



**Mideast Filling Station Ltd v Kingori & another (Environment & Land  
Case 316 of 2018) [2023] KEELC 22121 (KLR) (7 December 2023) (Ruling)**

Neutral citation: [2023] KEELC 22121 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 316 OF 2018  
LA OMOLLO, J  
DECEMBER 7, 2023**

**BETWEEN**

**MIDEAST FILLING STATION LTD ..... PLAINTIFF**

**AND**

**GEORGE K KINGORI ..... 1<sup>ST</sup> DEFENDANT**

**LEAH NJERI KINGORI ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This ruling is in respect to the Applicant's Notice of Motion application dated 9<sup>th</sup> February, 2023. The said application is expressed to be brought under order 8 rule 3 (1) and 5 (1) and order 51 rule 1 of the Civil Procedure Rules 2010.
2. The application seeks the following orders:
  - a. That this Honourable court be pleased to grant leave to the Plaintiff to amend the Plaint filed on 4<sup>th</sup> July, 2005.
  - b. That the costs of the application be in the cause.
3. The application is based on the grounds on its face and supported by the affidavit sworn by the Applicant, one Simon Mbuthia Gachomo. The Supporting affidavit is sworn on the 9<sup>th</sup> February, 2023.

**Factual Background.**

4. On 13<sup>th</sup> March, 2023, directions were issued that the application shall be heard by way of written submissions.
5. On 5<sup>th</sup> June, 2023 parties confirmed having filed their respective submissions and the application was reserved for ruling.



### **Applicant's Contention.**

6. Simon Mbuthia Gachomo deposes that he is a director of the Plaintiff's/Applicant's Company and that the Applicant filed this suit on 4<sup>th</sup> July, 2005 seeking inter alia restraining orders against the Defendant from interfering with its business on Plot No. LR No. 4729/56 (Nakuru Municipality) where it was operating a petrol station.
7. It is his deposition that at the time of filing this suit, the valuation on the development had not been done and the value was therefore not included in the pleadings.
8. It is his further deposition that subsequently, the parties resolved to attempt Alternative Dispute Resolution and a mediator was appointed in mediation No. 33 of 2019. It is his deposition that the mediation did not bear fruits owing to marital differences between the Defendant and his deceased wife who was also a party to this suit.
9. He deposes that unfortunately, the Respondent's wife passed on thereby causing further delay in the disposal of the suit. He also deposes that in yet another unfortunate turn of events, the late Mr. Dominic Kimata advocate (deceased) who acted for the Defendant passed on 25<sup>th</sup> October, 2020 further complicating matters in this case.
10. He contends that the circumstances of the case have since changed over the years that necessitate the amendment of the Plaintiff.
11. The Applicant deposes that consequently; he seeks to amend the Plaintiff for purposes of determining the issues raised in this suit.
12. He contends that the delay in bringing this application is sufficiently explained as the parties had attempted Alternative Dispute Resolution which did not bear fruits and there was always hope that the matters in dispute would be resolved without resorting to further court proceedings.

### **1st Respondent's Response.**

13. In response to the application, the Respondent filed grounds of opposition dated 10<sup>th</sup> March, 2023.
14. The 1<sup>st</sup> Respondent states that this court has no jurisdiction in the matter and the court is functus officio in respect to the said application.
15. He describes the application and the entire suit as bad in law, fatally defective, incompetent, unsustainable, and a gross abuse of court process.
16. He states that the application seeks to introduce a claim that is grossly time-barred by statute. He further states that the suit against the 2<sup>nd</sup> Defendant has long abated and hence cannot be amended. He states that the Plaintiff is guilty of unmitigated laches, and the application is totally unmerited.

### **Issues For Determination.**

17. The Plaintiff/Applicant filed submissions on 14<sup>th</sup> April, 2023.
18. The Plaintiff/Applicant submits that on the issue of whether this Honourable Court has jurisdiction, the 1<sup>st</sup> Defendant can raise the issue in his defence and this cannot be a basis to disallow the proposed amendments. The Plaintiff/Applicant relies on the judicial decision of *Inter Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd* [2021] eKLR.



