



**Kitololo & another v Middle East Bank Kenya Ltd. (Environment & Land Case 40 of 2006) [2023] KEELC 20978 (KLR) (16 October 2023) (Ruling)**

Neutral citation: [2023] KEELC 20978 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 40 OF 2006  
LL NAIKUNI, J  
OCTOBER 16, 2023**

**BETWEEN**

**AUSTIN SALMON KITOLOLO ..... 1<sup>ST</sup> PLAINTIFF**

**MAARIFA DEVELOPERS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**MIDDLE EAST BANK KENYA LTD. .... DEFENDANT**

**RULING**

**I. Introduction.**

1. The Honorable Court was moved formally by the “Middle East Bank Kenya Limited” the Defendant/Applicant herein to make its determination on the Notice of Motion application dated 29<sup>th</sup> May, 2023. The application was brought under the provisions of Sections 1A, 1B and 3A of the [Civil Procedure Act](#) Cap 21 and Order 1 Rules 9 and 10, Order 2 Rule 15 and Order 8 Rule 3 of the Civil Procedure Rules, 2010. It was against the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents herein.
2. Upon effecting service, the 1<sup>st</sup> and 2<sup>nd</sup> Plaintiffs/Respondents herein also filed and served replies in the nature of a Replying Affidavit dated 7<sup>th</sup> June, 2023 which the Honourable Court shall be dealing with indepth at a later stage thereof. Pursuant to that, directions on how to dispose off the application were taken accordingly.

**II. The Defendant/Applicant Case**

3. The Defendant/Applicant herein sought for the following orders:-
  - a. That the purported Further Amended Plaints have all been filed without leave of this Honorable Court.



- b. That a party has been added as the First Defendant in the said Further Amended Plaintiff once again without leave of this Honorable Court.
  - c. That filing of the said purported Further Amended Plaintiffs would delay, prejudice or embarrass the fair trial of the suit.
  - d. That the filing of the said purported Further Amended Plaintiff without the leave of this Honorable Court was an abuse of the process of court.
4. The application is premised on the grounds, testimonial facts and the averments made out under the eight (8) paragraphed Supporting Affidavit of KENNEDY OGERO MOKAYA sworn and dated on 29<sup>th</sup> May, 2023. He averred as follows:-
- a. He was an Advocate of the High Court of Kenya and a Partner in the Law firm of Messrs. Mokaya Onyambu Advocates which has had the conduct of this case on behalf of the Defendant/Applicant herein.
  - b. The Advocate for the Plaintiff/Respondent herein filed in court and also served three purported Further Amended Plaintiffs on 26<sup>th</sup> April, 2022, 15<sup>th</sup> July, 2022 and 26<sup>th</sup> April, 2023 without applying for leave to further amend the Further Amended Plaintiff filed herein on 21<sup>st</sup> November, 2018 or without otherwise obtaining the permissions of court to do so.
  - c. In the course of making the amendments to these Further Amended Plaintiffs, the Plaintiff/Respondent had proceeded to add a new Party - "Maarifa Developers Limited" as the "First Plaintiff". To this end, the Defendant/Applicant objected as there was no leave of court sought nor granted through an appropriate application on joinder of parties as required by law.
  - d. The Plaintiffs/Respondents were not entitled to further amend the Plaintiff and introduce new causes of action and make the alleged claims for special damages almost twenty five (25) years after the alleged causes of action arose.
  - e. The application and the prayers sought to be allowed accordingly.

### **III. The Replies by the Plaintiffs/Respondents**

5. While opposing the application by the Defendant/Applicant, the Plaintiffs/Respondents filed a 13 Paragraphed Replying Affidavit sworn by DANIEL NJOROGE KIHICO and dated 7<sup>th</sup> June, 2023. It had one annexure marked as "DNK - 1" annexed thereof. He stated as follows:
- a. He was an Advocate of the High Court of Kenya and conducting this matter herein on behalf of the Plaintiffs/Respondents and hence was well versed on it.
  - b. After reading the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant/Applicant, he concluded that from the said application, clearly the Defendant/Applicant had misrepresented the issues to the court. He had blatantly misled and concealed material facts from Court which facts would have enabled the court to reach a just decision. He affirmed that the allegations that the Plaintiffs/Respondents had amended the Plaintiff without leave of court were baseless and unfounded.



