



Mbithi & 2 others (Suing as Personal Representatives of the Estate of Christopher Kioko Mbithi) v Nairobi City Council & 3 others (Environment & Land Case 683 of 2012) [2023] KEELC 21091 (KLR) (26 October 2023) (Ruling)

Neutral citation: [2023] KEELC 21091 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 683 OF 2012
OA ANGOTE, J
OCTOBER 26, 2023**

BETWEEN

**DOROTHY N. MBITHI 1ST PLAINTIFF
AMOS MULEI MBITHI 2ND PLAINTIFF
STEPHEN MBINDYO MBITHI 3RD PLAINTIFF
SUING AS PERSONAL REPRESENTATIVES OF THE ESTATE OF
CHRISTOPHER KIOKO MBITHI**

AND

**NAIROBI CITY COUNCIL 1ST DEFENDANT
SAMEDIY TRADING COMPANY LIMITED 2ND DEFENDANT
EAST AFRICAN BUILDING SOCIETY 3RD DEFENDANT
REGISTRAR OF TITLES 4TH DEFENDANT**

RULING

1. There are three applications before this court for determination: the 3rd Defendant's Notice of Motion application dated 12th October 2022; the Plaintiff's Chamber Summons application dated 12th October 2022; and the 2nd Defendant's Notice of Motion application dated 17th November 2022.
2. In the 3rd Defendant's Chamber Summons application dated 12th October 2022, the 3rd Defendant has sought for the following orders:
 - a. This Honourable Court be pleased to order that the 3rd Defendant is neither a proper nor a necessary party in these proceedings.



- b. This Honourable Court be pleased to strike out the 3rd Defendant from being a party to these proceedings: and
 - c. The costs of this application follow the cause.
3. The application is supported by the grounds set out in the affidavit sworn by Caroline Mbenge, the Director of Legal Services and Company Secretary of the 3rd Defendant, who deponed that the 3rd Defendant was a chargee of property known as L.R. No. 1/418 (Orig No. 1/6/1) (the suit property), having registered a mortgage over the suit property in its favour to secure the repayment of a loan facility of Kshs. 9,000,00 extended to the 2nd Defendant.
4. It was deposed by the 3rd Defendant's Director that the joinder of the 3rd Defendant as a party to this suit is evidenced in the Plaintiff's Further Further Further Amended Plaint dated 18th May 2022 and was due to the fact that the property was charged to the 3rd Defendant and that the 3rd Defendant's interest in the suit property has been extinguished as the 2nd Defendant has since settled and cleared the loan arrears in full repayment of the loan facility secured over the suit property.
5. According to the 3rd Defendant's Director, the 3rd Defendant has subsequently executed a discharge of charge and returned the same with the original title documents to the 2nd Defendant for registration and that the suit relates to a claim of ownership of the suit property.
6. It was deposed that there is no right of relief in respect of the same, or arising of any act or transaction relating to the Plaintiff's interest in the suit property, claimed against the 3rd Defendant; and that the 3rd Defendant is neither a proper nor a necessary party in this suit.
7. The Plaintiff opposed the application by way of Grounds of Opposition dated 21st November 2022 in which he averred that the 3rd Defendant was sued because the suit property was charged to it as security for a loan advanced to the 2nd Defendant and that unless and until there is evidence that shows the title herein is free from encumbrances, the 3rd Defendant's application to be released from these proceedings is premature.
8. It was deponed that whereas the 3rd Defendant has annexed on its application a signed Discharge of Charge executed in early 2021, that document is of no value unless it has been registered against the title.
9. The Plaintiff assert that in any event, the 3rd Defendant has not exhibited a current official search on the title showing that the suit property known as L.R. No. 1/418 is no longer encumbered and that it has not been possible for the Plaintiff's counsel to access the file at the Lands Registry so as to verify the allegations of discharge of charge.
10. The second application is the Plaintiff's Notice of Motion application dated 12th October 2022 in which he has sought for the following orders:
 - a. That the Second Defendant's Further Amended Defense and Counterclaim dated 29th May 2022 and filed in court on 4th October 2022 be struck out for being improperly on record, having been filed out of time and without leave of the court.
 - b. That the First Defendant's Further Amended Defense dated 30th May 2022 be struck out for offending the provisions of Order 2 rule 6 of the *Civil Procedure Rules*.
 - c. That costs of this application be provided for.