19. It is the Plaintiff's/Applicant's submission that the 1<sup>st</sup> Respondent argues that the court is functus officio in respect of the Application. It submits that as things stand now, there is no evidence that this court had conclusively dealt with this matter as the doctrine of functus officio can arise.
20. It further submits that the court examined the doctrine of functus officio in the judicial decision of *ICEA Lion General Insurance Co. Ltd v Julius Nyaga Chomba* [2020] eKLR.
21. The Plaintiff/Applicant submits that from the judicial decisions cited for the pleas of funtus officio, one must demonstrate that the issues raised in the present case have previously been adjudicated upon conclusively and with finality.
22. The Plaintiff/Applicant submits that the plaint shows that the Plaintiff has pleaded a claim for special damages and the Plaintiff only seeks to insert the actual amount as per the valuation report which forms part of the Plaintiff's documents already filed in court. It submits that the issue of the claim being statute barred does not arise.
23. The Plaintiff/Applicant submits that the 1<sup>st</sup> Respondent has also raised the issue that the suit against the 2<sup>nd</sup> Defendant has long abated and hence cannot be amended. It submits that however, there is no evidence that the Plaintiff seeks to amend the 2<sup>nd</sup> Defendant's case or it seeks to maintain a suit that has abated and the allegation is therefore without any legal or factual basis.
24. The Plaintiff/Applicant submits that as regards the issue of laches/delay, the same is sufficiently explained in the grounds of the application and supporting affidavit. It submits that indeed, the court allowed the suit to proceed when the matter came up for dismissal for want of prosecution. It submits that the 1<sup>st</sup> Defendant's plea therefore seeks to challenge the court's decision which would amount to an attempt to seek review of the court decision without following due process.
25. The Plaintiff/Applicant submits that having found all the grounds raised by the 1<sup>st</sup> Defendant as unmerited, the Application cannot be said to be bad in law or defective or an abuse of the process of court.
26. The Plaintiff/Applicant submits that the single issue for determination is whether it is entitled to leave to amend its Plaint. It submits that the law applicable is order 8 rule 5 of the Civil Procedure Rules.
27. It submits that the exercise of the powers donated by this provision is discretionary and for the court to exercise its discretion, it has to look into the content and purpose of the amendments and whether any prejudice can be compensated by way of costs.
28. The Plaintiff/Applicant submits that the general rule is that the amendments sought before the case is heard should be freely allowed so long as the amendments do not seek to change the character of the suit.
29. It is the Plaintiff's/Applicant's submission that like in the present case, the application to introduce figures after the valuation was done was made in the judicial decision of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] eKLR.
30. Finally, the Plaintiff/Applicant submits that it is entitled to fair hearing as enshrined in Article 50 of the Constitution, 2010 and the same is a non-derogable right that should be accorded to every litigant. It submits that the 1<sup>st</sup> Defendant has right to file an amended defence if need be hence no prejudice will be suffered.
31. The Plaintiff/Applicant ends its submission by pleading with the court to allow the application and asking the costs of the application be ordered in the cause.



32. The 1<sup>st</sup> Defendant/Respondent did not file submissions.

### **Analysis And Determination**

33. I have considered the application, the affidavit in support of the application and the 1<sup>st</sup> Defendant's grounds of opposition and submissions filed by the Plaintiff/Applicant.

34. In my view, the questions that arise for determination are:

- a. Whether this Honourable court should grant leave to the Plaintiff to amend the Plaint filed on 4<sup>th</sup> July, 2005?
- b. Who shall bear costs of this application?