- c. The Plaintiffs/Respondents had made an application dated 8<sup>th</sup> October, 2021 seeking leave to amend pleadings. On 18<sup>th</sup> October, 2021, the application was allowed. Specifically, the Court pronounced itself as follows:-

“Taking that the Defendant have been served twice with the Notice of Motion application dated 8<sup>th</sup> October, 2021 without eliciting any response and there is an affidavit of service to that effect dated 15<sup>th</sup> October, 2021 the prayers sought are allowed accordingly as the Notice of Motion is unopposed”

Hence, it was it was clear that this Court that had already granted the Plaintiffs/ fixing any time line as indicated from the aforestated orders of 18<sup>th</sup> October, 2021.

- d. Pursuant to the orders of the Court made on 18<sup>th</sup> October, 2021 the Plaintiffs/Respondents filed a further Amended Plaint dated 31<sup>st</sup> day of March, 2022 and served it on the Defendant/Applicant’s Advocate. The said Advocate never raised any issue then. Therefore, it was not in good faith that they sought to challenge the amendments at this point in time.
- e. On 16<sup>th</sup> March, 2023, when the matter came up for mention, the Defendant/Applicant’s Counsels raised an issue that there were multiple amended Plaints and sought direction from the Court to be guided on which particular filed pleading they were to respond to. During that the said Court session, for good order and in the spirit of wanting to expedite this rather protracted matter, both parties reached a consensus that the Plaintiffs/Respondents peruses the Court’s and their files and put on record one Further Amended Plaint. Further to this, it was mutually agreed that the Plaintiffs/Respondents do compile a single record of all the relevant documents pertaining to this case fresh and subsequently file and serve it upon the Defendant/Applicant’s Counsel to be adopted by all parties in the next Court’s session. The court directed the Defendant/Applicant herein, that upon being served with these pleadings and the bound record of documents, to make the necessary responses particularly to the Further Amended Plaint. The court scheduled the matter for purposes of conducting an intensive Pre - Trial Conference on 11<sup>th</sup> May, 2023 in open Court and hearing of the main suit on 20<sup>th</sup> September, 2023.
- f. On 11<sup>th</sup> May, 2023 when the matter came up for the scheduled Pre-trial session, the Counsel for the Defendant/Applicant again raised the issue of the existence of multiple documents being filed by the Plaintiffs/Respondents terming them as offensive, yet the Plaintiffs/Respondents had filed documents in line with the court’s directions of 16<sup>th</sup> March, 2023. He was directed to move Court formally.
- g. The application was meant to waste courts’ time as the issues in the application were addressed by the court through the leave granted on 18<sup>th</sup> October, 2021 and its further orders issued on 16<sup>th</sup> March, 2023. Being a court of record the application should be dismissed with costs.

#### **IV. Submissions**

6. On 15<sup>th</sup> June, 2023 while all parties were in court, directions were taken to have the Notice of Motion application dated 29<sup>th</sup> May, 2023 be disposed off by way of written submissions. Indeed, parties were to have highlighted the said application. Pursuant to that all the parties obliged and court reserved a date for delivery of Ruling.



