



**Murimi v Murimi & another (Environment & Land Case 106 of 2023)
[2023] KEELC 21806 (KLR) (23 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21806 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NYANDARUA
ENVIRONMENT & LAND CASE 106 OF 2023
YM ANGIMA, J
NOVEMBER 23, 2023**

BETWEEN

PAUINE WAMAITHA MURIMI PLAINTIFF

AND

VERONICAH NYAKINYUA MURIMI 1ST DEFENDANT

LAND REGISTRAR, NYANDARUA/SAMBURU COUNTIES 2ND DEFENDANT

RULING

A. 1st Defendant's Application

1. By a notice of motion dated 27.04.2023 brought under Orders 8 rule 3(1) of the *Civil Procedure Rules*, 2010 (the Rules) and all other enabling provisions of the law the 1st Defendant sought leave of court to amend her defence and counterclaim and for costs of the application to be provided for.
2. The application was based upon the grounds set out on the face of the motion and the contents of the 1st Defendant's supporting affidavit sworn on 27.04.2023 and the draft amended defence and counterclaim annexed to the affidavit. It was contended that it was necessary for the 1st Defendant to amend her pleading in order to bring out the real issues in controversy and that the intended amendment shall not prejudice any of the parties to the proceedings.

B. Plaintiff's Response

3. The Plaintiff filed a replying affidavit sworn on 11.08.2023 in opposition to the application. It was contended that the dispute among the parties was in the nature of a boundary dispute and that the same was fully resolved vide the land registrar's report dated 11.10.2019 hence the matter was concluded and there was nothing left for full hearing before this court.



4. It was contended that the 1st Defendant did not lodge any appeal against the Registrar's decision within the prescribed period or at all hence she was estopped from reopening the matter. As a result, the court was urged to dismiss the application for leave to amend with costs.
5. The Plaintiff also filed grounds of opposition dated 11.08.2023 objecting to the application on the following grounds:
 - a. That the application is frivolous, vexatious and or otherwise an abuse of the process of the court.
 - b. That on 23.10.2018 the boundary dispute that is the subject to this suit was fully settled and a report dated 11.10.2019 filed in this honourable court.
 - c. That any party dissatisfied with the decision and the report from the Land Registrar, Nyandarua/Samburu Counties was supposed to appeal the ruling within 21 days from 11.10.2019.
 - d. That the suit herein has already been determined and the application seeks to re-open a concluded suit when pleadings had already been closed.
 - e. That the 1st Defendant/applicant's application seeks to defeat the rights of the Plaintiff/respondent and it is in the interest of justice that the application be struck out with costs.

C. Directions on Submissions

6. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. Consequently, the parties were granted timelines within which to file and exchange their written submissions. The record shows that the 1st Defendant's submissions were filed on 19.10.2023 whereas the Plaintiff's submissions were filed on 01.11.2023.

D. Issues for Determination

7. The court has perused the Defendant's notice of motion dated 27.04.2023, the Plaintiff's replying affidavit and grounds of opposition in response thereto as well as the material on record. The court is of the opinion that the following key issues arise for determination herein:
 - a. Whether the suit herein is concluded.
 - b. Whether the 1st Defendant is entitled to leave to amend her pleading.
 - c. Who shall bear costs of the application.

E. Analysis and Determination

- a. Whether the suit herein is concluded
8. The court has considered the material and submissions on record on this issue. It was submitted by the Plaintiff that the dispute among the parties was solely a boundary dispute and that the same was fully resolved through a site visit and the land registrar's report dated 11.10.2019. The Plaintiff was thus of the view that the matter was effectively concluded hence there was nothing pending hearing before this court.
9. The Plaintiff further submitted that where parliament has provided a specific procedure for resolution of a dispute then that procedure must be strictly followed and a court of law ought not to entertain such



a dispute unless the statutory avenue is not viable, adequate or effective. The Plaintiff cited the case of Speaker of the *National Assembly –vs- Njenga Karume* [1992] KLR 21 in support of that submission. The Plaintiff also submitted that the determination of a boundary dispute was a matter entirely within the province of the land registrar hence a court of law had no jurisdiction to entertain the same. In that regard, the Plaintiff cited, inter alia, the cases of *Azzuri Limited –vs- Pink Properties Ltd* [2018] eKLR; *George Kamau Macharia –vs- Dexka Limited* [2019]; *Willis Ochola –vs- Mary Ndege* [2016] eKLR and *Estate Sonrisa Ltd and Another –vs- Samuel Kamau Macharia & 2 Others* [2020] eKLR.

