



Muye v Sharrif; Omar (Interested Party) (Environment & Land Case 53 of 2015) [2023] KEELC 21657 (KLR) (22 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21657 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 53 OF 2015
FM NJOROGE, J
NOVEMBER 22, 2023**

BETWEEN

PIRY JOHNSTONE MUYE PLAINTIFF

AND

SHARIF OMAR MOHAMMED ALIAS JAFFER SHARRIF DEFENDANT

AND

JAFFER SHARIFF OMAR INTERESTED PARTY

RULING

1. Before the court for determination is the Plaintiff's Notice of Motion application dated 17th March 2023 filed on 11th April 2023. The application is brought under section 1A, 1B, 3A and 18 of the *Civil Procedure Act*, Order 1 Rule 10 and Order 8 Rule 3 of the Civil Procedure Rules, 2010 for orders: -
 1. That the Honourable court be and is hereby pleased to grant leave to the Plaintiff/Applicant to further amend the Plaint dated 6th June 2022 and filed in court on 7th June 2019 in terms of the draft amended plaint attached herewith.
 2. That the draft amended plaint attached herewith be deemed as duly filed and serviced upon payment of the requisite court filing fee.
 3. That the honourable court be and is hereby ordered to withdraw Kilifi MC ELC No. 29 of 2020 Jaffer Sharriff -v- Piri Johnstone & 5 others to this honourable court and consolidate the same with this instant suit for trial and final determination.
 4. That this honourable court be pleased to make any other or such further orders as it may deem fit and just to grant.
 5. That the costs of this application be in the cause.



2. In support of the application is the affidavit sworn by the Plaintiff on 17th March 2023 wherein he deposed that he instituted the present suit against Shariff Omar Mohammed for trespass over his alleged property identified as L.R. No. 7733/III/22036 Kijipwa situate at Kikambala within Kilifi County (the suit property) now subdivided. That sometime in 2020, one Jaffer Sharrif joined the suit as an Interested Party. The Plaintiff deposed that at all material times, the said Jaffer Sharrif was known to him as Sharrif Omar Mohammed and that there is therefore need to amend the Plaint so as to substitute the Defendant.
3. The application was opposed by the said Interested Party. He filed grounds of opposition dated 27th April 2023 and a Replying Affidavit sworn by himself on 8th September 2023. According to the Interested Party, the application was an abuse of the court process as the Plaintiff had previously successfully sought to amend his pleadings; that

on 22nd March 2023 upon realization that the Plaintiff had sued the wrong party, the court directed that the defendant be substituted with the interested party. Subsequently, the Interested Party filed a statement of defence based on the amended plaint dated 6th June 2019, that the Plaintiff was not granted leave to file the present application. He added that the issues raised in the present application are res judicata having been ventilated in the ruling dated 21st April 2016 by Angote J and another dated 30th July 2021 by Olola J. To the Interested Party, the amendments sought in the further amended plaint will substantially change the nature of the claim.
4. The application was canvassed by way of written submissions which I summarize as hereunder.

The Plaintiff's submissions

5. Counsel for the Applicant submitted that the present application was not an abuse of the court process since the directions given in court to substitute the defendant did not amount to leave to amend the Plaint as required under Order 8 rule 3 of the Civil Procedure Rules, that the amendment is necessary so as to plead on the issue of ownership as raised by the Interested Party and to highlight the irregularity of the Interested Party's title. Counsel relied on the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR where the purpose of amendment of pleadings was discussed; and *St. Patricks Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR where the principles for amendment of pleadings were aptly highlighted.
6. Counsel further submitted that the issue of res judicata as raised by the Interested Party did not apply in the present case since the question of trespass was yet to be determined. That the argument did not fit the description in Section 7 of the *Civil Procedure Act*.

The Interested Party's submissions

7. Counsel identified two issues for determination, namely whether the application for leave to amend the plaint has merit and whether prayer 3 of the application is res judicata. Regarding the former issue, counsel submitted that in a situation where an amendment is sought at a later stage and is purely meant to advance a new ground or repair a party's omission in their case, the court must assess the injustice it would visit on the other party. This, counsel submitted, was the position in *Julius Njiraini Nyamu v Henry Mburu Marungo & 3 Others* [2021] eKLR and in *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR. That the amendments sought by the Plaintiff herein would change the entire plaint and introduce new grounds too late in the day.
8. Counsel argued that the application is an abuse of the court process and urged the court not to aid the Plaintiff's carelessness and negligence.



Analysis and Determination

9. I have considered the application before me and in my view, what is for determination is as follows-
- i. Whether prayer 3 of the present application is res judicata.
 - ii. Whether leave to further amend plaint should issue and whether the draft further amended plaint be deemed as duly filed.

