



**Athumani & another (Suing for and on Behalf of the Mwanyundo Clan) v M/  
S Karsan Ramji & Sons Ltd & 6 others (Environment and Land Case Civil  
Suit 230 of 2018) [2023] KEELC 21749 (KLR) (20 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21749 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MALINDI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 230 OF 2018  
MAO ODENY, J  
NOVEMBER 20, 2023**

**BETWEEN**

**SHABANI ATHUMANI ..... 1<sup>ST</sup> PLAINTIFF  
ALEX FURAHA CHARO ..... 2<sup>ND</sup> PLAINTIFF  
SUING FOR AND ON BEHALF OF THE MWANYUNDO CLAN**

**AND**

**M/S KARSAN RAMJI & SONS LTD ..... 1<sup>ST</sup> DEFENDANT  
DIRECTOR OF LANDS ADJUDICATION AND SETTLEMENT .... 2<sup>ND</sup>  
DEFENDANT  
DISTRICT LAND ADJUDICATION AND SETTLEMENT OFFICER  
KILIFI ..... 3<sup>RD</sup> DEFENDANT  
NATIONAL LAND COMMISSION ..... 4<sup>TH</sup> DEFENDANT  
THE CHIEF LAND REGISTRAR ..... 5<sup>TH</sup> DEFENDANT  
MINISTRY LAND & URBAN DEVELOPMENT ..... 6<sup>TH</sup> DEFENDANT  
THE HONOURABLE ATTORNEY GENERAL ..... 7<sup>TH</sup> DEFENDANT**

**RULING**

1. This ruling is in respect of a Notice of Motion dated 20<sup>th</sup> March 2023 by the 1<sup>st</sup> Defendant seeking the following orders:



- a. That the 1<sup>st</sup> Defendant/Applicant be granted leave to amend their defence to include a counterclaim as per the draft annexed Amended 1<sup>st</sup> Defendant's Written Statement of Defence and Counter-claim annexed hereto.
  - b. That costs of this application be provided for.
2. The application was supported by the affidavit sworn by Kishorkumar Dhanji Varsani on 20<sup>th</sup> March, 2023 where he deponed that the current law firm was instructed to take over the conduct of the matter on the 22<sup>nd</sup> February, 2023 on its behalf and upon perusal of the pleadings herein, it is imperative that the 1<sup>st</sup> Defendant's statement of defence be amended to include a counter-claim as per the draft annexed thereto.
  3. According to him, the proposed amendments will enable the Honourable Court determine all the issues in dispute once and for all. Further, that the said amendments will also enable the 1<sup>st</sup> Defendant/Applicant be able to completely plead its case against the Plaintiff and seek appropriate reliefs and remedies.
  4. In response, the Plaintiff filed Grounds of Opposition dated 20<sup>th</sup> April, 2023 and stated that the application is defective as it is an abuse of the mandatory provisions of Order 8 Rule 3 of the Civil Procedure Rules and that the proposed amendments introduce a new and inconsistent cause of action which would change the cause of action into one of a substantially different character that can only be subject to a fresh action.

#### **1st Defendant's Submissions.**

5. Counsel for the 1<sup>st</sup> Defendant identified three issues for determination namely; whether the amendment is necessary for the purposes of determining the real questions in controversy between the parties once and for all, whether the application is defective and whether the amendments will occasion any injury to the Plaintiff.
6. Counsel submitted that Section 100 of the *Civil Procedure Act* provides that parties to a suit have a right to amend their pleadings at any stage of the proceedings, however, this right is not absolute and the court discretionary power to either allow or reject the application for amendment as per Order 8 Rule 3 of the Civil Procedure Rules.
7. It was counsel's further submission that the 1<sup>st</sup> Defendant seeks leave to amend the defence to include a counter claim which had been omitted by the 1<sup>st</sup> Defendant's previous counsel and relied on the case of *Central Kenya Limited v Trust Bank Limited* [2000] 2 EA 365.