## **A. The Written submissions by the Defendant/Applicant.**

7. The Learned Counsel for the Defendant/Applicant, the Law firm of Messrs. Mokaya and Onyambu Advocates filed online their written submissions dated 26<sup>th</sup> June, 2023. Mr. Mokaya Advocate commenced his submissions by providing court with a detailed background and the reliefs sought from the filed Notice of Motion application dated 29<sup>th</sup> May, 2023. According to the Learned Counsel, though he admitted that on 18<sup>th</sup> October, 2021 leave was granted to the Plaintiffs/Respondents to make amendments to their pleadings, but emphasized the said leave was strictly to only amend the Plaintiff but not to add a party to the suit.
8. According to him, the application was brought under the provision of Order 8 Rule 2 of the Civil Procedure Rules 2010 which provided the procedure for the amendment of pleadings. The Learned Counsel's contention was that no leave had ever been sought nor had any application ever been made by the Plaintiffs/Respondents to join a party as they did to one termed as 1<sup>st</sup> Plaintiff and trading in the names and style of "Maarifa Developers Ltd." as an additional Plaintiff to this suit. To him, the Plaintiffs/Respondents ought to have expressly made an application under the provision of Order 1 Rules 9 and 10 of the Civil Procedure Rules, 2010 but which they never did. Thus, to him, the attempt made by the Plaintiffs/Respondents to introduce an additional Plaintiff by way of an amended Further Plaintiff was incompetent and null and void. He averred that it was clear from the provisions of the Civil Procedure Rules, 2010 that the criteria for adding a Plaintiff was completely different from those for allowing the amendment of pleadings. From the courts record for 18<sup>th</sup> October, 2021, the Plaintiffs/Respondents' Advocate sought leave to "Amend the Plaintiff" and the orders were granted as sought namely to amend the Plaintiff and not for adding a party. Furthermore, the Learned Counsel argued that that even the said application was incompetent as both an "Amended Plaintiff" and "a Further Amended Plaintiff" had already been filed on 8<sup>th</sup> October 2020 and 21<sup>st</sup> November, 2018 respectively.
9. By critically assessing the proceedings of the Court, there was no time fixed for filing of the Further Amended Plaintiff. However, all the three Amended Pleadings were ought to have been filed within time. Furthermore, the Counsel argued that despite of the absence of time being fixed by court, the Civil Procedure Rules, 2010 dictated that the amended pleadings must be filed within 14 days under the provision of Order 8 Rule 6 of the Civil Procedure Rules, 2010. He held that none of the three (3) Amended Pleadings were filed within this time limit.
10. Further, from the record of proceedings on and the order made by the court on 16<sup>th</sup> March 2023 were very clear and could not be contradicted by the Advocate for the Plaintiffs/Respondents. To comply with this order, the Plaintiffs/Respondents was given leave to "withdraw" any documents namely the two "Further Amended Plaintiff". But the Plaintiffs/Respondents failed to do so. Also the Plaintiffs/Respondents was given leave to file any further documents within 21 days but he again failed to do so. Instead, according to the Learned Counsel, the Plaintiffs/Respondents without withdrawing the said two offending pleadings, they proceeded to file yet another "Further Amended Plaintiff" on 26<sup>th</sup> April, 2022 making it now a total of three (3) Further Amended Plaintiffs on the record of this Honorable Court.
11. The Learned Counsel submitted that there was no explanation why there were three Further Amended Plaintiffs filed and still on court record and why none of them was withdrawn yet the Court had expressly given permission to do so. The Learned Counsel advanced a contention that there was no explanation why neither of the third "Further Amended Plaintiff" were filed on time fixed by court namely 21 days from 16<sup>th</sup> March 2023. According to him, this had prejudiced the Defendant/Applicant. To him, this was what he had justifiably complained in Court about on 11<sup>th</sup> May, 2023. The Learned Counsel



held that the record of that date showed that the Plaintiffs/Respondents' Advocates confirmed that he would have no objection to the Defendant/Applicant's Advocate making an appropriate application on all these occasional complaints raised in Court. It was based on this that Court gave leave to the Defendant/Applicant to make this application.

12. The Learned Counsel made an observation that from the filed skeleton submissions by Plaintiffs/Respondents, they had admitted that none of the "Further Amended Plaints" were filed within the stipulated statutory time frame. Indeed, he noted that it was from the said submissions and not their Replying Affidavit that they were now purporting to ostensibly seek for orders of extension of time from this Court. He stressed that the Plaintiffs/Respondents had made never made such a request for the enlargement of time to file the amendments out of time as required by law from any of the contents of the said Replying Affidavit. On the contrary, the Learned Counsel submitted that the alleged "facts" to justify an extension of time were being offered from the written submissions on page 2 Paragraph (a) and (e) which was not permissible. To buttress his point, the Learned Counsel relied on the decision of the court of Appeal "D.T. Moi – Versus - Mwangi Stephen Mureithi (2014) eKLR which expressed itself "inter alia":-

"Submissions cannot take the place of evidence. The 1<sup>st</sup> Respondent had failed to prove his claim by evidence. What happened on submissions could not come to his aid such a course why only mutilates against the law and we are unable to countenance it. Submissions are generally parties "Marketing language" each side endeavoring to convince the court that its case is the better one. Submissions, we reiterate do not constitute evidence at all. Indeed, there are many cases decided without hearing submissions but based only on evidence presented".

Hence, in the absence of any evidence to this effect, this Honorable Court could not even consider the Plaintiffs/Respondents' plea for an extension of time. The Learned Counsel held that the Plaintiffs/Respondents never mentioned the lack of permission to add another Plaintiffs/Respondents – a clear admission that the consent of court was necessary yet it was not applied for.

