



REPUBLIC OF KENYA

IN THE ENVIRONMENT & LAND COURT

AT MOMBASA

ELC NO. 125 OF 2018

BASIL CRITICOS.....PLAINTIFF/APPLICANT

- VERSUS -

AIC MAKUTANO & 39 OTHERS.....DEFENDANTS/RESPONDENTS

RULING

I. PRELIMINARIES

1. Before the Honorable Court for determination is the Notice of Motion application dated 25th September, 2020 by the Plaintiff/Applicant filed in court on 17th August, 2021. The said application which is of an omnibus form is brought under several the Provisions of law being Orders 1 Rule 8, Order 8 Rule 3 (1 & 5) Order 40 Rule 1 and Order 51 Rule 1 of the Civil Procedure Rules of 2010.

II. THE PLAINTIFF/APPLICANT'S CASE.

2. The Plaintiff/Applicant seeks for the following orders.

(a) Spend

(b) That the Plaintiffs/Applicant be granted leave to amend its Plaintiff as per the annexed Plaintiff and be allowed Plaintiff and be allowed to enjoin one MARION ATIENO MOON as a Defendant in this suit.

(c) That pending the hearing and determination of this Application temporary order of injunction do issue restraining the said MARION ATIENO MOON whether by herself, her representative servant, agent and/or assigns from developing, alienating selling, trespassing and/or in any other manner whatsoever interfering with or otherwise dealing with part or whole property known as Land reference No. 10287/4.

(d) That costs of this application be in the cause.

3. The application by the Plaintiff/Applicant is premised on the grounds, facts, testimony and averments of the 10 Paragraphed Supporting Affidavit of OSCAR AVEDI sworn and dated 25th September, 2021 and one annexure marked as "BC-1". He deposed that he is an Advocate of the High Court of Kenya practicing as such in the Law firm of Messrs. Avedi and Co. Advocates who have had the conduct of this matter from its inception on behalf of the Plaintiff/Applicant and hence competent to make this Affidavit. He held that the Plaintiff/Applicant was the registered owner of all that parcel of land known as Land Reference Number 10287/4 the subject of the suit herein and annexed a copy of the certificate of Title Deed marked as "BC-1" (hereinafter referred to as "The Suit Land").

4. He deposed that from the information given by the Plaintiff that the Plaintiff had neither personally nor through his agent and/or representative alienated, sold or transferred any portion of his property to one Marion Atieno Moon. Further, the Plaintiff/Applicant recently discovered that the said Marion Atieno Moon had allegedly purchased several parcels of land within the Plaintiff/Applicant's property and was currently constructing permanent structures on the said property the subject matter of this suit. He averred that her actions amounted to encroachment and/or trespass and ought to be estopped pending the hearing and determination of this suit.

5. The deponent asserted that unless she was allowed as a Defendant in this suit and also restrained either by herself here representatives, servants, agents and/or assigns from developing, alienating, trespassing selling interfering with or otherwise dealing with any part or whole property the object of this suit shall be defeated and rendered nugatory. Finally he deposed that it would be in the interest of justice that should she be enjoined as a co - Defendant to enable this court effectively and substantially adjudicate upon and settle all the questions regarding the subject suit and parties involved in the suit property and hence have the Plaintiff amended accordingly as the other Defendants

would not suffer any prejudice if the orders sought here are allowed whatsoever. He prayed the application to be allowed with costs.

III. THE PROPOSED DEFENDANT'S CASE.

6. On 7th October, 2021 while opposing the Notice of Motion application dated 25th September, 2020 by the Plaintiff/Applicant, the proposed Defendant – filed a 21 Paragraphed Replying Affidavit of MARION ATIENO MOON sworn and dated 7th October, 2021 with two (2) annexures marked as “MAM – 1 and 2” she deposed to be a female adult of sound mind and understanding, conversant with the facts of the matter thus competent to swear this affidavit on her on behalf.