10. The 1st Defendant, on the other hand, submitted that the Plaintiff's suit and her counterclaim have never been heard and a judgment rendered by this court. It was submitted that the land registrar's report was not a decision of this court and the same had never been adopted as such. It was further submitted that the dispute before court was not a boundary dispute since the Plaintiff's land does not abut the 1st Defendant's land. It was further submitted that there was an issue concerning an access road which was raised in the defence and counterclaim which had not been resolved.
11. The court has noted from the record that the Plaintiff's application for an injunction was heard and dismissed on 12.04.2018. Since then the matter remained dormant for about 5 years in consequence whereof the court issued a notice to show cause why the suit should not be dismissed for want of prosecution under Order 17 rule 2 of the Rules. When the matter came up for hearing of the notice to show cause on 02.05.2023 the court dispensed with the notice in favour of the hearing of the suit. It is at that point that the 1st Defendant expressed her desire to amend her pleading.
12. The court is satisfied from the material on record that the suit and counterclaim are still pending in court. The filing of the land registrar's report cannot be a substitute for a judicial determination of a dispute presented before a court of law. Section 18(2) of the *Land Registration Act*, 2012 provides that a court shall not entertain any proceedings on a boundary dispute unless the land registrar has made a determination on the disputed boundary. It is thus clear that the court's jurisdiction is excluded only where the registrar has not made a determination. The material on record in this matter shows that the land registrar made a determination and prepared a report thereon dated 11.10.2019.
 - b. Whether the 1st Defendant is entitled to leave to amend her pleading
13. Order 8 rule 3(1) of the *Rules* on amendment of pleadings stipulates as follows:

“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.”
14. On the other hand, Order 8 rule 5 of the *Rules* stipulates as follows:
 - (1) 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as may be just.
 - (2) This rule shall not have effect in relation to a judgment or order.”
15. The principles to be considered in granting or refusing an application for leave to amend pleadings were re-stated in the case of *Eastern Bakery –vs- Castellino* [1958] EA 461 at 462 as follows:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to



the other side, and that there is no injustice if the other side can be compensated by costs *Tildesley v. Harper* (10 (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya vs. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

16. Similarly, in the case of *Central Kenya Ltd –vs- Trust Bank Ltd & 5 Others* [2000] eKLR the Court of Appeal considered the principles as follows:

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

17. The court has noted that the matter is yet to be set down for hearing of the suit and counterclaim. The court has also noted the issue of the access road was raised in paragraph 33 of the 1st Defendant’s counterclaim but there was an omission in seeking a relief in respect thereof. It is evident from the draft amended defence and counterclaim that the only substantial amendment sought is a prayer for the opening up of an access road which was said to have been drawn in the mutation of 04.02.1993.
18. The court is satisfied that the proposed amendment shall help in framing the real issues in controversy in the suit and counterclaim once and for all. The court is further satisfied that none of the parties shall suffer any prejudice as a result of the amendment. The Plaintiff shall still have an opportunity of amending her defence to counterclaim to dispute the existence of the alleged access road. The Plaintiff shall also have an opportunity of relying upon the land registrar’s report at the trial in support of her case and in defence of the counterclaim. In the premises, the court is of the opinion that the 1st Defendant is entitled to the leave sought to amend her defence and counterclaim.

c. Who shall bear costs of the application

19. Although costs of an action or proceeding are at the discretion of the court, the general rule is that costs shall follow the event in accordance with the proviso to Section 27 of the *Civil Procedure Act* (Cap 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise. See *Hussein Janmohamed & Sons –vs- Twentsche Overseas Trading Co. Ltd* [1967] EA 287. Although the 1st Defendant is the successful party in the application, the court is not inclined to award her any costs due to her delay in seeking leave to amend. The court is thus of the opinion that costs of the application should be in the cause.



F. Conclusion and Disposal Order

20. The upshot of the foregoing is that the court finds merit in the 1st Defendant's application dated 27.04.2023. Accordingly, the court makes the following orders for disposal thereof:
- a. Leave be and is hereby granted to the 1st Defendant to file and serve an amended defence and counterclaim within 14 days from the date hereof.
 - b. The Plaintiff shall be at liberty to file and serve an amended reply to defence and amended defence to counterclaim within 14 days upon service by the 1st Defendant.
 - c. Costs of the application shall be in the cause.
 - d. The suit shall be mentioned on 18.01.2024 for pre-trial directions.

Orders accordingly.

RULING DATED AND SIGNED AT NYANDARUA THIS 23RD DAY OF NOVEMBER, 2023 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.

In the presence of:

Mr. Mukire holding brief for Mr. Kabaiku for the Plaintiff

Mr. John Gachie holding brief for Ms. Makena for the 1st Defendant

N/A for the 2nd Defendant

C/A - Carol

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Y. M. ANGIMA

JUDGE

