



Gikunda v Bogani Gardens Management Company Limited (Environment & Land Case E034 of 2022) [2025] KEELC 3462 (KLR) (29 April 2025) (Ruling)

Neutral citation: [2025] KEELC 3462 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E034 OF 2022**

**JA MOGENI, J
APRIL 29, 2025**

BETWEEN

MARTIN KOOME GIKUNDA PLAINTIFF

AND

BOGANI GARDENS MANAGEMENT COMPANY LIMITED DEFENDANT

RULING

1. Before me is a Notice of Motion dated 30/01/2024 brought pursuant to Section 1A, 1B and 3A of the Civil Procedure Act Cap 21 Laws of Kenya, Order 1 Rule 3 and 10 (2), and Order 8 Rule 3 of the Civil Procedure Rules, 2010. The Applicant seeks leave to amend their Defence and include a Counterclaim and join the parties mentioned in the draft attached.
2. The Application is based on the grounds on the face of it and on the Supporting Affidavit of the Applicant. He avers that he is challenging the root of title held by the Plaintiff since the allocation and transfer of the suit property to the Plaintiff was wrongful and amounted to unjust enrichment. He further avers that the Plaintiff acquired the suit property with the aid of the parties that he proposes to introduce in the Counterclaim and that without introducing both the Counterclaim and the Defendants then the matter cannot be determined on merit.
3. The Applicant has annexed the proposed Amended Defence and Counter claim seeking joinder of additional parties in the suit in the terms of the draft Amended Defence and Counterclaim which is marked "VK-1".
4. The Application is opposed by the Plaintiff vide a Replying Affidavit sworn on 02/04/2024. They contend that the amendments are not genuine and are intended to delay the expeditious hearing and disposal of this suit.
5. It is the contention of the Plaintiff/Respondent that the Application has been filed in bad faith and with the sole purpose of muddling up the issues for determination by this Honourable Court. The



proposed amendments are solely aimed at hijacking the Respondent's suit and/or delaying the hearing and disposal of this suit. He avers that despite the suit being filed in 2022, the Applicant has had access to the alleged information since 2012. It is therefore inexcusable that while the matter was on the brink of certification for hearing the Applicant came up with the instant Application.

6. The Applicant in response to the Plaintiff's Replying Affidavit filed a Supplementary Affidavit sworn on 23/04/2024 where he denied allegations of bad faith as stated in the Replying Affidavit of the Plaintiff/Respondent. He stated that the Plaintiff had not stated any prejudice that he stands go suffer if the Application is allowed. Further that if the Court allowed all the proper parties to be joined, then this will assist the Court reach a just decision.
7. The parties agreed to canvass the Application by way of written submissions.

The Defendant's/Applicant's Submissions

8. In the Defendant's/Applicant's submission dated 20/08//2024, the Applicant submitted and relied on the cases of Easter Bakery vs Castelino [2018]EA and Gaso Transport Bus Ltd vs Obene (1990-1994) EA. From which cases the Applicant stated that the Courts have made decisions that amendment should freely be allowed if made before hearing.
9. Further he submitted that Order 8 Rule 3 allows amendment at any stage of the proceedings before Judgment. It was his contention that the proposed amendment disclose a cause of action against the Plaintiff by raising many triable issues and has listed the Plaintiff as the 1st Defendant.
10. He submitted that history of acquisition, subdivision and vesting of properties show the need to have the case against the proposed Defendants together with the current suit. The Applicant seeks to recover Title No 2259/787/16 which he alleges to have been unlawfully issued to the Plaintiff with the help of the proposed Defendants to the Counter-claim. It is the averment of the Applicant that the amendments have not raised a new cause of action.