13. The Learned Counsel argued that the Defendant/Applicant never applied to set aside the orders made on 18<sup>th</sup> October, 2021 because the said orders ceased to be of any effect on the Plaintiffs/Respondents' failure to file the Amending document as envisaged under Order 8 Rule 6 of the Civil procedure Rules, 2010. The leave granted which in any case lapsed before filing of any of the amended Plaints was to be utilized only once. The Plaintiffs/Respondents had under the same leave filed three (3) different further Amended Plaints which offended the leave granted and all known rules as pertained to amendment of pleadings.
14. The Learned Counsel distinguished the decision cited by the Counsel for the Plaintiffs/Respondents of: "D.T. Dobbie – Versus - Muchina" (1982) KLR 1. He held that the said case would not be of any assistance to the Plaintiffs/Respondents as the Defendant/Applicant was not seeking for the dismissal of the entire suit which was the legal ratio in the afore said Court of Appeal Case but merely the filed Further Amended Plaints.
15. In a nut shell, therefore, the Learned Counsel submitted that all the three offending pleadings should be struck off and have the Plaintiffs/Applicants move Court afresh on affirmed reliefs. Specifically, in so doing, the Counsel advised that the Plaintiffs/Respondents herein should instead make an application seeking to amend and file Further Further Amended Plaintiff and to add any new party if they so wished as this would not in any way prejudice the Defendant/Applicant. Resultantly, then there would be due equitable, just and fair dispensation of justice and trial of the issues. To buttress on this point,



the Learned Counsel cited the cases of:- “Institute for Social Accountability and Another – Versus - Parliament of Kenya & 3 Others (2014) eKLR where the Court “inter alia” held:-

“The Court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid multiplicity of suits provided there has been undue delay, no new or inconstant cause of action is introduced no vested interest or accessed legal right is affected and that the amendment can be allowed without an injustice to the other side”

He further cited that the case of: “Lewar Ventures Limited – Versus- Equity Bank (Kenya) Limited (2022) eKLR where It was held:-

“The Legal parameters governing the amendment of pleadings from the above cited decisions can be summoned up as follows: - that the amendment should not introduce new or inconsistent cause of action or issues, the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party”

In conclusion, the Learned Counsel prayed for the application to be allowed with costs.

#### **B) The Written Submissions by the Plaintiff/Respondents**

16. The Plaintiffs/Respondents through the Law firm of Messrs. Muthee Kihiko and Associates filed their written submissions dated 29<sup>th</sup> June, 2023. Mr. Kihiko Advocate commenced his submissions by providing the court with a brief introduction of the matter, to wit, that the Plaintiffs/Respondents were opposing the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant/Applicant. He referred Court to a further skeleton submissions filed on 20<sup>th</sup> June, 2023 by the Plaintiffs/Respondents. The Learned Counsel raised the following issues which he urged the Honorable Court to consider as it makes its determination to the matter at hand. These were.

17. Firstly, whether the Plaintiffs/Respondent ought not to have added another party while making amendment of the Further Amended Plaintiff. To him, the objection raised by the Defendant/Applicant to this effect was misplaced and erroneous in law. He insisted that the Plaintiffs/Respondents had all the legal right to have added the party during the amendment of the pleadings. To support his point, he relied on the decision of “Angelina Chepng’etich Kimaiti – Versus – Tom Mongare Nyariki & Another (2021) eKLR where Court observed as follows:-

“The purpose of amending pleadings was to ensure that nothing is left out of the case since should one include all the causes of action in the suit, he cannot file another suit for the cause of action that ought to have been included in the suit such would be “Res Judicata. Order 8 Rule 5 of Civil Procedure Rules gives the Court Powers to allow an amendment notwithstanding that its effect will be to add a new a cause of action arises out of the same facts or substantially the same facts as 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”.

18. Similarly, the Learned Counsel cited the case of: “Pakaja Limited – Versus- Trustees of Mombasa Simba Sports Club & 3 Others, Singh Sobha Community (Interested Party) (2022) eKLR where the Court had this to say regarding the amendment of pleadings:-

“It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which



cannot be remedied by costs. The factor to be taken into account on the exercise of the Court's discretion were summarized in "Kassam –Versus- Bank of Baroda (Kenya) Ltd. (2002) 1 KLR 294 They are:-

- 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 purposes 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 still on the same aspect, the case of "Daniel Ngetich and Another – Versus- K-Rep Bank Ltd. 2013 KLR makes very useful holdings to the effect that:-

"Normally the Court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of court".  
Amendment ought to be allowed when:-

- a. They do not work injustice to the other side.
  - b. They are necessary for the purposes of determining the real questions in controversy between its parties
- f. it was the Plaintiff/Respondent contention that Order 8 Rule 3 gave the Court unfettered discretion to allow amendment of pleadings at any stage if the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct. According to the Learned Counsel there was no limitation in the extent of amendment so long as the same was just and never occasioned a prejudice that could not be remedied by costs.