### **A. Whether this Honourable court should grant leave to the Plaintiff to amend the Plaint filed on 4<sup>th</sup> July, 2005?**

35. The 1<sup>st</sup> Defendant has stated that Court has no jurisdiction in the matter. Order 8 rule 3 (1) of the [Civil Procedure Rules](#) provides for amendment of pleadings with leave of court 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 be 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.”

36. Further, Order 8, rule 5 gives the court the general power to amend.

“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.”

37. The Court thus finds that a jurisdictional challenge in respect of the present application raised in the 1<sup>st</sup> Defendant's grounds of opposition as unmerited.

38. Further in the judicial decision of [Inter Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd](#) [2021] eKLR, the court at paragraph 34 expressed itself as follows:

“The Respondent has raised the issue of jurisdiction of the Court to entertain the matter in terms of the proposed Further Amended Plaint. In briefly addressing the same, I concur with the position of the court in the case of *City Clock Limited v County Clock Kenya Limited & another* [2020] eKLR where the court held:

I further find that the questions regarding the jurisdiction of this court to entertain the suit, with the proposed amendments, is an issue that the Defendants can raise in their defence for the court's determination at the appropriate time.”



39. The 1<sup>st</sup> Defendant has further stated in his grounds of opposition that this court is functus officio in respect of the said application. The Black's Law Dictionary, Tenth Edition defines the term "functus officio" as:
- “Having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”
40. The doctrine of functus officio was considered by the Court of Appeal in the judicial decision of *Telkom Kenya limited v John Ochanda (suing on his own behalf and on behalf of 996 former employees of Telkom Kenya limited)* [2014] eKLR, where the court held that –
- “Functus officio is an enduring principle of law that prevents the re-opening of a matter before a court that rendered the final decision thereon.
- The general rule that final decision of a court cannot be re-opened derives from the decision of the English Court of Appeal in re-St Nazaire Co, (1879), 12 Ch. D 88. The basis for it was that the power to rehear was transferred by the Judicature Acts of the Appellate division. The rule applied only after the formal judgment had been drawn up, issued and entered, and was subject to two exceptions. ---”
41. The 1<sup>st</sup> Defendant has not adduced any evidence to demonstrate that the Court conclusively rendered judgment in this matter and therefore the doctrine of functus officio has no relevance in this matter.
42. The Plaintiff/Applicant submits that it has pleaded a claim for special damages in its plaint and it only seeks to insert the actual amount as per the valuation report which forms part of the Plaintiff's documents already filed in court.
43. In the judicial decision of *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court expresses itself as follows in paragraph 18 and 19: -
- “The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. (Emphasis is mine). The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.” (Emphasis is mine).
44. This Court has perused the draft amended Plaint annexed to affidavit in support of the application and finds that the amendments sought are intended to revise the amount claimed as special damages; in terms of a recent valuation report.
45. The Applicant acknowledges that there has been delay and I find that the explanation offered for the delay is justified.



46. In conclusion, I find that justice shall be better served if the Plaintiff is allowed to amend its plaint. I also find that no prejudice shall be occasioned to the Defendants.

**Disposition.**

47. The upshot of the foregoing is that the Plaintiff's application dated 9<sup>th</sup> February, 2023 merited. Consequently, the same is allowed in the following terms:

- a. Leave is hereby granted to the Plaintiff to amend Plaintiff filed on 4<sup>th</sup> July, 2005 in terms of the annexed draft amended plaint.
- b. The draft amended plaint shall be filed and served upon the Defendants within 14 days of the date hereof.
- c. The Defendants shall file their amended statements of defence within 14 upon service.
- d. The costs of this application shall abide the outcome of the suit.

48. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 7TH DAY OF DECEMBER, 2023**

**L. A. OMOLLO**

**JUDGE**

**In the presence of:**

**Mr. Mbutia for the Plaintiff/Applicant.**

**Mr. Deenambo for the 1st Defendant/ Respondent.**

**No appearance for the 2nd Defendant/ Respondent**

**Court Assistant: Ms. Monica Wanjohi**