7. She indicated having been served read and fully understood the content of the Notice of Motion application dated 25th September, 2020 by the Plaintiff/Applicant together with the Support Affidavit. From the very onset, she categorically denied having ever purchased from and/or received any legal interest in any property, including the suit land, from the Plaintiff/Applicant nor any dealings with him with respect to the suit property or at all. She noted that the said Notice of Motion application was dated 25th September, 2020 yet the same was only served upon her via email from the offices of the Plaintiff/Applicant's Advocate on 22nd September, 2021 and held that the one year delay in serving her was mala fides on the part of the Plaintiff/Applicant.

8. She averred that although the Plaintiff/Applicant sought to join her as a co-Defendant in the suit and claimed to have attached a Draft Amended Plaintiff to this effect, there was no such attachment to have enabled her comprehend and understand the Plaintiff/Applicant's cause of action against her and/or the nature of the Plaintiff/Applicant's claim. Based on her Advocate's advise, she held that the failure to adduce a draft amended Plaintiff clearly showed that the Plaintiff/Applicant had no reasonable cause of action or any at all against her personally.

9. She stated that and based on advise from her Advocates the Plaintiff/Applicant had failed to produce even a single document such as sale agreements or even an official search from the Land Registry or any on the alleged construction she was undertaking as evidence making the allegations baseless and whimsical and tantamount to hearsay.

10. She held that although the Plaintiff/Applicant sought to join her in the suit but failed to demonstrate in any manner howsoever that her presence in the instant case was necessary in order to enable the Honorable Court effectively, efficiently and completely adjudicate upon and settle all questions involved in the suit. She also felt there would be need to avoid multiplicity of suits. The Plaintiff/Applicant had also failed to show a right on his part that had been infringed by her nor any irreparable harm caused as a result of her actions or omission which harm could not be compensated by way of damages. She held that the balance of convenience tilted in her favour of this court denying the orders sought from the filed Notice of Motion application. In other words she held that the Plaintiff/Applicant failed to meet the threshold established for grant of temporary injunction orders as set out in the decision of “*Giella –Versus- Cassman Brown (1973) E.A. Page 358*”. The Plaintiff/Applicant had failed to disclose all the material facts and the prolonged delay of one year in serving the Notice of Motion application whereby under these two instances she cited the legal maxims of “*he who comes to equity comes with clean hands and equity aids the vigilant and not the indolent*”.

She urged the court to dismiss the Notice of Motion application with costs

III. THE SUBMISSIONS

11. On 30th September, 2021 while in the presence of all the parties in this matter, the Honorable Court directed that the Notice of Motion application dated 25th September, 2020 by the Plaintiff/Applicant be disposed off by way of written submissions. Pursuant to that, all the parties obliged and court reserved a date to deliver its ruling on 16th February, 2022.

A. The Plaintiff/Applicant's Written Submissions

12. On 5th November, 2021 the Learned Counsel for the Plaintiff/Applicant the Law Firm of Messrs. Avedi and Company Advocates filed their written submission dated 18th October, 2021. The Learned Counsels submitted that the application had merit by dint of the Provisions of Sections 1A, 1B, 3A and 100 of the Civil Procedure Act Cap 21, Order 8 Rule 3(1) and (2) and Rule 5 (1) of the Civil Procedure Rules, 2010 and Articles 50 (1) and (2) and 159 (2) (a) of the Constitution of Kenya. They also cited the overriding objectives and the inherent powers of this court to facilitate just, expeditious and proportionate resolution of disputes allowing parties to amend their pleadings at any stage of the proceedings before delivery of judgment on such terms as to costs or otherwise as may be just for purposes of determining the real issues in dispute between parties so long as such amendments are not intended to introduce new issues or inconsistent cause of action. To buttress their point, they relied on the case of “*Ochieng and Other –Versus- First National bank of Chicago Civil Appeal No. 147 of 1991 and St. Patrick's Hill School Limited Bank of Africa Limited (2018) eKLR*”

13. The Counsels emphasized that the power to amend pleadings is discretionary court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice.

