



**Gituma v Murwithania & 2 others (Environment and Land Appeal
E039 of 2022) [2023] KEELC 21574 (KLR) (16 November 2023) (Judgment)**

Neutral citation: [2023] KEELC 21574 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MERU
ENVIRONMENT AND LAND APPEAL E039 OF 2022**

CK YANO, J

NOVEMBER 16, 2023

BETWEEN

JOHN WYCLIFF MUREITHI GITUMA APPELLANT

AND

MARTIN MUTWIRI MURWITHANIA 1ST RESPONDENT

LUCY GACHIGO MUTWIRI 2ND RESPONDENT

MWANAISHA NKIROTE M'MUTHAURA 3RD RESPONDENT

JUDGMENT

Introduction

1. The appellant filed notice of motion dated 10th May 2022 brought under Order 1 Rule 3, Order 8 Rule 3 & 5 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking leave to amend his defence to include a counter claim and to join Mwanaisha Nkirote M'Muthaura, the 3rd respondent herein as a defendant in the suit before the lower court. The appellant who was the 3rd defendant in the suit in the trial court stated that the amendment was necessary to avoid a multiplicity of suits. He averred that the suit was precipitated by an illegal lease by the 3rd respondent who was a defendant in Nanyuki CMCC E097 of 2021.
2. The application was opposed by the 1st & 2nd respondents, who were the plaintiffs in the lower court, through a replying affidavit dated 24th May 2022 sworn by Ms Evelyn Nasiantoi Kilesi Advocate who stated that the counterclaim raised issues that were contained in a separate suit Nanyuki CMCC E097 of 2021 over a dispute on the validity of a lease agreement between the 1st and 2nd respondents and the said Mwanaisha Nkirote M'muthaura and that there was an application for transfer which was pending in court.



3. After considering the application the learned trial magistrate found that the application was without merits and dismissed the same with costs. The trial court noted that there existed another suit Nanyuki CMCC E097 of 2021 in which the issue of the lease agreement that was challenged by the appellant in the intended counterclaim had been made a subject matter to be determined by that court which had competent jurisdiction. The parties were also in agreement that there was a pending application to transfer the suit at Nanyuki to Meru C.M's court. The learned trial magistrate stated that by introducing the intended 4th defendant and her lease agreement would amount to a multiplicity of suits, with the attendant risk of the two courts issuing conflicting decisions over the same subject matter which would amount to an abuse of the court process. The trial court was of the view that the issue of the lease agreement would aptly be addressed without including the lessors as parties.
4. Being dissatisfied by the said ruling the appellant filed this appeal and set out the following grounds-;
 - 1) That the learned magistrate misapprehended and misapplied the law and the facts placed before the trial court on amendment of pleadings to introduce a counterclaim by the 3rd defendant and effectively denied the 3rd defendant a chance to bring out all issues of trial by the court.
 - 2) That the learned Magistrate erred in law by finding that the introduction of the intended 4th defendant and the issue of legality of the lease agreement between the 2nd respondent herein and the intended 4th defendant would amount to a multiplicity of suits yet the issue sought to be introduced in the intended counterclaim was not in issue before the other suit namely Nanyuki CMCC No. E097 of 2021.
 - 3) That the ruling of 6/7/2022 has the effect of muzzling and restricting the appellant's inherent right to participate fully in the hearing of the dispute before the court.
 - 4) That the learned trial magistrate erred by failing to find that the defence raised by the appellant at paragraphs 20-24 of the intended counterclaim raised very serious fundamental triable issues, namely that the court should not be used by a party to perpetuate an illegality.
 - 5) That the ruling of the court was against the established Oxygen rule principles and the provisions of Article 159 of the Constitution of Kenya.
5. The appellant sought to set aside the ruling dated 6th July, 2022 and in its place allow the application dated 10th May 2022 as prayed plus costs of the appellant.
6. The appeal was canvassed by way of written submissions.

Appellant's Submissions

7. The appellant filed his submissions dated 27th June 2023 through the firm of Mwirigi Kaburu & Co. Advocates. It is the appellant's submissions that the 3rd respondent was and remains a necessary party in the suit because of a lease agreement entered into between the 2nd respondent herein and the 3rd respondent while the appellant was still in occupation of the same lands, having leased the same from the administrator of the estate of the deceased registered owner of the two parcels of land. Further that the intended counterclaim is to plead that the lease agreement between the 2nd respondent and 3rd respondent was an illegality and that the court should not be used to further an illegality.
8. Learned counsel for the appellant submitted that the lease property in contest is the same one that the respondents' claim ownership of and seek a declaration to that effect against the appellant. That the appellant, like the respondents, was leased the suit land by the lessor, the 3rd respondent herein and are



of the view that apart from the 3rd respondent being perhaps a necessary party in the proceedings, the court will be placed in a better position to adjudicate on all the issues in controversy if the amendment is allowed and the parties respond to the issues.