19. Secondly, the Learned Counsel submitted on whether the orders by this Court on 18<sup>th</sup> October, 2021 were for strictly for filing an "Amended Plaintiff". He argued that this argument was simplistic and seeking to introduce a technical aspect onto the matter. To him the amendment sought was not for an already existing Amended Plaintiff but for further amended Plaintiff filed on 21<sup>st</sup> November, 2018.
20. Finally, on the court's discretion, the Learned Counsel held that the court never ordered for the withdrawal of the documents as alleged rather the court ordered that the multiple further amended Plaints be deemed to be either withdrawn or expunged from the record such that the Plaintiffs/ Respondents files fresh further amended Plaintiff for the Defendants/Applicants to respond to. Hence, it was on the basis of this that the Plaintiffs/Respondents filed further Amended Plaintiff of 26<sup>th</sup> April, 2022.
21. In conclusion, the Learned Counsel urged the Honorable Court to be guided by its skeleton submissions, the authorities and dismiss the application with costs as the same lacked merit and was an abuse of the court process.



## V. Analysis and Determination

22. I have keenly assessed all the pleadings made out by the parties being the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant/Applicant herein, the responses, the written submissions cited authorities and the provisions of *the Constitution* of Kenya 2010 and the statutes.

For the Court to arrive at reasonable informed just, fair and equitable decision onto the subjection matter it has condensed it into the following three (3) issues:-

- a. whether the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant seeking to strike out the 3 filed further amended plaints and parties by the Plaintiff allegedly without leave of Court has any merit
- b. Whether the parties are entitled to the relief sought.
- c. Who will bear the costs of the application?

### **Issue No. (a) Whether the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant seeking to strike out the 3 filed further amended Plaintiff and parties by the Plaintiff allegedly without leave of court has any merit.**

23. As a preamble, to begin with, I wish to state that this is a rather protracted suit. From the record the Plaintiff herein instituted the case through a Plaint dated and filed on 14<sup>th</sup> March, 2006, that is close to seventeen (17) years being before this Court. Paradoxically, to add injury to the would, the matter has never taken off at all!. That is extremely unfortunate. From the records, the case has been marred with too many interlocutory applications among other reasons that has caused this delay. The delay in disposing the case is inexcusable, inordinate and unreasonable. It goes completely against the legal maxim as enshrined under the provision of Article 159 (2) ( b ) that “Justice shall not be delayed” as that “Justice delayed is Justice denied”. It is with this brief background, therefore, that the Court has a deliberate intention and as guided by the overriding objectives founded under Section 3 of the Environment & Land Court Act, No. 19 of 2011 to ensure that that this case is expeditiously disposed off at least in the next One Hundred and eighty (180) days from this date. In order to achieve this stringent timeframe, in the instant case, there will be need to set all the records well through an intensive and thorough Pre – Trial sessions no matter what steps the Court and the parties will be made to undergo. Certainly, procedures and law cannot be compromised. Like the bitter Quinine pill to cure Malaria or any other disease, it has to be swallowed.

24. Having stated that, let me now deal with the matters before hand. Notwithstanding the assertion stated herein on the long period the matter has taken to start off and be finalized, its an accepted fact that parties are bound by their own pleadings as stated out under Order 2 Rule 6 (1) of the Civil procedure Rules, 2010. Under this sub - heading, the court takes judicial notice of the fact that the main substratum of this application is two prong - on the amendment of the pleadings and addition of parties (joinder) with or without the leave of Court. Amendments is governed under the provision of Order 8 Rules 1, 2, 3, 4, 5, 6, and 7 of the Civil Procedure Rules 2010 hold as follows:-

Order -“Amendment of pleading without leave.

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Rule (1) A party may, without the leave of the court, amend any of his pleadings once at any re before the pleadings are closed.