They Submitted that the leave to amend the Plaintiff to enjoin the Proposed Defendant was vital as the property was within which she had developed formed part of the suit property thus it was of cardinal importance that all such amendments ought to be made as may be necessary for the purposes of determining the real question in controversy between the parties. They held that the Plaintiff suit and the relief sought against 139 other Defendants expressly pleaded in the Plaintiff would directly and adversely affect the proposed Defendant. They averred the instant suit was still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious. They stressed that the application derived from the unauthorized actions by the proposed Defendant within the Plaintiff/Applicant's property the subject matter of this suit. The amendment sought herein did not seek to introduce a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3(5) of the Civil Procedure Rules and once allowed as the 40th Defendant, they would have the opportunity to respond to the amendment if they so wished to do.

B. The Proposed Defendant's written submissions.

14. On 2nd November, 2021 the Law Firm of Messrs. Mwaura Ng'arua and Company Advocates for the Proposed Defendant filed their written submissions dated 1st November, 2021, they submitted that the Plaintiff brought the suit under Order 1 Rule 8 of the Civil Procedure Rules, 2010 which rules provides for where one person sues or defends on behalf of all in the same interest which was not applicable in the instant case. According to them the pertinent rule for joinder of party should have been Order 1 Rule 10 (2) of the Civil Procedure Rules of 2010.

The learned Counsels held that there were only two tests in an application for joinder of parties – firstly, whether an Applicant could demonstrate that a party to be enjoined has and identifiable interest in the subject matter in the litigations and Secondly, it must be shown that the Applicant is a necessary party whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the substance of the dispute.

15. They averred that the test was not whether the joinder of persons proposed to be enjoined as a Defendant in the matter would be in accordance with or against the wishes of the Plaintiff or whether the joinder would involve an investigation into a question not arising from the cause of action averred by the Plaintiff.

The Learned Counsels contention was that not everyone could be enjoined into a suit as a Plaintiff or Defendant unless that the Plaintiff claimed some relief even if only a determination against him.

Their argument was that there existed no nexus shown between either the Plaintiff/Applicant and the Proposed Defendant or even the other Defendants in this suit. Indeed, the proposed Defendant in her replying Affidavit had denied having ever had any dealings with any of the persons named and appearing in the suit with respect to the suit property or at all.

16. On the whether the Plaintiff/Applicant's prayer for the relief of being granted temporary injunction, they submitted that it was trite law that for an Applicant to be granted interim injunction orders, the applicant must demonstrate the three (3) principles espoused in the well celebrated case of "*Giella – Versus- Cassman Brown (1973) E.A. 358*" – the Plaintiff has failed to produce any proof such as sale agreement, official search in respect to the suit property not photographs of the illegal construction of structures taking place adduced before the Honorable Court as all these averments were all speculative and vague allegations which were tantamount to hearsay. They held that he who alleges must proof under Sections 107 of the Evidence Act, Cap 80 therefore failed to proof they have a pima facie case established against the Proposed Defendant and the court fully concurs with them on this aspect.

17. On the second limb that the Plaintiff/Applicant was likely to suffer any irreparable damage likely to occur due to the invasion the fact that there is no prima facie case they cannot claim to suffer any irreparable damage at all and hence even the balance of convenience tilts in favour of the Proposed Defendants which argument this court fully agree with the Learned Counsel for the Proposed Defendant as they have failed to prove there is any right on their part which has apparently been infringed by the Proposed Defendant and which is incapable of being compensated by way of damages. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. To buttress their point they relied on the cases of "*MRAO Limited –Versus- First American Bank Limited and 2 Others (2003) KLR 125, Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape 1986 KLR 705, Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others 2014 eKLR, Gerphas Alphonse Odhiambo –Versus- Felix Adiego (2006) eKLR & Pius Kichirchir Kogi –Versus Frank Kimeli Tenai (2018) eKLR* and for these reason they concluded the application was bad in law incurably defective, mischievous speculative, frivolous, vexatious and an abuse of the process. They humbly urged court to dismiss the Plaintiff Notice of Motion application dated 25th September, 2020 with costs.

