



Obero (as the Administrator of Richard Simon Obero) v Nakhisa & another (Environment and Land Appeal 9 of 2020) [2023] KEELC 19044 (KLR) (28 July 2023) (Judgment)

Neutral citation: [2023] KEELC 19044 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT BUNGOMA
ENVIRONMENT AND LAND APPEAL 9 OF 2020**

**EC CHERONO, J
JULY 28, 2023**

BETWEEN

JOICE BEATRICE OBERO (AS THE ADMINISTRATOR OF RICHARD SIMON OBERO) APPELLANT

AND

PENINA NAMUSILA NAKHISA 1ST RESPONDENT

REZA KHISA 2ND RESPONDENT

(Being an appeal arising from the order & decree delivered on 2nd July, 2020 by Hon. C.A.S MUTAI (SPM) Bungoma in CMC ELC Case No. 31 of 2018)

JUDGMENT

Introduction

1. These proceedings begun with a plaint filed in the Environment and Land Court by the respondents dated 31st January,2017 seeking eviction orders and costs. The appellants entered appearance and filed their statement of defence dated 28th March,2017. Both parties filed their respective lists of documents and set the matter down for hearing. The court on its own motion referred the matter to the Chief Magistrates court for pecuniary jurisdiction.
2. At the Chief magistrate’s court pre-trial directions were taken and the matter was certified ready for hearing. The matter came up severally for hearing but finally kicked off on 18th February, 2019 when the plaintiff called two witnesses i.e. PW1-Penina Namusila Nakhisa and PW2-Reza Khisa and on 5th August,2019 when PW3-Cleophas Wanyonyi Waswa testified and the plaintiff/respondent’s closed their case.
3. During the defence hearing date,30th September,2019 the defendant/appellant raised a Notice of Preliminary Objection which the court disallowed and directed that the issue raised therein be dealt



with in the main suit. The matter came up for defence hearing severally and on 5th February,2020 the defendant/appellant filed a Notice of Motion under certificate of urgency seeking the following orders;

- a. That the application be certified as urgent and service of the same be dispensed with in the first instance, and be heard on priority.
 - b. That the Honourable court be pleased to stay and set aside further proceedings slated on the February 17, 2020
 - c. That the defendant/applicant be granted leave to amend his defence dated 28.3.2017 and incorporate a counterclaim
 - d. That the proposed draft of amended defence and counterclaim annexed hereto be deemed as duly filed upon payment of the requisite court fees.
 - e. That the plaintiff/respondents be at liberty to amend their plaint within 14 days thereafter if they so wish.
 - f. The cost of this application be provided for.
4. Prayer 1 and 2 were granted on interim basis pending *inter-parte* hearing. The application was heard orally and the court retreated to write its ruling which was delivered on 2nd July,2020. In its ruling the court disallowed the application with costs.
5. Being dissatisfied with the court's ruling the appellant herein preferred the current appeal for orders that the appeal be allowed and the ruling and order of the trial magistrate be set aside and the appellant be allowed to amend her defence plus cost of the appeal. The appeal is predicated on the following grounds;
- a. That the learned trial Magistrate erred in law and in fact by delivering a ruling and order without regard to the provisions of Article 159(2) of the constitution, and the overriding interests of the Land Registration Act,2012.
 - b. That the learned trial Magistrate erred in law and in fact in failing to allow the Appellants notice of Motion for amendment, contrary to the provisions of Order 8 Rule 3 and 5(1) of the Civil Procedure Rules.
 - c. That the learned trial Magistrate erred in law and in fact by not considering the provisions of Section 1A,1B and 3A of the Civil Procedure Act.
 - d. That the learned trial Magistrate erred in law and in fact by holding that the Application has been brought as an afterthought and yet the amendment sought were not inconsistent with the pleadings
 - e. That the learned trial Magistrate erred in law and in fact by failing to find that the amendment sought was necessary by the apparent error on the face of the defence dated 28th March,2017 to give particulars as required by the law.
 - f. That the learned trial Magistrate erred in law and in fact by ignoring the Appellants submission and authorities relied on.
 - g. That the learned trial Magistrate erred in law and in fact by failing to consider submissions by the appellant that the mistake of an advocate should not be visited on an innocent litigant.



- h. That the learned trial Magistrate erred in law and in fact by failing to find that the intended amendments were necessary to enable the court fully and properly determine the real issue between the parties.