9. Counsel for the appellant urged the court to exercise its discretion in favour of the appellant and allow the amendment and relied on the Court of Appeal case of *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 and submitted that allowing the application sought will enable the court determine the real issues in controversy especially the legality or otherwise of the lease agreement between the 2nd respondent and the 3rd respondent and avoid multiplicity of suits. That the amendments will not cause any prejudice to the respondents in any manner that cannot be compensated by costs as the case has not been heard yet as they will have the opportunity to respond and reply to the defence and counterclaim. Learned counsel for the appellant also relied on the case of *General Manager E.A.R & HA & Thierstein* (1968) 1 EA 354 (HCK), *John Nyagaga Osoro v Reynold Karisa Charo & 5 others* [2021] eKLR, *Kenya National Commission on Human Rights v Attorney General, Independent Electoral & Boundaries Commission & 16 others (interested parties)*, and *Eunice Chepkoi Soi v Bomet Water Company Ltd* [2017] eKLR.
10. The respondents did not file submissions although they were duly notified of the court's directions and served with the appellant's submissions.

Analysis And Determination

11. I have perused and considered the record of appeal, the grounds of appeal, the submissions filed and the authorities relied on. This being a first appeal, I am conscious of the court's duty and obligation to evaluate, re-assess and re-analyse the evidence on record to determine whether the conclusion reached by the learned trial magistrate were justified on the basis of the pleadings, evidence and the law.
12. Having considered the record of appeal, the grounds of appeal and the submissions made, I find that the issue before court for determination is whether the appellant should be granted leave to amend his defence to include a counter claim and to join the 3rd respondent herein as a defendant in the primary suit.
13. The general power to amend pleadings is to be found in Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings. However, that right is not absolute for it is dependent upon the discretion of the court. Like any other discretion, this discretion should be exercised judiciously and in line with the criteria set out under Order 8 Rule 3 of the *Civil Procedure Rules*.
14. 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 an 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.”
15. Further, the addition of a party to a suit is guided by order 1 Rule 10 sub rule 2, that gives a court the discretion at any stage of the proceedings to add a party into a suit as a defendant, in instances where their presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit.



16. The principles that guide amendments of pleadings have been discussed in many decided cases. In *Joseph v Elena Chepkurgat Talam (sued as the legal administrator of the estate of the late Kiptalam Arap Kogo)* [2019] eKLR, the court stated-;

“The overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.”

17. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank Limited* (Supra) 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 rights is affected and that the amendment can be allowed without injustice to the other side.”

18. In the present case, the appellant sought to amend his defence to include a counterclaim and to join the 3rd respondent herein as a defendant to the suit. I have perused the pleadings herein. The appellant is contesting the lease agreement entered into between the 2nd respondent and the 3rd respondent while the appellant was still in occupation of the suit parcels of land which the appellant alleged he was also leased by the administrator of the estate of the deceased registered owner of the said parcels of land. The appellant is also challenging the legality of lease agreement between the 2nd respondent and the 3rd respondent. From the material on record, it is clear to me that the lease property in contest is the same one that the respondents claim ownership and seek a declaration against the appellant who claims to have been leased the land by the 3rd respondent herein. It is my view that the 3rd respondent is a necessary party to the proceedings as her presence will place the court in a better position to adjudicate on all the issues in controversy. Further, in my view, the amendments are necessary to avoid multiplicity of suits. This court has not been shown what prejudice the respondents would suffer if the amendments were allowed and the 3rd respondent joined as a party in the suit. In my humble view, the learned trial magistrate fell into an error when he disallowed the application for amendment and joinder. For the foregoing reasons, the appeal is not without merit. I therefore allow it, set aside the trial court’s order made on 6th July, 2022 dismissing the application dated 10th May 2022, and in place therefore substitute an order allowing the said application.

19. Costs of the appeal are awarded to the appellant against the respondents.

DATED, SIGNED AND DELIVERED AT MERU THIS 16TH DAY OF NOVEMBER, 2023.

In the presence of

Court Assistant – V. Kiragu/Lena M

Mwirigi Kaburu for appellant

No appearance for Ms. Kilesi for respondent

C.K YANO

JUDGE

