



**Kiarie v Bei International Limited t/a Scorpio Villas & 3 others (Environment & Land Case 159 of 2017) [2023] KEELC 19346 (KLR) (25 August 2023) (Ruling)**

Neutral citation: [2023] KEELC 19346 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT & LAND CASE 159 OF 2017  
MAO ODENY, J  
AUGUST 25, 2023**

**BETWEEN**

**AMON MUTURI KIARIE ..... PLAINTIFF**

**AND**

**BEI INTERNATIONAL LIMITED T/A SCORPIO VILLAS ..... 1<sup>ST</sup> DEFENDANT**

**OFFICE OF THE ATTORNEY GENERAL ..... 2<sup>ND</sup> DEFENDANT**

**KENYA WILDLIFE SERVICE ..... 3<sup>RD</sup> DEFENDANT**

**NATIONAL ENVIRONMENT MANAGEMENT AUTHORITY .... 4<sup>TH</sup>  
DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 2<sup>nd</sup> December 2022 by the 1<sup>st</sup> Defendant Applicant seeking the following orders: -
  - a. Spent.
  - b. Spent.
  - c. This honourable court be pleased to grant leave to the 1<sup>st</sup> Defendant/applicant to amend its statement of defence in terms of the draft annexed amended 1<sup>st</sup> Defendant's statement of defence and counterclaim.
  - d. Leave be granted to the 1<sup>st</sup> Defendant to file a supplementary list of witnesses to include;
    - a. Simone Mancini



- b. Stephen Kahindi
  - e. The 1<sup>st</sup> Defendant be granted leave to file a supplementary list of documents including annual environmental audit report year 2022.
  - f. The draft amended 1<sup>st</sup> Defendant's statement of defence and counterclaim, supplementary list of documents, supplementary list of witnesses be deemed as duly filed and served with the leave of court upon payment of the requisite court fees.
  - g. Costs of this application be provided for.
2. The application is supported by the grounds on the face of the application and the affidavit of the 1<sup>st</sup> Defendant's director known as Gastone Agazzani where he stated that the intended amendments will enable the court determine the real question in controversy between the parties and not cause any prejudice to the suit.
  3. The deponent further stated that the information, witnesses and documents proposed to be added to the pleadings was not available to the 1<sup>st</sup> Defendant until around 29<sup>th</sup> November 2022 when one of the proposed additional witnesses, Simone Mancini, the immediate former owner of the suit properties, agreed to cooperate with the 1<sup>st</sup> Defendant. That the intended amendments were pleaded as follows;
    - a. The 1<sup>st</sup> Defendant has acquired the right to use the suit foot path by prescription.
    - b. The Plaintiff's suit was filed outside the limitation period.
    - c. That the 1<sup>st</sup> Defendant obtained written permissions from the relevant authority to construct and operate the structure known as Cocoa Beach.
  4. In response to the application the Plaintiff opposed relied on his Replying Affidavit dated 22<sup>nd</sup> December 2022 whereby he stated that the 1<sup>st</sup> Defendant was all along aware of the aforesaid information and had ample opportunity and time to amend its pleadings.
  5. The Plaintiff further averred that the issues raised in the proposed amendment were res judicata as the 1<sup>st</sup> Defendant filed a preliminary objection dated 26<sup>th</sup> September 2017 which was dismissed 25<sup>th</sup> May 2018. It was the Plaintiff's contention that the proposed amendments were an attempt to cure the 1<sup>st</sup> Defendant's omissions highlighted in the Plaintiff's testimony in court and an attempt to delay the hearing of the suit.

### **1<sup>st</sup> Defendant's Submissions**

6. Counsel identified three issues for determination namely:
  - a. Whether the court should grant leave to amend the statement of defence.
  - b. Whether the court should grant leave to file supplementary list of documents and witnesses.
  - c. Whether the proposed amendments and the evidence of the proposed witnesses will prejudice the Plaintiff.