The Plaintiff's/Respondent's Submissions

11. The Plaintiff in his submissions stated that the Application seeks to raise new issues unrelated to the suit and therefore the Application is unmerited. The Plaintiff/Respondent submits that Order 8 Rule 5 (1) only supports amendments that are not prejudicial or unjust to the opposing party. That the amendments should not cause inordinate delay or be made in bad faith or introduce an altogether new cause of action.
12. The Plaintiff thus identified two issues for determination being:-
 - a. Whether the Applicant has established a case to warrant the amendments sought; and
 - b. Whether this Honourable Court should exercise its discretion in favour of the Applicant.
13. The Plaintiff relied on the following cases, Court of Appeal case of Rubina Ahmed & 3 Others vs. Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR; St. Patrick's Hill School Limited vs. Bank of Africa Kenya Limited [supra]; Kenya Wine Agencies vs. Yobesh Amoro (Cause 180 of 2015) [2018] KEELRC 970 (KLR) (Employment and Labour) (12 October 2018) (Ruling), Court of Appeal case of James Ochieng' Oduol T/A Ochieng Oduol & Co. Advocates vs. Richard Kuloba [2008] eKLR, George Gikubu Mbuthia vs. Consolidated Bank of Kenya Limited & Another (Civil Suit 937 of 1986) [2009] KEHC 3711 (KLR) (30 April 2009) (Ruling), Kuloba vs. Oduol [2001] eKLR, Harrison C. Kariuki vs. Blue Shield Insurance Co. Ltd. [2006] eKLR, and Kasam vs. Bank of Baroda [2002] eKLR.



14. It was ultimately the position of the Plaintiff that the Applicant is not deserving of the prayers sought in the Application. That it was an afterthought which is calculated to delay the hearing of the suit. He averred that the Applicant has been guilty of laches. He prays that the Application be dismissed with costs.

Determination

15. I have considered the Notice of Motion and the Affidavit in support. I have considered the Replying Affidavit filed by the Plaintiff, the written submissions by both Counsel and the authorities cited. For the Court, the single issue for determination is whether the Application is merited.
16. Order 8 rule 3(1) of the Civil Procedure rules provides that:
- “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.”
17. Order 8 Rule 3(5) of the Civil procedure Rules provides that:-
- “An amendment may be allowed under sub rule (2) 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 on the suit by the party applying for leave to make the amendments”
18. In the case of *Wamuiga vs Central Bank of Kenya* [2002] 1EA 314, the Court held that:-
- “Amendment to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party however negligent and careless may have been in the first omission and however late the proposed amendment. If no injustice is occasioned the amendments should be allowed”
19. I am guided by the above authority in finding that no prejudice will be occasioned to the Plaintiff/ Respondent herein if the amendment is allowed. I have considered the submissions by the Plaintiff/ Respondent and noted that there is no specific prejudice highlighted that shows the harm the Plaintiff/ Respondent will suffer. I am therefore not persuaded that I should not exercise my discretion. In any case, the Plaintiff/Respondent shall be granted the right to amend their pleadings in response.
20. I am further guided by Order 8 rule 5(1) of the Civil Procedure Rules which provides that:-
- “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.”
21. I do find that the Applicant has met the evidentiary threshold for the grant of order to amend the Defence and include the Counter-claim. I further find that the amendments will enable the Court to decide effectively on the issues in dispute.
22. All in all I find merit in this Application and grant the orders sought namely:-



- a. That the Defendant/Applicant be and is hereby granted leave to amend the Defence to include the Counterclaim as per the draft Amended Defence and Counterclaim attached and the same to be deemed as duly filed upon the payment of the requisite fees.
- b. That, upon service the Plaintiff/Respondent do file a reply to Amended Defence and Counterclaim within (21) twenty one days.
- c. Mention to confirm compliance and issue directions for disposal of suit on 21/05/2025.
- d. That costs of this Application be borne by the Defendant/Applicant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT THIKA THROUGH MICROSOFT TEAMS ON THIS 29TH DAY OF APRIL, 2025.

.....

MOGENI J

JUDGE

Judgement read in virtual Court in the presence of:

Mr. Okego holding brief for Mr. Nyabiri for the Plaintiff/Respondent

Mr. Ojiambo for the Defendant/Applicant

Melita - Court Assistant.

.....

MOGENI J

JUDGE

