



Mombasa Autocare Limited v Kenya Power & Lighting Company Limited (Environment & Land Case 162 of 2015) [2023] KEELC 22376 (KLR) (14 December 2023) (Ruling)

Neutral citation: [2023] KEELC 22376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 162 OF 2015
FM NJOROGE, J
DECEMBER 14, 2023**

BETWEEN

MOMBASA AUTOCARE LIMITED APPLICANT

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. Before this court is an application by the Plaintiff/ Applicant dated 16th September, 2022 brought under Section 1A, 1B, 3A and 100 of the Civil Procedure Act, Order 8 rule 3 and Order 51 rule 1 and 4 of the Civil Procedure Rules seeking the following orders;
 1. That this Honourable Court be pleased to grant leave to the Applicant to amend its Plaintiff dated 29th June, 2015 in terms of the draft Amended Plaintiff annexed to the Affidavit in support of this application;
 2. That leave be granted to Applicant to file a supplementary Witness Statement, Supplementary List & bundle of Documents;
 3. That the Applicant do file the Amended Plaintiff, Supplementary Witness Statement and Supplementary List & Bundle of Documents within fifteen (15) days from the date of orders granting the Applicant leave to amend the Plaintiff;
 4. That the Respondent do file an Amended Defence (if any) to the Amended Plaintiff within fifteen (15) days from the date of service of the Amended Plaintiff, Supplementary Witness Statement, Supplementary List & Bundle of Documents by the Applicant;
 5. That the costs of this application be provided for.
2. The application was supported by the grounds on the face of the application as well as the supporting affidavit sworn by Salim Ali Mohamed Juma on 19th September, 2022. He asserted that the applicant



company instructed the firm of Bosire & Partners to commence the proceedings herein to protect its proprietary interests in the suit property which was done by the Plaintiff filed concurrently with an application seeking orders of injunction both dated 29th June, 2015; that the Respondent continued to encroach the suit property, proceeded to finalize erection of the electric poles and connected power supply despite issuance of interim orders of injunction by the Honourable Court.

3. He also asserted that it was the applicant's intention to subdivide and sell the suit property which was rendered unachievable as the ongoing illegal supply of electricity has not only invited trespassers but also enabled them to encroach and unlawfully put up structures on the suit property. Further, that the applicant instructed the firm of Daly Inamdar Advocates LLP to take over conduct of the case to reflect the change of status and circumstances which proposed amendments will allow the court to adjudicate on all issues in this case to finality.
4. In Response, the Respondent filed a Replying affidavit sworn by Justus Ododa on the 22/11/2022. He stated that the nature of the amendments sought amounts to introduction of a new cause of action and particularly in raising the issue of trespass, squatters being alleged to be on the suit property which could more conveniently be made the subject of a fresh action. According to him, there has been undue delay on the part of the applicant in filing the application as it has been made 7 years after the suit was filed. Further, that the nature of the amendments sought to be effected will highly be prejudicial and likely to cause injustice to the defendant.

Submissions

5. The applicant filed submissions on the 19th day of October, 2015. Counsel identified one issue for determination; whether the Plaintiff is entitled to the orders being sought in the application. He submitted that 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 as per Order 8 Rule 3 (1) of the CPR. Further under Order 8 Rule 3(5) of the CPR, an amendment may be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the 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.
6. Counsel relied on a number of cases including *Central Kenya Limited v Trust Bank Ltd & 5 others* (2000) eKLR, *Institute for Social Accountability & another v Parliament of Kenya & 3 others* (2014) eKLR, *St. Patrick's Hill School Limited v Bank of Africa Limited* (2018) eKLR and that of *Eastern Bakery v Castelino* (1958) EA 461 which this court has duly considered.
7. The Respondent on the other hand filed its submissions on the 28/2/2023. Counsel submitted that the nature of the amendment sought to be effected by the Plaintiff amounts to introducing a new and inconsistent cause of action and specifically by raising the issue of trespass and squatters being on the suit property which could be made the subject of a fresh action.
8. Counsel relied on the case of *Eastern Bakery v Castelino* (1958) EA, 461 where the Court of Appeal held 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 way of costs.
9. It was her submission that the application was filed seven (7) years which was undue delay on the Plaintiff's part which if allowed will clearly amount to an abuse of the court process. Relying on Section 100 of the *Civil Procedure Act*, counsel submitted that the Plaintiff in its amendments sought also pleads that the defendant has invited and aided squatters who have encroached the suit property by supplying them with electricity but the said squatters are not party to the suit and, according to her,



the Plaintiff ought to file a separate suit against the said squatters without using the defendant as an excuse for not suing them and seeking appropriate remedies.

Analysis And Determination

10. The issues which arise for determination in this application are whether this court can allow the amendment of the Plaint and whether the proposed amendments raise any inconsistent cause of action.
11. The general power to amend pleadings draws from 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, 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*.
12. On the other hand, 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.”
13. The applicant contends that he has now appointed a new firm of advocates to represent its interests owing to the fact that the Respondent continued to encroach the suit property, proceeded to finalize erection of the electric poles and connected power supply despite issuance of interim orders of injunction by the Honourable Court; that the new firm of advocates has now taken over conduct of the case to reflect the change of status and circumstances which proposed amendments will allow the court adjudicate on all issues in this case to finality. The Respondent on the other hand is of the view that the nature of the amendments sought amounts to introducing a new cause of action.
14. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12th 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...”
15. I have considered the sentiments of both parties and I have noted that this is a matter that was filed in 2015 but it has never kicked off for trial; further that there are injunctive orders that were issued by this Court on the 14/10/2016 which according to the applicant have not been adhered to since the respondent has now encroached onto the suit property. In my view, the intention to amend the Plaint by the applicant is not one that has been done in bad faith as there are third parties who have been said to have invaded the suit property and put up illegal structures which allegation in my view cannot be ignored.
16. Having said that I am of the view that the present application has merit and I allow the same in as prayed in terms of prayers nos 1, 2, 3, and 4 thereof. The timelines in the orders issued shall be strictly observed. The costs of the application shall be in the cause.



17. The matter shall be fixed for a mention for pretrial directions on 22/2/2024.

DATED, SIGNED AND DELIVERED AT MALINDI ON THIS 14TH DAY OF DECEMBER 2023.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