7. On the 1<sup>st</sup> issue, counsel relied on Order 8 rule 3 of the Civil Procedure Rules and the case of Institute for Social Accountability and another v Parliament of Kenya and 3 others [2014] eKLR, and submitted that the proposed amendments were necessary to understand the history of the disputed foot path and the adjoining properties; and that it is in the interest of justice that the application is allowed.
8. Ms Mwangi argued that it is necessary to introduce the new witnesses and documents in order to support the proposed amendments to their defence and that the evidence was new, material to the facts in issue and of conclusive probative value to the case in so far as proving the existence of the rights to use the disputed footpath by the owners of the adjoining lands.
9. Counsel relied on the case of *Pinnacle Projects Limited v PCEA, Ngong Parish and another* [2019] eKLR.
10. It was counsel' submission that the counterclaim is important in protecting the 1<sup>st</sup> Defendant's constitutional rights to enjoy his property and to prevent the Plaintiff from interfering with its right to own and enjoy private property and to avoid multiplicity of suits.
11. On the 2<sup>nd</sup> issue as to whether the court should allow the additional documents and supplementary witnesses, counsel submitted that paragraph 19 and 20 of the draft annexed amended 1<sup>st</sup> Defendant's statement of defence and counterclaim, the 1<sup>st</sup> Defendant raises a preliminary objection to the jurisdiction of the Court to entertain the suit which needs to be addressed first and foremost. That a party is allowed to challenge the jurisdiction of the court at any stage of proceedings.
12. Counsel submitted that the proposed amendments will not prejudice the plaintiff in any way as the amendments do not materially change the facts of the case; the plaintiff shall have equal leave to file additional documents and recall witness; that the additional documents were not voluminous; that there was no evidence that the 1<sup>st</sup> Defendant's intention was to delay the suit; and that the Plaintiff will be compensated by way of costs.
13. Counsel relied on the cases of *Hangover Kaakwacha Hotel Ltd v Philip Adundo and Leonard Adundo t/ a Hangover Kaakwacha Hotel* [2022] eKLR; and *Pinnacle Projects Limited v PCEA, Ngong Parish and another* [supra] and urged the court to allow the application as prayed.

### **Plaintiff's Submissions**

14. Counsel gave a brief background to the case, stated that this matter had gone for pretrial several times and counsel agreed that it was ripe for hearing, and took a hearing date. Counsel relied on the case of *Kassam Versus - Bank of Baroda (Kenya) Limited* (2002) 1 KLR 294 and urged the court to consider the requirements highlighted in the case namely:
  - a. The party applying is not acting mala fides;
  - b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
  - c. The amendment is not a device to abuse the court process;
  - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
  - e. And that the amendment will not alter the character of the suit.



15. It was counsel's submission that the 1<sup>st</sup> Defendant's actions were mala fides and an abuse of the court process for being filed late in the day yet the proposed amendments were available to them since the inception of the suit in 2017.
16. Ms Ouma argued that the 1<sup>st</sup> Defendant ought to have sought the assistance of other previous owners of the land they occupied, if the proposed new witness was uncooperative therefore the proposed amendments were an attempt to fill the gaps in the defendant's case and relied on the cases of [Julius Njiraini Nyamu v Henry Mburu Marungo and 3 others](#) [2021] eKLR; and [Lawrence Kinyua Mwai v Nyariginu Farmers Co. Ltd and another](#) [2019] eKLR.
17. Counsel submitted that there was a precondition to be considered as to whether the amendment will result in prejudice or injustice or will affect accrued rights of the other party which cannot be compensated by way of costs as per the cases of *J.C Patel v D. Joshi* [1952] 19 EACA 12; and [Daniel Ng'etich and another -v- K-Rep Bank Limited](#) [2013] KLR.
18. Ms Ouma submitted that allowing the application after the close of the Plaintiff's case on 16<sup>th</sup> March 2022, will necessitate amendment of the Plaintiff's pleadings and the suit be heard de novo, thus further delaying determination of the suit and effectively causing hardship and injustice to the Plaintiff which cannot be compensated by an award of damages. Counsel relied on the case of [Richard Omare Moreka \(Suing as the administrator of the estate of the late Eresta Mong'ina Moreka\) -v- Peter Mabuka and 9 others](#) [2021] eKLR.
19. Counsel further submitted that the proposed amendments were of no value to the determination of the suit and cited the case of [David Kitonyi and 4 others -v- Joseph M. Nzioka](#) [2018] eKLR.
20. Counsel added that the proposed amendments would alter the character of the suit as they entailed new claims to wit a claim of right by prescription and that under the [Limitation of Actions Act](#).
21. Ms Ouma relied on the case of *Abdul Karim Khan -v- Mohamed Rosban* [1965] EA 289 cited by the Court of Appeal in [Catherine Koriko and 3 others -v- Evaline Rosa](#) [2020] eKLR and urged the court to dismiss the application with costs to the plaintiff.