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(2) Where an Amended plaint is served on a defendant-



- (a) if he has already filed a defence, the defendant may amend his defence; and
  - (b) the defence or amended defence shall be filed either as provided by these rules for the filing of the defence or fourteen days after the service of the amended Plaintiff whichever is later.
- (3) Where an amended defence is served on a Plaintiff.
- (a) if the Plaintiff has already served a reply on that Defendant, he may amend his reply; and
  - (b) the period for service of his reply or amended reply is fourteen days after the service on him of the amended defence.
3. Amendment of pleading with leave [Order 8, rule 3.]
- (1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
  - (2) Where an application to the court for leave to make an amendment such as is mentioned in sub - rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub - rule if it thinks just so to do.
  - (3) An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

25. At the same time, it will be noted that while causing amendment, no new cause of action should be introduced as it is seen from the provisions of Order 8 Rule 3(5) of Civil Procedure Rules, 2010. It provides thus:

“An amendment may be allowed under Sub – Rule (2) notwithstanding that its effect will be to add or substitute a 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”



26. Likewise, as indicated above amendment of pleadings may be sought with or without leave of court. Without leave is where the pleadings have not yet closed. But otherwise leave is mandatory. It will be noted that time frame for amendment is stringent.

Order 8 Rule 6. Failure to amend after order

Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.

27. Again, the courts have expended a lot of resources on setting out the legal principles to be considered while granting orders for amendment of pleadings. These include, the cases of “Eastern Bakery – Versus – Castelino (1958) E.A 461 (U) at Page 462 and Civil case No. 7 of 2017, St. Patrick’s Hills School Limited - Versus - Bank of Africa Kenya Limited” eKLR (2018) where courts held, inter alia:

“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 to be if the other side can be compensated by costs....”

28. The same was later on buttressed by the case of:- Bramwell, LJ in “Tildesley – Versus – Harper” (1878), 10 Ch. D. at Page 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...”

It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final Judgment is delivered. Pursuant to the above position, this Court agrees with the Learned Counsel for the Defendant/Applicant and it concurrently follows, the power to amend pleadings is discretionary. In that case the court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice.

29. Be that as it may, there seem to be some emerging issues thereafter, and which apparently seem to be the cracks of the matter in this application. Firstly, although the Honourable Court never specifically provided on any fixed time for the filing of the pleading, the Plaintiff/Respondent overstretched the time out of the statutory period under Order 8 Rule 6 of the Civil Procedure Rules, 2010. Despite of this they never bothered to seek for enlargement of time as it is provision for under Order 50 Rules, 6 and 7 of the Civil Procedure Rules, 2010. This was wrongful.
30. Secondly, based on the leave granted, the Plaintiff/Applicant for no unclear reasons and/or justifiable cause proceeded to file and serve three Further Amended Plaints dated 26<sup>th</sup> April, 2022, 15<sup>th</sup> July, 2022 and 26<sup>th</sup> April, 2023. These were all done out of the statutory time. Definitely, without any doubt, this situation will create confusion and disorder. There will be need for good order by expunging all these pleadings and start a fresh.
31. Finally, the Plaintiffs/Applicants, perhaps in an attempt to invoke the provision of Order 8 Rule 3 (4) of the Civil Procedure Rules, 2010 proceeded to add another party terming it as the 1<sup>st</sup> Plaintiff – “Maarifa Developers Ltd.” Whether the Plaintiffs/Applicants was right or not is a matter of conjecture. It is my own personal view and I seem to concur with the Learned Counsel for the Defendant/Applicants, the safest route or way out would have been to specifically move Court for



joinder of this party under the provision of Order 1 Rule 10 (2) and (4) of the Civil Procedure Rules, 2010. The provision provides:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as Plaintiff or defendant, or whose presence before court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