Issue (i)

10. The doctrine of res judicata is set out in Section 7 of the *Civil Procedure Act*. The doctrine ousts the jurisdiction of a court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title. A close reading of Section 7 of the *Act* reveals that for the bar of res judicata to be effectively raised and upheld, the party raising it must satisfy the doctrine's five essential elements which are stipulated and construed in conjunctive terms. The doctrine will apply only if it is proved that:
- i. The suit or issue raised was directly and substantially in issue in the former suit.
 - ii. That the former suit was between the same party or parties under whom they or any of them claim.
 - iii. That those parties were litigating under the same title.
 - iv. That the issue in question was heard and finally determined in the former suit.
 - v. That the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
11. A reading of the said prayer 3, the Plaintiff wants this court to withdraw Kilifi MC ELC No. 29 of 2020 *Jaffer Sharriff -v- Piri Johnstone & 5 others* to this honourable court and consolidate the same with this instant suit for trial and final determination. The Interested Party's argument is that this issue was canvassed and determined by Olola J in his ruling dated 30th July 2021.
12. I have perused the said ruling, it is evident that the Plaintiff previously filed an application dated 21st July 2020. One of the orders sought therein was framed as prayer 3 above. The learned judge aptly addressed the issue of transfer and consolidation and held: "23. In the circumstances, I did not find any basis for the request for the transfer and consolidation of the two suits."
13. Therefore, the issue herein being between the same parties, similar to that raised in the previous application, before this court and having been heard and determined, there is no doubt that prayer No. 3 as prayed is res judicata.

Issue (ii)

14. Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendment of pleadings with leave of court as follows: -
- (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.
15. Further, Order 8, rule 5 gives the court the general power to order amendment.



5. (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 are just.
16. The Court of Appeal outlined the principles in amendment of pleadings in *Joseph Ochieng & 2 others Trading as Aquiline Agencies –v- First National Bank of Chicago* [1995] eKLR as follows: -
- “The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff’s claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.”
17. Similarly, in *Central Kenya Limited -v- Trust Bank Limited* (2000) 2 EA 365 the Court held that:
- “A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”
18. Further, Bullen and Leake & Jacob’s Precedents of Pleading, 12th Edition provides for the following: -
- “Power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action.”



19. It follows therefore that the legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows: that the amendment should not introduce new or inconsistent cause of actions 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. To determine the above tenets, I will now turn to the contents of the draft further amended plaint.
20. The Plaintiff's initial claim was commenced by way of a plaint dated 8th April 2015. The original plaint had only one defendant, that is, Sharrif Omar Mohammed. The Plaintiff sought amongst other orders general damages for trespass and a permanent injunction against the said Defendant. On 12th March 2017, the Plaintiff successfully sought leave to amend his plaint. He ultimately filed the amended plaint dated 6th June 2019. The details of amendments therein being description of the suit property and an additional prayer for declaration that he is the rightful owner of the suit property.
21. On 11th June 2020, the interested party successfully filed an application to join the suit as an interested party. In the end, the matter proceeded to a full hearing when it was established that the Plaintiff's claim ought to have been filed against the Interested Party as the Defendant. Subsequently, this court directed that the pleadings be regularized and to give effect to the substitution of parties.
22. The Plaintiff then filed the present application seeking leave to amend, not only the details of the parties but also some new averments and prayers. The gist of the new paragraphs will be to add a claim for fraud on the part of the Interested Party (intended defendant) and illegality of his title.
23. It must be remembered that the chances of being granted leave to amend, diminish with the progress of the matter and also with the effluxion of time. Further, the court in most cases will frown upon an amendment that seeks to introduce a completely new cause of action especially where the proposals come so late in the course of litigation.
24. This is because the effect of such amendments would ordinarily prejudice the other party as they will now be subjected to litigation that is completely different from that which they have been defending. In my view, liberally allowing such amendments would create bad precedent, because then a litigant would wait till the end of the suit to attempt to fill in the holes in his case created by the other party during the conduct of the hearing. Such amendments should not be encouraged except in very exceptional circumstances.
25. It is also trite that the purpose of allowing amendment of pleadings is to enable the court to determine the real issues in controversy between the parties once and for all. For the court to allow an amendment it has to look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether such prejudice can be compensated by way of costs (See Order 8 rule 5 above).
26. In the present case, there is no doubt that the amendment is being sought late in litigation. However, the exceptional circumstances in this case are that there is a whole new defendant and it is expected that some new facts will arise. Pertinently, the issue between the parties currently touches on trespass. The Plaintiff now wants to introduce a claim challenging the Interested Party's title. To me, these two issues go hand in hand, and an amendment as proposed will enable the court determine the real issues in controversy between the parties once and for all. In any event, the Interested Party is yet to regularize his pleadings, that is file a statement of defence as directed by the court and give his evidence. In the circumstances, I do not see any prejudice that will be occasioned to him that cannot be compensated by way of costs, if leave to amend is granted at this point.



27. The upshot of the foregoing is that the application dated 17/3/2023 partially succeeds and I hereby grant it in terms of prayers Nos. 1 and 2 as prayed with costs to the respondents in any event.

DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 22ND DAY OF NOVEMBER, 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI.

