



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CIVIL SUIT NO. 1049 OF 20014

MARK ANTONY MUKIRI (The personal representative of the Estate of
Regina Mweru Njuku (Deceased))..... PLAINTIFF

=VERSUS=

JANE WANDIA.....**1ST DEFENDANT**

MICHEAL MWANGI KARANJA.....**2ND DEFENDANT**

ALEX NGOTHO.....**3RD DEFENDANT**

-AND-

COUNTY GOVERNMENT OF NAIROBI.....**THIRD PARTY**

RULING

1. That following the hearing on 14/02/2022 the following oral application was made by the advocate of the Plaintiff Mr. Njuguna:

i) That the plaintiff be granted leave to amend its plaint dated 5/08/2014;

2. The application is based on the following grounds;

i) That the amendments sought are necessary to enable the Honourable Court properly adjudicate upon the rights of respective parties.

ii) That the defendant will not be prejudiced by the proposed amendments.

3. The application to allow filing of an application to amend was opposed by the Mr. Gachie advocate for the 1st defendant and Ms. Apolot advocate for the Third party on the following grounds:

i) Pleadings closed long time ago and if the plaintiff is granted leave to amend and the defendant will have to amend its defence.

ii) That the plaintiff should have amended their plaint before the matter proceeded on trial.

iii) Amendment will mean the matter has to be hear afresh.

5. The advocate for the 1st defendant further averred that it is grossly incompetent to amend a plaint long after the pleadings have closed; that the plaintiff's application seeks to have its pleadings to align with the adduced evidence.

6. On the part of the Third Party the advocate further stated while opposing the oral application that to allow the plaintiff to file an application to amend their plaint was going to allow the plaintiff to reopen the case whose evidence has already been tendered therefore prejudicing the defense case. The court was urged not allow the filing of the application to amend the plaint.

7. The court has considered the learned counsels' submissions on all the matters raised and notes that the application is one for amendment and the applicable law is **Section 100 of the Civil Procedure Act, Cap 21, Laws of Kenya, and Order 8 of the Civil Procedure Rules, 2010**. It provides as follows:

Section 100. General power to amend

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

8. The other provision of the law on amendments is **Order 8, Rules 3 and 5**, which in my view are important. Rule 3 provides as follows:

3. Amendment of pleading with leave [Order 8, rule 3.]

“(1) 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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3).....

(4).....

(5) An amendment may be allowed under subrule (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 in the suit by the party applying for leave to make the amendment”.

9. Rule 5 addresses the issue of general power to amend it states:

[Order 8, rule 5.]

“(1) 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.

(2) This rule shall not have effect in relation to a judgment or order.”

10. My reading of the above provisions point to the fact that indeed an amendment may be allowed at any time of the suit. This however is discretionary and therefore the parties need to seek leave. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. That said, it is preferable that applications to amend come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

11. The reason there is Order 11 of the Civil Procedure Rules is to ensure efficient case management and quick disposal of matters. There must be an end to litigation and indeed an end to amendments and perennial filing of documents. Parties are required to ensure that their pleadings are in order before proceeding for hearing.

12. In the matter at hand the application to amend has not been filed. What is before the court for consideration is an oral application to grant leave for the plaintiff to file a formal application to amend. This oral application to grant leave for a formal application has been made after the close of both the plaintiff’s and defendants’ case. The respective parties have already called their witnesses and tendered all their evidence. The parties have both closed their cases. As a matter of fact, the plaintiff’s advocate closed their case on 03/02/2022. The only application that the advocate for the plaintiff made on this day was for the court to allow the plaintiff to produce the original map since the copy was filed in court was very faint and therefore illegible. There was no application to amend the plaint.

13. The main issue in contention is that both the defendant and the plaintiff claim to hold title to the suit property. The plaintiff has claimed that there will be no prejudice to be suffered by the amendment though the application is being made after the close of plaintiff’s case and after the close of the defendant’s case.

14. The principle upon which the court exercises the discretion to allow amendment was summarized by the Eastern African Court of Appeal in the Case of **Eastern Bakery v Castellino [1958] EA 461**. The object and rationale behind this principle was outlined by the High Court in the case of **Institute for Social Accountability and Another v Parliament of Kenya and 3 others (2014) eKLR** as follows:

“The issue of amendment of pleadings is not novel and has been the subject of numerous court decisions, the common denominator being that as a general principle, courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. See generally Eastern Bakery v Castellino (1958) EA 461; Ochieng and others v First National Bank of Chicago CA Civil Appeal

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. 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.”

15. Consequently, I will allow the plaintiffs’ plea to amend the plaint for I see no prejudice that will be suffered by the defendants who are at liberty to amend their defenses if need be.

Disposal orders

16. In light of the foregoing, the oral application dated 14/02/2022 will be disposed of in the following terms:

- a) The plaintiff is granted leave to amend their plaint and serve the defendants in the next 14 days from the date of the ruling .*
- b) The defendants are also granted 14 days leave from the date of service to file an amended defence if need be.*
- c) Costs to be in the cause.*

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 24TH DAY OF MARCH 2022.

.....

MOGENI J

JUDGE

In the presence of

Mr. Githiri h/b for Mr. Njuguna for the Plaintiff

Ms. Wanjiku h/b for Mr. Gachie for the Defendant

Ms. Apolot h/b for Mr. Kithi for the 3rd Party

Mr Vincent Owuor.....Court Assistant