counter claim that shall raise crucial and pertinent issues touching substantively on the matters in issue in this suit. He deposed that if the sought leave is not granted, the 3rd Defendant will be extremely prejudiced and that the counter claim will assist the court in determining all the issues in dispute.
3. The Applicant explained that his father's estate, the 4th Defendant was sued in this matter and was represented by his mother, the 5th Defendant. However, she passed on and he came on record to represent her estate as well as that of his father. He contended that while his mother was still alive, she had wanted to file a Counter-claim against the Plaintiff but passed on before she could instruct her lawyers to file the same.
4. The Applicant stated that it took him time to get her mother's letters of administration and he did not have access to all information necessary to file the counter claim and that after their mother's demise the family was affected financially hence not able to raise fees for filing and instructing the lawyers.
5. The Plaintiff vehemently opposed the applicant's motion vide replying affidavit sworn by Col. Alexander M. Mwangangi on 14th March 2023 contending that he will suffer great injustice which cannot be compensated by costs if the motion is allowed. He deposed that this case has been pending in court for approximately 16 years with the dispute which goes back to 1991. That the Applicant has been aware of the dispute all along but only came on record around 30/11/2020 when the matter was coming up for hearing, thus scuttling the hearing with claims that they had never been served.
6. Further, he stated that the Defendants filed their defence dated 4/6/2021 when the matter had been rescheduled for hearing on 6/6/2021. That the Court issued directions on the substitution of the deceased 4th Defendant on 24/1/2022 and directed for all necessary compliances. The Plaintiff deposed that the Applicant failed to comply necessitating the court on 4/4/2022 to issue self-executing orders requiring compliance within 21 days. In default, they would not be allowed to file any other documents and therefore it is an abuse of process for the 3rd Defendant to seek to file a counter claim now.
7. The Plaintiff also stated that the amendment sought if granted will change the cause of action to a substantially different character. He avers that the counter claim widens the scope of this case by impugning the titles issued of persons who are not parties in this case and who own the other 4 titles that resulted from the sub-division of LR.No.13036. That for the court to adjudicate over the proposed counter claim, it will be necessary to invite the owners of the 4 titles subdivided in 1989 which have further been sub-divided and that will mean there will be approximately 36 other parties in the case, some of whom have been in occupation of the land since the 1980s against whom the claims sought to be raised are statutorily time barred.
8. The 1st and 2nd Defendants filed grounds of opposition dated 14th March 2023 to the Applicant's application stating that it violates the orders and directions of the court issued on 24th January 2022, lacks merit, there is inordinate delay in its filing and the same is an abuse of the process of court and prejudicial to them.
9. The 4th Defendant supported the application vide replying affidavit sworn by Anna Kamanya Toweett on 24th April 2023 which generally gave the history of the suit property stating that the issues in this



matter cannot be isolated and need to be discussed right from the genesis of the dispute in order for the ends of justice to be met effectively, therefore it is important to have the counterclaim admitted.

10. The Plaintiff filed submissions dated 16th May 2023 in opposition to the Applicant's application. He submitted that the motion should be scrutinized against the parameters of granting leave to amend pleadings as set out by the Court of Appeal in *Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago* [1995]eKLR thus; the power of the court to allow amendments is intended to determine the true substantive merits of the case, the amendment should be timeously applied for, 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 the Applicant will not be allowed to reframe his case or his claim if by amendment of the Plaintiff.

Analysis.

11. In explaining the cause for the delay, The Applicant avers that the matter was prosecuted by his deceased mother and after her demise, it took time to obtain letters of administration and the necessary information to enable filing of the counter-claim. He also stated that after the demise of the mother, the family was affected financially hence they were not able to raise fees for filing and instructing the lawyers. Also, stated that the counter claim raises crucial issues which will aid this court in determining the dispute in this matter.
12. The Plaintiff and 1st and 2nd Defendants stated that the application had been filed with undue delay and will be prejudicial to them and that the counter claim seeks change the cause of action into one of a substantially different character. It is trite that courts can allow amendments to pleadings at any stage of the proceedings. However, after the close of pleadings, qualification as to their merit and overall justice to all parties is added to allow their amendments. This goes to the intended purpose of the amendment.
13. The Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76, states the following on amendment of pleadings:

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.
14. This was echoed by the Court of Appeal in the case of *Central Kenya Limited v Trust Bank Limited* (2002) 2EA 365 where held that:

“...a party is allowed to make such amendments as maybe 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.”
15. The age of the case confirms that this is a matter that has taken a long time to be determined and that the instant application has been filed with undue delay considering the 3rd Defendant filed their defence



on 4/6/2021. However, even where there is undue delay, this court can still allow amendments with warranted reasons as to the very late filing. See the case of *Ocean Foods Limited v Osotpa Company Limited & 2 Others* (2020)eKLR which held that:

“The court however notes that, as rightly pointed out by the defendants, there was a long delay, on the part of the plaintiff in not only filing the defence to counter-claim, out of time, but also in filing the instant application. I find that the apparent long delay notwithstanding, this court still has the inherent power under Section 3A of the *Civil Procedure Act*, to permit the plaintiff to amend its pleadings at any time before judgment.

In *J. C. Patel v D. Joshi* [1952] 19 EACA 12, the court held:

“The rule of conduct of this court in such a case is that however negligent or careless may have been the first omission and however late the proposes amendment, the amendment should be made if it can be made without injustice to the other side.”

16. In considering the reasons for the delay, I have perused both the application and the court record. I note that the first plaintiff witness started giving his evidence on 2nd May 2018 and concluded on 22nd January 2019. Subsequently the Plaintiff filed an amended plaint dated 28th January 2022. Thus the Plaintiff applied to amend when the hearing had commenced and which application was within the law allowing amendments at any stage of the proceedings. The application by the 3rd Defendant was made after the close of the Plaintiffs case but before the commencement of the hearing of the defence case. The delay in bringing the current application runs from when the time the amended plaint was served in January 2022 and not when this suit was filed.
17. The only question this court will seek to answer is whether the proposed amendment will substantially change the cause of action in this suit and which will be prejudicial to the Plaintiff and the 1st and 2nd Defendants. A counter claim is a suit and/or a cross action. The Applicant stated that the counter claim raises pertinent issues and has annexed a draft of the same. In the case of *Eastern Bakery v Castelino* (1958) EA 462 the court held that:

“The court will not refuse to allow an amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of 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 amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.
18. I have perused the proposed counter-claim sought to be introduced vis the pleadings contained in the amended plaint. For instance, paragraphs 7 and 8 of the amended plaint states that the 4th Defendant was the registered propriety of L.R. 13036 which he later caused to be subdivided into five portions creating L.R. Nos 12218-12222. Under the particulars of fraud, paragraph 31(b)- (e) refers to fraudulent activities undertaken on the main title to the property. While in the proposed counter-claim, the Applicant pleads fraud on transfer of the L.R No 13036 to Flower Power without the consent of the 5th Defendant as a co-director of the Applicant. It then goes on and on about the transfer of shares including listing particulars of fraud touching on transfer of shares of the Applicant to Flower Power.



19. The issues raised in the draft counter-claim in my view refer to internal dealings of the two companies (the Applicant and Flower Power) and has nothing to do directly with the Plaintiffs claim. Therefore, allowing the application will substantially change the cause of action. In any event, this court lacks jurisdiction to hear and determine disputes relating to the fraudulent transfer of company shares. It is my considered opinion and I so hold, that the Applicant has rights which ought to be adjudicated upon independent of the current suit and outside the jurisdiction of the environment and land court.
20. After considering the proposed amendments as contained in the draft amended defence and counter-claim, I decline to grant the orders sought on account that the proposed amendments will substantially change the cause of action in the initial suit. Therefore, I proceed to dismiss the application dated 3rd February 2023 with costs to the Plaintiff, the 1st and 2nd Defendants

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 31ST DAY OF JULY 2023

A. OMOLLO

JUDGE