11. The application is based on the supporting affidavit sworn by Amos Mulei Mbithi, the 2nd Plaintiff who deposed that following the grant of leave by this Court, the Plaintiff filed a Further Further Further Amended Plaintiff and served the Defendants, including the 2nd Defendant, on 19th May 2022.
12. It was deposed by the 2nd Plaintiff that the 2nd Defendant filed and served its amended Defence beyond the 14 days required by law, on 4th October 2022, together with an amended Counterclaim introducing a claim for Kshs. 41 million, without the leave of the court and that his amendment intends to introduce a fresh cause of action and substantially alter the substratum of the case which is an ambush and will occasion great prejudice to the Plaintiffs.
13. The Deponent averred that contrary to Order 2 rule 6 of the *Civil Procedure Rules*, the 1st Defendant's Amended Defence departs from earlier pleadings filed in the consolidated case, HCCC Number 800 of 2002, *Nairobi City Council v Samedy Trading Company Limited*.
14. The Plaintiff deposed that in that suit, the 1st Defendant stated that the acquisition of LR Number 1/418 by Samedy Trading Company Limited was fraudulent; that the 2nd Defendant had sought prayers for a declaration that the conveyance of LR No. 1/418 to Samedy Trading Company Limited dated 26th March 1993, is null and void; and an order directing the Registrar of Government Lands to cancel the registration of the conveyance of LR No. 1/418 to Samdey Trading Company Limited dated 23rd March 1993.
15. The 2nd Defendant opposed the application by way of a Replying Affidavit dated 17th November 2022, sworn by Eddy Ndung'u Kimemiah, the Managing Director of the 2nd Defendant, who deposed that the 2nd Defendant filed the Further Amended Defence and Counterclaim 10 days after the date issued by the court due to an administrative lapse which they regret and that this was a mistake on the part of its Advocate and should not be meted on the client who is eager to prosecute its case.
16. The 2nd Defendant denied that it has introduced a new claim; that the Amended Defence and counterclaim raises triable issues; that this court has power and jurisdiction to enlarge time for filing of the further amended defence and counterclaim and that the Plaintiffs will not suffer prejudice, harm or irreparable damage if the Further Amended Defence and Counterclaim are admitted.
17. It was deposed that the power to strike out pleadings should be exercised as a last resort and the same should be invoked cautiously, exercised sparingly and only in the clearest case and that the 2nd Defendant has already invoked the jurisdiction of this court to enlarge time to file the further amended defence and counterclaim and therefore, the application herein should not be allowed in the circumstances.
18. The 1st Defendant, on its part, also opposed the Plaintiff's application by way of a Replying Affidavit sworn by Wesonga Ogola, the Acting County Solicitor of the Nairobi County Government. According to Mr. Ogola, all Further Defences have been filed as a result of the Plaintiff's continued amendments to introduce new grounds of claim and that the 1st Defendant has never introduced new facts.
19. Mr. Ogola averred that the Plaintiffs are estopped from reliance on the pleadings in HCC No. 800 of 2002 because neither they nor their late father were parties to the suit; that therefore, the provisions of Order 2 Rule 6 do not apply herein because the Plaintiff is not part of the pleadings herein.
20. The third application is a Notice of Motion dated 17th November 2022 filed by the 2nd Defendant, in which he is seeking for the following reliefs:



- a. That this Honourable Court be pleased to enlarge the time for filing the amended Further Amended Defence and Counterclaim dated 29th May 2022.
 - b. That the Further Amended Defence and Counterclaim dated 29th May 2022 and filed on 4th October 2022 be deemed to have been filed within such extended time.
 - c. That in the alternative, the 2nd Defendant/Applicant be granted further leave to file a Further Amended Defence and Counterclaim within seven days.
 - d. That the costs of this Application shall be in the cause.
21. This application is based on the grounds that the 2nd Defendant has a valid Further Amended Defence and Counterclaim to the claims raised by the Plaintiffs, but was not able to comply with the stipulated timelines by sheer inadvertence.
 22. It was deposed that the 2nd Defendant had thought that the further amended Defence and Counterclaim had been filed in good time, which was not the case; that the issues raised in the further amended Defence and Counterclaim will not prejudice the Plaintiff but will enable the court to determine the matter effectually and that substantial loss will result to the 2nd Defendant unless the orders sought are granted.
 23. The Plaintiffs opposed the application *vide* Grounds of Opposition dated 28th February 2023. It was averred in the Plaint that on 12th May 2022, this Honourable Court issued directions by consent of the parties granting the Plaintiffs leave to further amend their Plaint and granted corresponding leave to all the Defendants to file their amended Defences within 14 days of service of the amended Plaint and that while the Plaintiffs filed and served the Further Further Further Amended Plaint on 19th May 2022 and served it upon all Defendants, the 2nd Defendant failed to file and serve its amended Defence within the 14 days as had been directed by the Court.
 24. The Plaintiff averred that the introduction of the counterclaim of Shs. 41 million was sneaked into the Defence without the court's leave, which has introduced a new cause of action and changed the substratum of the case. The parties filed their respective submissions which I have considered.