Appellants Submissions

6. The appellant in her submissions states that the trial court did not consider the provisions of Article 159 (2)(d) of the *constitution* which talks about administration of justice without undue regard to technicalities and which in essence introduces the overriding objective in civil litigation and brings in the aspect of considering the hardship, expense, delay and injustice that would be occasioned if a court made a determination based on a technicality. She further submitted on the provisions of Article 50 of the *constitution* on fair hearing and asserted that the trial court disregarded these paramount constitutional provisions and condemned the appellant unheard.
7. The appellant further submitted on the overriding interests attaching to a registered title under Section 28 of the *Land Registration Act*, 2012. She relied on the case of *Samuel Kamere v Land Registrar* (2015) Eklr in support of her claim that the respondent does not qualify as a bonafide purchaser for value and that the defendant was the legal allottee of the suit property.
8. It was the appellant's submission that the trial court disregarded the provisions of Order 8 Rule 3 of the *Civil Procedure Rules* where the law allows a party to amend his pleadings with the leave of court at any stage of the trial for purposes of determining the real question in controversy between the parties. She placed reliance on the cases of *Eunice Chepkorir Soi v Bomet Water Co. LTD* (2017) Eklr and *Sanyu International Limited v Oriental Commercial Bank LTD* (2017) Eklr.
9. Further submissions were made that the trial court did not invoke its discretion as drawn from Section 1A, 1B and 3A of the *Civil Procedure Act* to ensure justice is realized. The appellant further submitted that the trial court erred by disallowing the application to amend on the ground that the same was an afterthought despite the same being geared to correct an error apparent on the face of the defence. She submitted that the law allows any party to a suit to amend pleadings at any state of the hearing before its conclusion as long as the same did not introduce a new or inconsistent cause of action as was the case in her proposed amendments. She further submitted that the application was timely and the same would not prejudice her opponents. She relied on the case of *Lewar Ventures Limited v Equity Bank (K) Ltd* (2022) Eklr and *Elijah Bii v Kenya Commercial Bank Ltd* (2013) Eklr, *Central Kenya Limited v Trust Bank Limited* (2000) 2EA 365.
10. The appellant further submitted that the trial court the guiding principle that the error of an advocate ought not to be visited upon a client and the court's decision in *Philip Chemwolo & Anor v Augustine Kudebe* (1982-88) KAR 103, *Mbaki & others v Macharia 7 Another* (2005) 2EA 206 and *Cromwel Kitana v John Mwema Mbevi* Civil Appela No.50 of 1984.
11. The appellant urged the court to find that the sought amendments were necessary to facilitate the determination of the real question in controversy between the parties and to avoid multiplicity of suits and that the trial court misapprehended the facts and the law hence reaching a wrong conclusion. She urged the court to allow the appeal and set aside the ruling of the trial court.

Respondents Submissions

12. The respondents in their submissions state that the grounds as set out in the memorandum of appeal do not in any way demonstrate that the trial court based its decision on any evidence or misapprehended the evidence on record or acted on wrong principles in reaching its findings. The respondent submitted



that the plaintiff did not deny the existence of the proceedings in the trial court from pre-trial directions to the plaintiff calling 3 witnesses and later closing his case, a notice of preliminary objection being determined and to the matter being set down for hearing. They submitted this in support of the trial courts finding that the application for amendments was an afterthought and a delay tactic on the part of the appellant. They placed reliance on the courts pronouncement in the Supreme Court in the case of *Zacharia Okoth Obado v Edward Akongo Obado & 2 others* (2014)Eklr.

13. The respondents submitted that the trial court properly exercised its discretion in disallowing the application under Section 8 of the *Civil Procedure Rules*. It was further their submission that the application was not timely and relied in the case of *Elijab Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013) Eklr. It was their submission that the application to amend did not meet the parameters allowed in law as stated in *Lewar Ventures Ltd v Equity Bank (Kenya) Ltd* (2022)Eklr. They urged the court to find that the appellants were indolent in filing their application and the same amounted to an abuse of the due process of the court which would highly prejudice their case. Finally, they submitted that no elaborate mistake by the previous advocate had been brought before court and that the appellants were merely clutching on straw's to escape drowning

Analysis And Determination

14. I have carefully considered the appeal, submissions by counsel for the parties and the authorities relied on. This being a first appeal, parties are entitled to and expect a rehearing, reevaluation and reconsideration of the evidence afresh and a determination of this court with reasons for such determination. In other words, a first appeal is by way of retrial and this court, as the first appellate court, has a duty to re-evaluate, re-analyze and re-consider the evidence and draw its own conclusions.
15. In *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR, the Court of Appeal stated that;

“[A]n appeal to this Court from a trial by the High Court is by way of retrial and the principles upon which this Court acts in such an appeal are well settled. Briefly put, they are that this court must reconsider the evidence, evaluate it itself and draw its own conclusions though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowances in this respect”
16. I now proceed to discuss the issues raised in the appeal. From the memorandum of appeal, it is clear that the appellant contends that the court misdirected itself in disallowing the application dated 5th February, 2020 by failing to consider the provisions of the law and the guiding principles in allowing or disallowing applications to amend pleadings. I will therefore discuss the requirement under the law, *viz-a-viz* the case before me.
17. Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 (1) of the *Civil Procedure Rules*, 2010 gives the court power to amend pleadings. Order 8 Rule 5(1) provides as follows:
 - i. “For the purpose of determination the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any documents to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just.”
18. 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...”.