III. ANALYSIS AND DETERMINATION

18. I have keenly considered all the pleadings, articulate written submissions by the parties herein the cited authorities and the relevant provisions of law with reference to the rather omnibus Notice of Motion application dated 25th September, 2020 by the proposed Defendant.

In order to arrive at an informed, just and fair decision the Honorable Court has framed the following salient issues. These are: -

a. Whether the Plaintiff/Applicant vide the Notice of Motion dated 25th September, 2020 has met the well-established threshold and ingredients to be granted the orders of temporary injunction as set out under Order 40 Rules 1 and 2 of the Civil Procedure Code.

b. Whether the Plaintiff/Applicants through the Notice of Motion application dated 25th September, 2020 should be allowed to join the Proposed Defendant in this suit pursuant to the Provisions of the Law under Civil Procedure Rules, 2010?

c. Whether the Plaintiff/Applicant should be granted orders to cause the amendment to the Plaint joining the Proposed Defendant in the suit?

d. Who should bear the costs of the Notice of Motion application dated 25th September, 2020.

ISSUE NO. 1 Whether the Plaintiff/Applicant vide the Notice of Motion dated 25th September, 2020 has met the well-established threshold and ingredients to be granted the orders of temporary injunction as set out under Order 40 Rules 1 and 2 of the Civil Procedure Rules, 2010.

Brief Facts

19. Before embarking on the analysis of the above framed issues pertaining to this case, it is significant, first and foremost, that this court embarks on providing brief facts to the case. The Plaintiff commenced the instant suit by way of a Plaint dated 20th May, 2018 contemporaneously with the Notice of Motion application dated 20th May, 2018 filed under Certificate of urgency all filed the same date. He seeks declaratory orders against the Defendants for the alleged encroachment of the suit property permanent injunction orders restraining the Defendants from entering the suit land, mandatory and permanent injunction directed at the 39 Defendants on the suit property which is the subject matter of the case. He claimed that the Proposed Defendant was in the currently in the process of developing the said parcel of land whose impact would negate the prayers sought in the Plaint.

In reply to this the Proposed Defendant through a Replying Affidavit has averred that she has denied that at any material times having ever purchased from and/or received any legal interest in any property from the Plaintiff. Further, she avers that she has not had any dealings with the Plaintiff or any of the Defendants in the matter to remove all encroachments and further constructions on the suit property and massive projects.

20. The Plaintiff/Applicant claims to be the legal and registered proprietor to all that parcel of land known as Land Reference Number 1028/4 located in East of Taveta Township through a Certificate of Title No. Land Reference 189730 on which the Defendants have allegedly encroached thereon. It is the Plaintiff's contention in the instant application that the Proposed Defendant has allegedly purchased several parcels within the suit or at all with respect to the suit property. She only came to learn of the instant suit on 22nd September, 2021 having been served with the pleadings by the Advocates for the Plaintiff/Applicant vide email, they submitted so elaborately and urged court to dismiss the Notice of Motion application.

21. Now turning to the issues under this sub-heading. I must determine whether the Plaintiff/Applicant is entitled to a temporary injunction orders prayed for. In deciding whether to grant the orders or not it is trite law that I should be guided on well-established principles enunciated in the *locus classicus* in the now famous precedent of **GIELLA –VERSUS- CASSMAN BROWN (1973) E.A. Page. 358** whose holding is as follows:-

“The condition for the grant of an interlocutory injunction are now, I think well settled in East Africa.

First, an applicant must show a prima facie case with a probability of success.

Secondly an interlocutory injunction will be normally granted unless the applicant might otherwise suffer irreparable injury which would not adequately be compensated by an award of damages.

Thirdly, if the court is in doubt, it will decide an application on the balance of convenience”.