Analysis and Determination

25. Upon consideration of the parties' pleadings and submissions, the following issues are for the determination of the court:
 - a. Whether this court should strike out the 3rd Defendant from being a party to these proceedings.
 - b. Whether the 2nd Defendant's Further Amended Defense and Counterclaim dated 29th May 2022 is properly on the record.
 - c. Whether the 1st Defendant's Further Amended Defense dated 30th May 2022 offends Order 2 Rule 6 of the Civil Procedure Rules.
26. This suit was filed in 1999 by the late Christopher Mbithi and is formerly known as HCCC No. 1141 of 1999. On 12th May 2022, this court granted the Plaintiffs leave to amend their Plaint. They subsequently filed a Further Further Further Amended Plaint dated 18th May 2022. Some of the changes in the Amended Plaint include changing the name of the 3rd Defendant from East African Building Society to Ecobank Kenya Limited.



27. The 3rd Defendant has sought to be struck out from this suit as the mortgage facility which they had registered in favor of the 2nd Defendant has been fully paid.
28. The Plaintiff has challenged the 1st Defendant's Further Amended Defence on grounds that it is inconsistent with the Plaint in HCCC No. 800 of 2002 which was consolidated with this suit. The 1st Defendant however asserts that the Plaintiffs and their late father were not parties to HCCC No. 800 of 2002.
29. The Plaintiffs have further challenged the 2nd Defendant's Further Defence and Counterclaim on grounds that it was filed out of time and the counterclaim the was filed without leave of this court.
30. In accordance with Order 1 rule 3 of the *Civil Procedure Rules* 2010, a person may be enjoined as a Defendant against whom any right to relief arising out of an act or transaction is alleged to exist. The said Order provides as follows:

“All persons may be joined as Defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”
31. Courts have held that a party is necessary to a suit where it is shown that the legal reliefs sought would directly affect the person sought to be enjoined, to avoid a multiplicity of suits and where it is shown that the Defendant cannot effectually set a Defence unless that person is joined in it.
32. This position was set out in the Ugandan case of *Departed Asians Property Custodian Board v Jaffer Brothers Ltd* [1999] 1 EA 55 quoted with approval by the Court of Appeal in *Civicon Limited v Kivuwatt Limited & 2 others* [2015] eKLR as follows:

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involve in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involve in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit. Alternatively, a person qualifies, (on an application of a Defendant) to be joined as a co-defendant, where it is shown that the defendant cannot effectually set a defence he desires to set up unless that person is joined in it, or unless the order to be made is to bind that person.”
33. In this case, the 3rd Defendant has sought to be struck out from this suit. It is not disputed that the 2nd Defendant obtained a loan facility from the 3rd Defendant, which was previously known as the East African Building Society, with the suit property attached as security for the said loan.
34. The 3rd Defendant has averred that its interest in the suit property has been extinguished, as the 2nd Defendant has since settled and cleared the loan arrears in full repayment of the loan facility secured over the suit property, and that the 3rd Defendant has subsequently executed a discharge of charge and returned the same with the original title documents to the 2nd Defendant for registration.