19. The principles for consideration in an application for amendment of pleadings are set out in Court of Appeal decision of *Ochieng & others v First National Bank of Chicago* Civil Appeal Number 147 of 1991. They are as follows:
- a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to amend can be exercised by the court at any stage of the proceedings;
 - d. 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;(emphasis is more)
 - e. the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.

In Bramwell, LJ in *Tildesley v Harper* (1878), 10 Ch.D. at p.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.”

20. In *Eastern Bakery v Castelino*, (1958) E.A.461 (U.) at p.462 it was stated thus:

“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 if the other side can be compensated by costs.

21. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously. The discretion of courts to amend pleadings was summarized by the Court of Appeal in *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 thus:

“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 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 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.”

22. From the principles set out above and as captured in the authorities cited, it is clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. That amendments should be allowed even in situations of delay if the other side can be compensated by an award of costs. The caveat in amendments is that it should not change the character of the case and should not deprive the other side of its legal rights. Any amendments allowed by the court should be geared towards achieving a just and final determination of the real issues in controversy between the parties. In addition, the application must be made in good faith.
23. On the issue raised by the respondent in his replying affidavit on directions under Order 11 of the *Civil Procedure Rules*, I opine that certification of a case as ready for hearing does not take away the court’s inherent discretion under Section 3A of the *Civil Procedure Act*. Further, from the record it is clear that there was no Reply to Defence filed hence pleadings had not closed when the suit was certified as ready for hearing.
24. The appellant as rightfully noted by the trial court is however guilty of inordinate delay of three years or there about in bringing up the application since when the claim was filed in court. That notwithstanding, there is no evidence that the application is being made mala fide. The appellant in his supporting affidavit in support of the application and submission in the appeal submitted that the failure to institute the sought amendments in the 1st defence was an inadvertent error and that the appellant has since changed advocates and the errors of the advocate should not be visited on the client. She quoted *Cromwel Kitana v John Mwema Mbevi Civil Appela No.50 of 1984*.
25. I wish to quote the court where in an attempt to narrow this discretion the High Court in Nairobi HCCC NO 159 of 1981 *Patel v Amin* held that;

“an application for amendment should be made at the earliest possible moment. The Applicant herein has given a satisfactory explanation for the delay in incorporating the proposed amendments in the initial Defence which was occasioned by a change of advocates and inadvertence on the part of his advocate.”
26. I find the explanation by the appellant plausible and find that the appellant ought to be given a chance to present her case in full for the courts consideration.
27. On the issue as to whether an injustice would be occasioned in the event the appeal is allowed the court takes Judicial Notice that the respondents had called three witnesses and closed her case. The main principle is that amendment should not be allowed if it will cause injustice to the other side. In *Institute for Social Accountability & another v Parliament of Kenya and 3 others* 2014 KLR a three judge bench of Lenaola, Mumbi and Majanja J stated that;

“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 state of facts which the parties really and finally intend to rely on. The power to amend 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 and proceedings”
28. It begs the question therefore, should the appeal be allowed and the respondents’ wishes to file a reply to the defence (since there was none) and even to recall the three witnesses who had already testified



who bears the cost incurred. The answer to this is simply that the costs of recalling the witnesses shall be borne by the Appellant. Therefore, in my opinion the delay in filing the counterclaim shall not occasion any prejudice to the respondent and even so the respondent can be compensated by way of costs for the delay.

29. It is my humble opinion it is in the interest of both parties in this suit to put the issue of ownership of the suit property to rest and that can only be achieved if both parties are allowed to present their cases in full. I am of the view that the court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are really brought out, the other party is not prejudiced, the character of the suit or defence is not altered and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work an injustice.
30. I find that the proposed amended defence raises triable issues on how the plaintiff obtained title of the suit property. This question can only be answered if pleaded in the defence.
31. I accordingly allow the appeal and set aside the ruling of the trial court and any orders emanating therefrom and remit the original file to the trial court for hearing and determination. I also proceed to direct that parties fix the suit in the Chief Magistrate's court for pre-trial within 14 days of this judgment.

Costs in the cause.

- 32 Orders accordingly.

READ, DELIVERED AND SIGNED IN THE OPEN COURT AT BUNGOMA THIS 28TH DAY OF JULY 2023.

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HON E C CHERONO

ELC JUDGE

In the presence of

Mr onyando for the Appellant

Mr Makokha for the

Joy – court Assistant