22. But before proceedings further, the fundamental issue to ponder is whether the Plaintiff/Applicant has made a **“Prima facie”** case in his case with a probability of success. In the case of **MRAO –VERSUS - FIRST AMERICAN BANK OF KENYA LTD. & 2 OTHERS (2003)eKLR 125** cases which have also been extensively referred to by the Learned Counsel for the Proposed Defendant, “a Prima facie” case was well described as follows:-

“A prima facie case in a civil application includes but not confined to “a genuine and arguable case”, it is a case which, on material presented to the court a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the latter”

23. I have noticed that the Plaintiff/Applicant though pleaded in its application and sought for temporary injunction orders against the Proposed Defendant, which is rather peculiar, he never submitted on it at all in his written submission. Did he decide to abandon the prayer or not. It is not clear. The Court found that rather strange. Nonetheless, the provisions of Order 2 Rules 6 of the Civil Procedure Rules, 2010 holds that parties are bound by their own pleadings and ca not make a departure thereafter from it. Therefore, this Court will still proceed to squarely deal with the issue at hand and placed before it. From their pleadings, the Plaintiff/Applicant avers that he never personally or through his agent and/or representative alienated, sold or transferred any portion of his property to one Marion Atieno Moon – the Proposed Defendant. But be that as it may, he had recently discovered she had allegedly purchased several parcels of land within the Plaintiff/Applicant's property and was currently constructing permanent structures on the said property the subject matter of this suit. He averred that her actions amounted to encroachment and/or trespass and ought to be estopped pending the hearing and determination of this suit. He asserted that unless the temporary injunction orders were granted and she be restrained either by herself here representatives, servants, agents and/or assigns from developing, alienating, trespassing selling interfering with or otherwise dealing with any part or whole property the object of this suit would be defeated and rendered nugatory.

24. The Court fully agrees with the Learned Counsel for the Proposed Defendant and the provisions of Section 107 and 120 of the Evidence Act, Cap. 80 on the legal ratio that he who alleges must prove. In other words, although the Plaintiff/Applicant makes these strong allegations but there was no empirical documentary evident such as official searches, copies of title deeds, Sale agreements, Mutation Forms, photographs and so on produced to proof such serious allegations. Thus, the Honorable Court concludes that the Plaintiff/Applicant has failed to establish any **“Prima facie”** case to be considered for the temporary injunction sought. On arriving at this decision, has also relied on the decisions of **Kenya Horticultural Exporters Pg. 1977 Limited –Versus - Pape 1986 KLR 705, Nguruman Limited –Versus- Jan Bonde Neilson & 2 Others 2014 eKLR.**

25. It is trite law that taking that the grounds for granting temporary injunction as set out in the **GIELLA –VERSUS - CASSMAN BROWN case (Supra)** are in sequential pattern and now that the Plaintiff/Applicant has failed to prove the first grounds, this Honorable Court need not spend more time venturing into the other well - known two (2) grounds. But for the benefit of doubt, this Honorable Court holds that the Plaintiff/Applicant is unlikely to suffer any irreparable damage to occur due to the ostensible invasion the fact that there is no prima facie case he cannot claim to suffer any irreparable damage at all and hence even the balance of convenience tilts in favour of the Proposed Defendants which argument this court fully agree with the Learned Counsel for the Proposed Defendant as they have failed to prove there is

any right on their part which has apparently been infringed by the Proposed Defendant and which is incapable of being compensated by way of damages. In order to show irreparable harm, the applicant must demonstrate that it is a harm that cannot be quantified in monetary terms or which cannot be cured. This position was upheld in the Court of Appeal Case of **“Kenya commercial Finance Co. Limited –Versus - Afraha Education Society (2001) 1 E.A. 86 as follows:-**

“The sequence of steps to be followed in the enquiry into whether to grant an interlocutory injunction isSequential so that the second condition can only be addressed if the first one is satisfied. The same position was upheld in Court of Appeal (Mombasa) No. 8 of 2015 –Hassan Huri –Vs- Abdulrazak Huri Ibrahim”,

For these reason the Honorable Court concludes that the application has no merit and therefore fails under this sub - heading.

ISSUE b). Whether the Plaintiff/Applicants through the Notice of Motion application dated 25th September, 2020 should be allowed to join the Proposed Defendant in this suit pursuant to the Provisions of the Law under Civil Procedure Rules, 2010.

