



**Marete v Mwidau & another (Environment & Land Case
224 of 2021) [2023] KEELC 19128 (KLR) (26 July 2023) (Ruling)**

Neutral citation: [2023] KEELC 19128 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 224 OF 2021
NA MATHEKA, J
JULY 26, 2023**

BETWEEN

JANE GAKII MARETE PLAINTIFF

AND

AHMED ABDALLA MWIDAU 1ST DEFENDANT

PRIME BANK LIMITED 2ND DEFENDANT

RULING

1. The application is dated March 31, 2023 and is brought under section 34 and 100 of the *Civil Procedure Act*, cap 21 Laws of Kenya, order 8 rules 3 and 5, order 51 rule I of the *Civil Procedure Rules 2010* and article 159 of the *Constitution* of Kenya (2010) seeking the following orders;
 1. That the honourable court be pleased to grant the 1st defendant leave to amend his defence in terms of the annexed draft amended defence and counterclaim.
 2. That the annexed draft amended defence and counterclaim be deemed as duly filed and served, upon payment of the requisite court fees.
 3. That costs of this application be in the cause.
2. It is based on the grounds that it is necessary to amend the 1st defendant's defence to comprehensively and articulately capture all the real issues on controversy and all the remedies to being sought by the 1st defendant in the counterclaim so as to have this matter adjudicated upon and determined once and for all. The amendments sought by the 1st defendant simply seek to cover and address all issues in controversy and which issues are directly and substantially relevant to his claim and defence. The amendments sought arise out of the same facts or substantially the same facts, hence no prejudice shall be visited upon the plaintiff and or the 2nd defendant. The issues and/or facts sought to be introduced by the intended amendment are already covered by the evidence filed by the parties herein.



This application has been made in a timely-fashion, pre-trial directions having not been issued and the suit having not been fixed for hearing. This application has been made in good faith and with the sole intention of all real issues in controversy which includes the 1st defendant to introduce a valid counterclaim. in the event that this application is not allowed, the 1st defendant shall be occasioned substantial loss and hardship thereby suffering grave injustice. It is the interest of justice and fairness that the 1st defendant be granted leave to amend his defence and include counterclaim so as to plead the whole of his claim he is entitled to make in respect of his cause of action.

3. The plaintiff/respondent stated that the intended amendments by the 1st defendant are so extensive that they shall change the entire nature, character and tenor of the original defence by introducing a counterclaim that is inconsistent and greatly at a variance with the 1st defendant's original pleadings. That it must be recalled that the substratum of the 1st defendant's defence, more particularly as pleaded at paragraph (4) of the 1st defendant's statement of defence dated November 22, 2022, was that the respondent never occupied the suit property since 1998, and that it is not true that the respondent put up several improvements on the suit property. Further, at paragraph (6) of the 1st defendant's defence, it is pleaded that sometimes in October, 2021, her illegal, forceful and unlawful attempts to gain entry into the suit property were successfully thwarted. In short, the essence of the 1st defendant's original pleadings has always been that the respondent has never occupied the suit property.
4. That whilst the aforesaid averments have been retained at paragraphs (4) and (6) of the 1st defendant's amended defence and counterclaim, at paragraphs 13, 15, 16 and 17 of his counterclaim, the 1st defendant has now made a complete about-turn by alleging that she is in illegal occupation of the suit property and she has refused to give vacant possession thereof. As consequence, the 1st defendant now intends to seek for orders of eviction and demolition of illegal structures. That the proposed amendments at paragraphs 13, 15, 16 and 17 of 1st defendant's amended defence and counterclaim, which substantially form the basis of the application for leave for amendment, is a mischievous ploy to introduce a new case which would change the nature, tenor and character of the action in to one of a substantially different character, at variance with the position hitherto vested and/ or pleaded by the 1st defendant. That the timing of the instant application is in itself suspect and telling, coming off the back of the court's ruling delivered on February 21, 2023, dismissing the 1st defendant's application dated March 17, 2022. That whereas the 1st defendant has not proffered an explanation as to why he has brought this application one and a half years later, the reason for his said application is manifestly obvious. The 1st defendant's application for eviction dated March 17, 2022 having, inter alia, been dismissed for the reason that it was not premised on any claim, the 1st defendant having not filed a counter-claim seeking her eviction from the suit property, it is quite clear that the 1st defendant is now trying to fill the glaring gaps in his otherwise frivolous and vexatious defence. As such, the belated application for amendment is an afterthought. That in light of the averments contained in the 1st defendant's application dated March 17, 2022, it is her belief that, all along, the 1st defendant knew the substance of his case and was possessed of the information he seeks to introduce. Therefore, there is no explanation whatsoever why he seeks to introduce amendments so late in the day. The 1st defendant is simply a negligent pleader. That the proposed amendments are geared to introducing a new cause of action which is inconsistent with the cause of action contained in the 1st defendant's statement of defence.
5. This court has considered the application and submissions therein. The issue for determination is whether the court should allow the application for amendment of the defence and counterclaim. The general power to amend pleadings comes from section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, however, the right is not



absolute but discretionary. Be that as it may, this discretion should be exercised judiciously and in line with criteria set out under order 8 rule 3 of the Civil Procedure Rules. Order 8 rule 5 of the Civil Procedure Rules provides as follows: -

"For the purpose of determining 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 manner as it directs and on such terms as to costs or otherwise as are just."

6. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per 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 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..."

7. Similarly, in Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments 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..."

8. In the instant case the applicant sought for leave to amend their defence and counterclaim so as to plead the whole of his claim he is entitled to make in respect of his cause of action. The defence remains unchanged and the counter claim seeks, *inter alia*, vacant possession and demolition of illegal structures. The respondent states that the 1st defendant's instant application runs contrary to the general principles that govern amendment of pleadings, that is to say, a party cannot be allowed to amend his/her pleadings in a bid to introduce a cause of action that is new and inconsistent with the cause of action that have hitherto been pleaded. I find that the proposed counter claim does not raise any new cause of action but seeks remedies flowing from their pleadings. I therefore find that the application has merit and is allowed as prayed. Costs of the application to be in the cause.

9. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 26TH DAY OF JULY 2023.

N.A. MATHEKA

JUDGE