#### **Plaintiff's Submissions.**

8. Counsel for the Plaintiff submitted that the proposed amendments will introduce a new cause of action of a substantially different character that can only be subject to a fresh action and if allowed will cause great prejudice to the Plaintiff's case.
9. Counsel further submitted that the 1<sup>st</sup> Defendant intends to introduce a totally new set of facts as it alleges that it is the duly registered owner of the property known as Kilifi/ Kawala "A" Kadzonzo/399, it also alleges that it has been the rightful and bonafide owner of the said, parcel of land.
10. Mr. Gakuo also submitted that the 1<sup>st</sup> Defendant has also outlined particulars of fraud, misrepresentation and illegality on the part of the Plaintiff an allegation which the Plaintiff did not have an opportunity to rebut since the 1<sup>st</sup> Defendant never raised it during pendency of the hearing of



the Plaintiff's case. That the 1<sup>st</sup> Defendant is also seeking a declaration that the suit property belongs to it and consequently seeks an order of permanent injunction against the Plaintiff herein restraining them from encroaching, entering, subdividing, selling, transferring, charging and/or dealing in any manner whatsoever with property known as Kilifi/Kawala "A" Kadzonzo/ 399.

11. Counsel relied on the cases of *Giro Commercial Bank Limited v Michael Philip Theuri & 4 others* [2014] eKLR and *Johana Kipkemei Too v Hellen Tum* [2014] eKLR where the court held that amendments can be allowed at any time of the proceedings so long as they do not cause prejudice to the parties, brought without delay and do not introduce new causes of action.
12. Mr. Gakuo also submitted that the application is an abuse of the court process as the Plaintiffs have already testified and that the suit was filed in the year 2018. That the 1<sup>st</sup> Defendant had over five years to amend its statement of defence before the matter was slated for hearing in order to give the Plaintiff an opportunity to rebut the same. Counsel cited the case of *Joseph Kuyo Legei v Kantain Ole Ntusero* [2018] eKLR.

### **Analysis And Determination.**

13. The issue for determination is whether the 1<sup>st</sup> Defendant has made out a case of amendment of its defence and counterclaim.
14. The general power to amend pleadings is guided by Section 100 of the *Civil Procedure Act*. Parties to a suit have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the *Civil Procedure Rules*.

Order 8 rule 5 of the *Civil Procedure Rules* provides as follows: -

“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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

15. The Court of Appeal addressed itself on the foregoing discussion in the case of *Central Kenya Limited v Trust Bank limited* [2000]2 E.A 365 as follows: -

“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.”

16. In the case of *Abdul Wahid Al Abubakar v Osman Abubakar t/a Osman Woodworks & 2 others* [2015] eKLR the court held that:

“The Defendant now wants to introduce a counterclaim, which is a cross suit after the Plaintiff has already closed his case. Indeed, the claim by the 3<sup>rd</sup> Defendant, who has also testified, is a new cause of action which was never raised in the Defence. Allowing the amendment at this stage will be prejudicial to the Plaintiff because what is being sought to be introduced is a new cause of action, which has been brought after the Plaintiff has testified”.



17. It should be noted that this case was filed in 2018 and the Defendant was aware of the line of defence that it would mount against the Plaintiff's claim. It is also on record that the 1<sup>st</sup> Defendant filed a Notice of Preliminary Objection dated 28<sup>th</sup> July 2021 which was heard and determined vide a ruling dated 16<sup>th</sup> February 2022 whereby the Preliminary Objection was dismissed.
18. If the 1<sup>st</sup> Defendant really wanted to pursue the amendments then it should have done it earlier before the start of the hearing of the case. The application seems like an afterthought to scuttle the hearing of the case. Moreover, the amendments sought to be introduced are new causes of action, which will cause prejudice and will have an effect of filing fresh pleadings to respond to the amendments.
19. This court also finds guidance in the scholarly work of *Bullen and Leake & Jacob's Precedents of Pleading*, 12<sup>th</sup> Edition, which provides as follows concerning amendment of pleadings: -
- “...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...”
20. In the case of *Harrison C. Kariuki v Blue Shield Insurance Co. Ltd* [2006] eKLR In the case Waweru, J. in refusing to grant the application inter alia stated:-
- “...This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admission made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted. Having considered all matters placed before me, in exercise of my discretion I will refuse the application...”.
21. I have considered the application, the submissions by counsel and the relevant authorities and find that the 1<sup>st</sup> Defendant's application for amendment lacks merit and is therefore dismissed with costs to the Plaintiff.

**DATED, SIGNED AND DELIVERED AT MALINDI THIS 20TH DAY OF NOVEMBER 2023.**

**M.A. ODENY**

**JUDGE**

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