35. The 3rd Defendant annexed copies of the mortgage dated 27th January 1999, the Discharge of Charge solely executed by the 3rd Defendant and a letter to the parties' advocates herein, informing them that the suit property is no longer charged to the 3rd Defendant. The letter also proposed that by consent, the 3rd Defendant be expunged and struck out as a party from these proceedings.
36. The Plaintiff has opposed the application on the grounds that the 3rd Defendant's application to be released from these proceedings is premature; that whereas the 3rd Defendant has annexed to its application a signed Discharge of Charge executed in early 2021, that document is of no value unless it is registered against the title and that it is the duty of the 3rd Defendant to prove to this Court that the suit property is no longer encumbered as alleged.
37. It was Counsel's submission that if the 3rd Defendant is removed from these proceedings now, it will amount to great injustice to the Plaintiffs if at the end of these proceedings, the Court makes any orders against the 2nd Defendant concerning the suit property; that it is not clear as to why the alleged Discharge has never been registered against the suit property despite the same being executed by the 3rd Defendant in 2021 and that there is no harm in having the 3rd Defendant stay in the suit until it is determined.
38. It is evident that the Discharge of Charge presented by the 3rd Defendant has not been executed by the 2nd Defendant. Indeed, there is no evidence that it has been registered against the suit property's title.
39. The reasons for the 2nd Defendant's failure to execute and register the Discharge of Charge is not clear. This court however agrees with the Plaintiff that the 3rd Defendant will not be prejudiced by remaining as a party to this suit, pending the execution and registration of the Discharge of Charge.
40. For these reasons, the 3rd Defendant's Chamber Summons dated 12th October 2022 is dismissed.
41. The Plaintiff has averred that the 2nd Defendant's Further Amended Defense and Counterclaim is improperly on record as it was filed out of time and that the counterclaim was filed without the leave of this court. The Plaintiff additionally asserts that the 2nd Defendant's amendments intend to introduce a fresh cause of action and substantially alter the substratum of the case, and that this is an ambush and will occasion great prejudice to the Plaintiffs.
42. The 2nd Defendant has on its part, sought leave to file the Amended Defense and Counterclaim out of time. He asserts that the Amended Defence and Counterclaim was filed after the timelines due to an administrative lapse which they regret and that this was a mistake on the part of its Advocate and should not be meted on the client who is eager to prosecute its case.
43. The Supreme Court in the *Nicholas Arap Korir Salat v Independent Electoral & Boundaries Commission & 7 others* [2014] eKLR authoritatively stated that extension of time is a discretionary remedy, and not a party's right:
- “Extension of time being a creature of equity, one can only enjoy if he acts equitably: he who seeks equity must do equity. Hence, one has to lay a basis that he was not at fault so as to let time to lapse. Extension of time is not a right of a litigant against a court, but a discretionary power of the courts which litigants have to lay a basis where they seek courts to grant it.”
44. The Supreme Court also derived the following principles which a court should consider in exercising its discretion to grant extension of time as follows:
1. Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the Court;



2. A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court
 3. Whether the court should exercise the discretion to extend time, is a consideration to be made on a case to case basis;
 4. Whether there is a reasonable reason for the delay. The delay should be explained to the satisfaction of the Court;
 5. Whether there will be any prejudice suffered by the respondents if the extension is granted;
 6. Whether the application has been brought without undue delay; and
 7. Whether in certain cases, like election petitions, public interest should be a consideration for extending time.
45. It is thus for this court to determine whether the case as laid out by the 1st Defendant has disclosed a reasonable reason for the delay, whether the Plaintiffs will suffer prejudice if the orders sought are granted and whether this application has been brought without undue delay.
46. The record shows that when this court allowed the Plaintiff to amend its Plaint on 12th May 2022, the court directed that the Defendants were at liberty to amend their Defences within 10 days of service of the Amended Plaint. The Plaintiffs thereafter filed the Amended Plaint on 19th May 2022.
47. While the Plaintiffs have asserted that they effected service on all the Defendants, including the 2nd Defendant, on 19th May 2022, they have not attached an Affidavit of Service as proof of the same. All the same, the 2nd Defendant has not challenged the Plaintiffs claim that they served them with the Amended Plaint on 19th May 2022.
48. In accordance with the order of the court, the Defendants ought to have filed the Amended Defences within ten days. However, the 2nd Defendant filed its Amended Defence on 4th October 2022, which it back-dated to 29th May 2022. This fact is admitted by the 2nd Defendant in its application dated 17th November 2022, in which it has sought that this court enlarge the time for filing the Further Amended Defence and Counterclaim dated 29th May 2022.
49. From the facts laid out above, 2nd Defendant filed its Amended Defense five months beyond the stipulated time. There was a further delay of six weeks between the filing of the Amended Defence and Counter claim and the application for enlargement of time to file the amended Defence and Counter claim. The reason for such delay has been alluded to be administrative mistake by the 2nd Defendant's advocate.
50. This court is satisfied that no prejudice would befall the Plaintiffs in enlarging the time to file the 2nd Defendant's Amended Defence and Counterclaim. It thereby finds that the 2nd Defendant has laid a basis for the delay in filing the amended documents to the satisfaction of this court.
51. This court is further guided by the Court of Appeal's decision on the issue of striking out pleadings in the case of *Kivanga Estates Limited v National Bank of Kenya Limited* [2017] eKLR as follows:
- “Striking out a pleading, though draconian, the court will, in its discretion resort to it, where, for instance, the court is satisfied that the pleading has been brought in abuse of its process or where it is found to be scandalous, frivolous or vexatious. Where the court below has properly addressed itself on these principles, and is satisfied, upon assessment of the material before it that any of the grounds enumerated under order 2 rule 15 exists, as an appellate



court, this Court will not interfere with the exercise of the former's discretionary power to strike out the pleading.”