25. The concept and substratum of joinder of parties is solely governed by the provisions of Order 1 Rules 1 to 25 of Civil Procedure Rules, 2010 and which I must admit the parties herein , particularly the Learned Counsel for the Proposed Defendant, have elaborately dealt with great admiration. .

The Black Law Dictionary 9th Edition defines **“Interested Party” as a party who has a recognizable stake and therefore a standing in a matter”**

Similarly, under Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedom) Practice and procedures Rules 2013 (The Mutunga Rules) provides it thus:-

“.....as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not directly involved in the litigationOne who will be affected by the decision of the court when it is made either way. Such a person feels that his or her interest will not be well articulated unless himself or she herself appears in the proceedings and champions his or her cause”

Also refer to the case of HCCC. Civil Suit No. 115 of 2019 - John Harun Mwau – Versus - Simeone Haysom & 2 Others, AG (2021) eKLR.

26. It is trite law that on the decision for joinder, court has discretionally power to do so. Which means it should be applied capriciously and judicially without any biases or abuse of the power. What to be considered for joinder are the following facts. Firstly, it is based on the principles of natural Justice – not to be condemned unheard and accorded an opportunity to be heard (**Principle of audi alteram partem**).

Secondly, joinder should be permitted of all parties in whom any right to relief in respect of or arising out of the same act or transactions alleged to exist – whether jointly or severally or in the alternative or in the alternative where of such persons brought separate suits any common question of law of fact would arise – Order 7 Rule 9 of Civil Procedure Rules, 2010.

Suffice to say, a court even on its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore joinder of parties is permitted by law and it can be done at any stage of the proceedings.

27. But, joinder of parties may be refused where such joinder would lead into practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary or will just occasion unnecessary costs on the parties in the suits – or just being a nuisance on rocking the boat from the bottom. In other words, joinder of parties would be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from the existing cause of action or the relief. The determining factor in joinder of parties would be a common question of fact or law would arise between the existing and the intended parties. (**See Lucy Nangari Ngigi & 128 Others –Versus- National Bank of Kenya Limited & Another (2015) eKLR**

28. The above illustrated legal litimus test on joinder is what I shall apply to the instant case. In consideration and application of all the facts stated here, this Court strongly holds that although the Plaintiff/Applicant has not made a strong demonstration that the Proposed Defendant to be joined in the instant case, in that its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. its own motion (*suo moto*) add a party to the suit of such a party is necessary for the determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

29. While arriving at this rather difficult decision, the Court is persuaded by the fact that the Plaintiff/Applicant has emphatically continued though, and concurs with the Learned Counsel for the Proposed Defendant, without any empirical documentary evidence such as a sale agreement, Transfer Forms, official search or Mutation Form referring to her in his pleadings to wit *“that she has bought several parcels of land and was in the process of construction on it.....”* the Honorable Court, **“Suo Moto”** and by invoking the inherent powers (the Overriding principles/Oxygen rule) of this Court vested on it under the provisions of Sections 3 (1) and 13 (1) of the Environment and Land Act, No. 9 of 2011; Section 150 of the Land Act, No. 6 of 2012 and Section 101 of the Land Registration Act, No. 3 of 2012 and Article 159 (1) and (2) of the Constitution of Kenya feels it imperative to have her joined as an Defendant. By so doing, she it will be necessary for these issues of evidence and facts pertaining to the suit will be critically tackled during a full trial and determination of the real matter in dispute (add value) or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. In any case, this is still a fresh matter and therefore taking that an application for joinder may be considered at any stage of the

proceedings, it may not cause any delay and costs to the litigants should this application be considered. For these reasons, the limb on joinder of the Proposed Defendant to the suit succeeds pursuant to the inherent powers vested to this court.