### **Analysis and determination**

22. The issue for determination is whether the 1<sup>st</sup> Defendant's application for amendment of defense to include a counterclaim can be allowed at this stage.
23. Order 8 of the [Civil Procedure Rules](#) gives the court discretion to grant leave to a party seeking to amend their pleadings. More specifically order 8 rule 5 of the [Civil Procedure Rules](#) stipulates as follows:
  - “(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.’
24. *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...”.

25. In the case of *Kassam Versus - Bank of Baroda (Kenya) Limited* (2002) 1 KLR 294(supra) the court stipulated the requirements to consider in an application for amendment of pleadings as enumerated above.
26. The principles are therefore clear that amendment of pleadings should ordinarily be allowed unless they are bound to cause prejudice to the other party. In case of delay, the amendments can be allowed upon explanation of the delay. The condition 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.
27. The Plaintiff's claim against the 1<sup>st</sup> Defendant is in relation to a portion of land identified as an access road to beach which he claimed that the portion forms part of his land known as Malindi Plot No. 10496 and that the 1<sup>st</sup> Defendant continuously trespassed on the said portion by utilizing the access road in complete disregard to the Plaintiff's right to property.
28. In the 1<sup>st</sup> Defendant's statement of defence, the 1<sup>st</sup> Defendant denied the allegations and averred that the Plaintiff's perimeter wall had encroached into public land and the 1<sup>st</sup> Defendant could not be faulted for that; and that they had obtained the relevant permits to occupy the beach.
29. This suit was filed in 2017, to be precise on 19<sup>th</sup> July 2017 which means the suit has been pending for more than 7 years before court. The matter has gone through pre- trial where counsel agreed that the case was ripe for hearing. Looking at the proposed amended Defence and counterclaim, I note that the amendments being proposed are majorly further denials of what was stated in the Plaintiff, which to me are immaterial in this case.
30. The amendment that the 1<sup>st</sup> Defendant obtained written permissions from the relevant authority to construct and operate the structure known as Cocoa Beach is part of evidence that the defendant should have armed themselves with in their defence and not seek to amend after the plaintiff has closed his case. The issue does not need amendment as they had touched on it in their general denials.
31. The other proposed amendment was the addition of a counterclaim whereby the 1<sup>st</sup> Defendant intends to claim that it has acquired the right to use the said access road by prescription and that they were not aware of such historical facts, changes the character of the case. The 1<sup>st</sup> Defendant particularly averred in their statement of defence that they occupied Cocoa Beach in the year 1985, which means that it should be presumed that they knew or could have known that there, was an existing access road being used. It follows that there is nothing new that the proposed new witnesses will add that the 1<sup>st</sup> Defendant had no knowledge of.
32. In the case of *Rose Kandie & Anor V Esther Jepkemboi Kiplangat* (2016) eKLR, the Court of Appeal held as follows:

“In our view, the amendments that fell into the third category which the courts rightly rejected were: paragraphs 3A, 9A and 9C introducing the defence of frustration; paragraph 10C introducing the cause of action in trespass; paragraph 10D introducing the defence of lack of capacity to contract; paragraph 12C asserting unavailability of the remedy of specific



performance; and paragraphs 20 and 21 introducing for the first time claims for the remedies of eviction and damages for persistent annoyance. Considering that the plaintiffs' case was already closed and that the defence case had already commenced, and considering further that the proposed amendments were being introduced over eight years after the pleadings had closed, we think that the amendments in the third category would have occasioned injustice to the plaintiffs.'

33. Further, the 1<sup>st</sup> Defendant proposed to challenge the suit on grounds of limitation of Actions. I note that the 1<sup>st</sup> defendant had raised a preliminary objection that the plaintiff's suit was fatally defective, scandalous, frivolous and vexatious but did not raise the issue of jurisdiction of the court or limitation of Actions. The preliminary objection was dismissed because the issues were not pure points of law but facts to be proved during the hearing.
34. It is strange that the 1<sup>st</sup> defendant wants to raise the issue of limitation of actions through an amendment in a counterclaim and include a claim of prescription. I find that the amendments are brought in bad faith, they are an afterthought, and no sufficient explanation has been given to warrant the issuance of the orders sought.
35. The upshot is that I am not satisfied that the proposed amendments will facilitate the determination of the real questions in controversy. On the contrary, the amendments will cause prejudice to the plaintiff. The application dated December 2, 2022 is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 25<sup>TH</sup> DAY OF AUGUST, 2023.**

**M.A. ODENY**

**JUDGE**