52. Further, in *D.T Dobie Company (K) Ltd v Muchina & Another* [1980] eKLR, Madan JA stated as follows with respect to summary dismissal of a suit:

“If an action is explainable as a likely happening which is not plainly and obviously impossible the court ought not to overact by considering itself in a bind summarily to dismiss the action. A court of justice should aim at sustaining a suit rather than terminating it by summary dismissal. Normally a law suit is for pursuing it.

No suit ought to be summarily dismissed unless it appears so hopeless that it plainly and obviously discloses no reasonable cause of action, and is so weak as to be beyond redemption and incurable by amendment. If a suit shows a mere semblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward for a court of justice ought not to act in darkness without the full facts of a case before it.”

53. The 2nd Defendant's application dated 17th November 2022 is hereby allowed and the Amended Defence and Counterclaim is therefore properly on record.

54. The final issue for this court's consideration is whether the 1st Defendant's Further Amended Defence offends the provisions of Order 2 Rule 6 of the *Civil Procedure Rules* on the ground that the 1st Defendant's Amended Defence departs from its assertions in the Plaintiff in HCCC No. 800 of 2002.

55. Order 2 Rule 6 of the *Civil Procedure Rules* provides that:

- “(1) No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.
- (2) Subrule (1) shall not prejudice the right of a party to amend, or apply for leave to amend, his previous pleading so as to plead the allegations or claims in the alternative.”

56. The procedural imperative under Order 2 Rule 6 of the *Civil Procedure Rules* was discussed by the Court of Appeal in *Independent Electoral and Boundaries Commission & Another v Stephen Mutinda Mule & 3 others* [2014] eKLR, in which the decision of the Supreme Court of Nigeria in *Adetoun Oladeji (NIG) v Nigeria Breweries* PLC 91/2002 was quoted with approval thus:

“.....it is now trite principle in law that parties are bound by their pleadings and that any evidence led by any of the parties which does not support the averments in the pleadings, or put in another way, which is at variance with the averments of the pleadings goes to no issue and must be disregarded.....

...In fact, that parties are not allowed to depart from their pleadings is on the authorities basic as this enables parties to prepare their evidence on the issues as joined and avoid any surprises by which no opportunity is given to the other party to meet the new situation.”



57. The Court of Appeal also relied on the Malawi Supreme Court of Appeal in *Malawi Railways Ltd v Nyasulu* [1998] MWSC 3, in which the learned judges quoted with approval from an article by Sir Jack Jacob entitled “*The Present Importance of Pleadings.*” [1960] Current Legal problems, page 174:
- “As the parties are adversaries, it is left to each one of them to formulate his case in his own way, subject to the basic rules of pleadings...for the sake of certainty and finality, each party is bound by his own pleadings and cannot be allowed to raise a different or fresh case without due amendment properly made. Each party thus knows the case he has to meet and cannot be taken by surprise at the trial. The court itself is as bound by the pleadings of the parties as they are themselves...”
58. The raison d’être of the principle of departure set out above is therefore to ensure that parties do not raise a fresh case without amending their Pleaint or Defence. In this case, the 1st Defendant was in fact undertaking an amendment to its Defence, which the court had granted them leave to do.
59. Order 2 Rule 6(2) of the *Civil Procedure Rules* clearly stipulates that the principle of departure does not restrict a party from amending their pleadings. The 1st Defendant can therefore not be said to have offended Order 2 rule 6. In any event, the Plaintiffs have an opportunity to file their reply to defence and Defence to the Counter-claim.
60. On the basis of the above analysis, this court dismisses the 3rd Defendant’s Notice of Motion and the Plaintiff’s Chamber Summons, both dated 12th October 2022 with no order as to costs.
61. The 2nd Defendant’s Notice of Motion dated 17th November 2022 is allowed as follows:
- a. The Court hereby enlarges the time for filing the Further Amended Defence and Counterclaim dated 29th May 2022.
 - b. The Further Amended Defence and Counterclaim dated 29th May 2022 and filed on 4th October 2022 be and is hereby deemed to have been filed within time.
 - c. The Plaintiff is granted 14 days following the delivery of this ruling to file their reply to Defence and Defence to the Counterclaims on record.
 - d. Parties shall bear their own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 26TH OCTOBER, 2023.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Kimuli for Plaintiff

Mr. Muriithi for Rimui for 3rd Defendant

Mr. Karisa for 1st Defendant

Mr. Karuga for 2nd Defendant

Court Assistant - Tracy