32. It appears that the Plaintiffs/Applicants is desirous on joining a party – “Maarifa Developers Limited” as party to this suit as 1<sup>st</sup> Plaintiffs/Applicants. There is nothing wrong at all with that intention. Far from it. The only hitch but a significant one is that the Plaintiffs/Applicants unilaterally having decided and elected to introduce this party through an amendment of pleadings rather than seeking leave for joinder of parties as provided for in law. I cannot concur more with the Learned Counsel for the Defendant/Applicant herein that the best avenue available for the Plaintiff/Respondent was to have sought leave for joinder of parties. Ideally, and in my view any application for joinder of a party before the hearing of the suit should be freely allowed by court especially where there will be no injustice caused to the other side. The joinder and amendment sought are designed to help place before the court all the relevant matters for purposes of determination of the real issue in dispute and controversy between the parties. Hence, the application once made should succeed.
33. But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (See Lucy Nangari Ngigi & 128 Others –Versus- National Bank of Kenya Limited & Another (2015) eKLR.
34. As already indicated, this matter has appeared before Court on several occasions purposely with the aim of placing the record straight and creating some order and normalcy. For instance, when the matter came up for mention, on 16<sup>th</sup> March, 2023 the Courts attention was drawn to this rather peculiar situation and in its wisdom advised the Plaintiffs/Respondents to withdraw at least two (2) of the Further Amended Plaint and retain one. I have taken cognizance that this direction was not complied with and of course having offended the Defendant/Applicant it necessitated the filing of this application. From the foregoing, and based on the reasons setout herein, I am fully satisfied that the Notice of Motion application is meritorious in that the amended cause by the Plaintiffs/Respondents went beyond the orders sought and granted by adding another party. Further, the Plaintiffs/Respondents failed to observe the stringent time allowed by law in causing the amendment. For these reasons, the application by the Defendant/Applicant herein must succeed.

**ISSUE No. (b): - Whether the parties are entitled to the relief sought**

35. Having concluded that the Defendant/Applicant herein application has merit, I proceed to hold further that since this is not a case of striking out of pleadings as envisaged in the Court of Appeal case of D.T. Dobbie (Supra) and taking the age of the matter it’s just fair based on the provisions of Article 159 (1) of *the Constitution* of Kenya that all the pleadings are straightened and the matter is expeditiously set down for hearing and determination. The court will provide the Plaintiff with the



second bite of the Cherry by granting them an opportunity to file and serve an omnibus application seeking fresh for amendment of a Further Further Amended Plaintiff under the provision of Order 8 Rules 2 and 3 and addition of a party – under order 1 Rule 10 (2) of Civil Procedure Rule, 2010. I reiterate that this matter should be heard in the next one hundred and eighty (180) days from now on a priority basis.

**ISSUE No. (c):- Who will bear the costs of the application?**

- 36. It is now well established that issues of costs is at the discretion of the Court. Costs mean an award granted to a party at the conclusion of any legal action or proceedings in a litigation process. The Proviso of the Section 27 (1) of the *Civil procedure Act*, Cap. 21 holds that costs follow the event. By the event it means the result or outcome of the legal action.
- 37. In the instant case, the Defendant/Applicant has been successful in prosecuting its application. Thus, they are entitled to costs but since the matter is still proceeding on, the same to be in the cause.

**VI. Conclusion and Disposal**

- 38. Ultimately, having caused an elaborate analysis of the framed issues herein, on the preponderance of probabilities the court holds specifically as follows:-
  - a. That the Notice of Motion application dated 29<sup>th</sup> May, 2023 by the Defendant/Applicant be and is hereby allowed in its entirety with costs.
  - b. That an order of this court for the Plaintiff/Respondent herein to file and serve a fresh an application seeking for leave to amend Further Further Amended Plaintiff under the provision of Order 8 Rules 2, 3, 4, and 6 of Civil Procedure Rules 2010 and hence to add the 1<sup>st</sup> Plaintiff – “Maarifa Development Limited” if they will so wish to do, within the next twenty-one (21) days from the date of this Ruling.
  - c. That upon service of the said application, the Defendant granted 14 days leave to file and serve Replies and an Amended Defence and/or Counter Claim under Order 7 Rules 3 & 11 of the Civil Procedure Rules, 2010.
  - d. That thereafter the Honourable Court will then render its Ruling on the afore said application immediately.
  - e. That there be a mention on 13<sup>th</sup> February, 2024 for Pre-trial Conference and have the matter be heard on 13<sup>th</sup> May, 2024
  - f. That costs of the application to be borne by the Plaintiffs/Respondents to be in the cause.

It is so ordered accordingly

**RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS SIGNED DATED AT MOMBASA THIS 16<sup>TH</sup> OF OCTOBER 2023**

.....

**HON. JUSTICE L.L. NAIKUNI (MR.),  
ENVIRONMENT & LAND COURT, AT MOMBASA**

Ruling delivered in the presence of:

- a. M/s. Yumnah Hassan, the Court Assistant.



b. No appearance for the Plaintiffs/Respondents.

c. M/s. Nyambane Advocate & Mr. Ismail Advocate holding brief for the Defendant/Applicant.