ISSUE c). Whether the Plaintiff/Applicant should be granted orders to cause the amendment to the Plaint joining the Proposed Defendant in the suit

30. The legal principles on amendment of pleadings are provided for under Order 8 Rules 1,2 and 3 of the Civil Procedure Rules, 2010. Before the close of pleadings, the leave of Court is not required as opposed to when there has been closure of pleadings. The principles upon which a Court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases. These includes the case of *“Eastern Bakery – Versus – Castelino (1958) E.A 461 (U) at Page 462 and Civil case No. 7 of 2017, St. Patrick’s Hills School Limited - Versus - Bank of Africa Kenya Limited” eKLR (2018)* where courts held, *inter alia*:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs....”

31. The same was later on buttressed by *Bramwell, LJ in “Tildesley – Versus – Harper” (1878), 10 Ch. D. at Page 296 stated as under:*

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”

It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final Judgement is delivered. Pursuant to the above position, this Court agrees with the Plaintiff/Applicant and it concurrently follows, the power to amend pleadings is discretionary. In that case the court must act judicially in the exercise of its discretion within the ambit of the Principles of natural justice. The Court has already decided and granted leave to join the Proposed Defendant in the suit hence an amendment of the Plaint is inevitably vital and of cardinal importance for the purposes of determining the real question in controversy between the parties.

32. In any case as stated by the Plaintiff/Applicant, the instant Plaintiff’s suit and the relief sought against 139 other Defendants expressly pleaded in the Plaint would directly and adversely affect the proposed Defendant. The Court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3(5) of the Civil Procedure Rules, 2010. Besides, the Court will allow the 40th Defendants corresponding leave and the opportunity to respond to the amendment if they so wished to do. Thus, under this sub – heading the application for the Plaintiff/Applicant succeeds.

IV. DETERMINATION

33. Ultimately in view of the foregoing detailed and expansive analysis to the rather omnibus application, this court arrives at the following decision and makes below order:-

a. THAT the Notice of Motion application dated 25th September, 2020 has no merit as to the extent as granting of temporary injunction orders against the proposed Defendant by herself, servants, employees, agents and/or assigns and hence on that prayers it stands dismissed with costs.

b. THAT the Plaintiff/Applicant is granted the following orders:-

i. Leave to join the Proposed Defendant into the suit within the next 14 days.

ii. Leave to amend the Plaint strictly to have the Proposed Defendant – Marion Atieno Moon as an additional and now the 40th Defendant in this suit by filing and serving the Amended Plaint within the next 14 days from the date of this ruling without fail.

iii. The Plaintiff/Applicant to serve the Proposed Defendant, now as the 40th Defendant herein with all the pleadings to this case within the next 3 days from the date of filing the Amended Plaint to enable her fully comply with the Provisions of Orders 6, 7 and 11 of the Civil Procedure Rules within 14 days thereafter.

iv. The Proposed Defendant, now as the 40th Defendant to fully comply with the Provisions of Order 6, 7, and 11 of the Civil Procedures Rules by filing and serving a Defence and/or a Counter Claim within 14 days of service and serve all parties.

v. THAT all the Defendants in this matter are granted corresponding leave of 14 days upon service with the Amended Plaint by the Plaintiff to file and serve their Amended Defence.

vi. THAT for expediency sake this matter and taking that the Pre-trial conference session was already conducted on 9th December, 2021 the matter be mention on 25th April, 2022 for the purposes of:-

- a. Confirming and Ascertaining full compliance of these directions and finalizing on the Pre-trial conference.
- b. Taking a hearing date of the full trial within the next 90 days from the date of this ruling.
- c. THAT the Costs to be in the cause.

IT IS SO ORDERED ACCORDINGLY.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24TH DAY OF FEBRUARY, 2022

HON. JUSTICE L. L. NAIKUNI (JUDGE)

ENVIROMNENT AND LAND COURT

MOMBASA

In the Presence of:-

- a. Yumna the Court Assistant.
- b. Mr. Oscar Avedi Advocate for the Plaintiff/Applicant.
- c. M/s. Takah Advocate for the 5th – 41st Defendants/Respondents.
- d. Mr. Ntongaiti Advocate for the Proposed Defendant.