



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

CIVIL SUIT NO 455 OF 2009

TRUSTLAND DEVELOPERS LIMITED.....PLAINTIFF

VERSUS

KENYA AGRICULTURAL RESEARCH INSTITUTE.....1ST DEFENDANT

KENYA VETERINARY VACCINES PRODUCTION INSTITUTE.....2ND DEFENDANT

THE LANDS REGISTRAR.....3RD DEFENDANT

THE COMMISSIONER OF LANDS.....4th DEFENDANT

RULING

1. In the Notice of Motion dated 20th September, 2021, the Plaintiff/Applicant seeks the following orders:

- a. That the Plaintiff be granted leave to amend its Amended Plaintiff in terms of the draft further Amended Plaintiff annexed hereto.**
- b. That the draft further Amended Plaintiff annexed hereto be deemed as duly filed upon payment of the requisite court fees.**
- c. That the cost of the Application be in the cause.**

2. The application is based on the grounds on the face of the Motion and supported by the Affidavit of Mohammed Barre, the Plaintiff's Director who has deponed that the present suit was filed to seek compensation from the Defendants jointly and severally for the destruction they caused to the Plaintiff's developments on its suit property L.R No 209/13293 and that the Plaintiff's case has already proceeded with the first witness having testified and awaiting further cross-examination by the Defendants' Advocates.

3. It was deponed by the Plaintiff's Director that in order to prove the loss it suffered, the Plaintiff procured the services of Architects, Quantity Surveyors and Financial Analysts trading under the name Apollo Associates who prepared an expert report dated 30th May, 2011; that the Plaintiff filed the aforesaid report on 6th June, 2016 as it was one of the reports they sought to rely on at the hearing and that the report was marked for identification as MF1 2 during the testimony of the Plaintiff's first witness.

4. According to the Deponent, the Plaintiff's attempts to reach the said Apollo Associates to present the expert evidence has been futile; that due to their unavailability aforesaid, it is necessary for the Plaintiff to procure the services of different firm of experts to prepare a report for purposes of proving special damages and that it is necessary for the Plaintiff to be amended to include the proposed amendments.

5. The Plaintiff's Director deponed that the proposed amendments do not introduce a new or inconsistent cause of action as the particulars of special damages stem from the same set of facts; that as advised by counsel, the power to amend pleadings can be exercised at any stage of the proceedings and that no prejudice will be occasioned against the Defendants.

6. In response to the Application, the 1st Defendant filed Grounds of Opposition dated the 12th October, 2021 and averred as follows:

- i. The Application is unmerited, unfounded in law and fact and does not lie in the circumstances.**
- ii. The proposed amendments sought in the Notice of Motion introduce a completely new cause of action from the original**

primary suit against the Defendants.

iii. Production of further and other evidence and/or witness is not a ground for amendment of pleadings in law.

iv. Through the Application, the Plaintiff seeks to panel beat its pleadings to mirror evidence created after the fact which is unlawful, unprocedural and unsustainable the same being highly prejudicial and unjust to the 1st Defendant.

v. The Application is made in bad faith, is an abuse of the process of this court; the same being brought over 12 years after this suit was filed by the Plaintiff and after the Plaintiffs 1st witness has given his evidence in chief and has been cross examined by the 1st Defendant.

vi. The Application by the Plaintiff and the Plaintiff's previous conduct from the record of this Honourable Court clearly illustrated the desperate attempts by the Plaintiff to avoid and/or further delay the trial of the case on its merits.

7. The 2nd Defendant also filed Grounds of Opposition to the application and stated as follows:

i. It is misconceived, lacks merit, bad in law, frivolous and vexatious.

ii. It is an afterthought and a means to buy time.

iii. The proposed amendments were in the Applicants know when it filed the suit.

iv. The claims being introduced are time barred.

v. The amendments if allowed will prejudice the 2nd Defendant.

vi. There has been no development to necessitate the amendments.

viii. It is not just and expedient to grant the application.

Submissions

8. The application was canvassed by way of written submissions. The Plaintiff's counsel submitted that the Plaintiff instituted this suit against the Defendants as a result of their illegal demolition of the developments on the suit property herein, which property belongs to the Plaintiff; that the matter has proceeded for hearing and the first witness has testified and that the Plaintiff has been unable to locate a representative from the firm of Apollo Associates to testify and produce the expert report they authored.

9. Counsel submitted that the application for amendment has been made in order to meet the principles of fairness and reasonableness as espoused in **Articles 10 (2) (b), 25 (c) and 50 (1) of the Constitution**; that the amendment seeks to introduce evidence in support of special damages which were pleaded in the original pleading; that the Defendants had notice of the same and will not be prejudiced and that the amendments are consistent with the original pleading. Reliance was placed on the case of **Eastern Bakery vs Castelino, (1958) E.A.461 (U.) at p.462.**

10. According to counsel, the application to amend the Plaintiff has been made in utmost good faith as the firm of Apollo Associates which authored the expert report are not available; that the Court of Appeal in **Ochieng vs First National Bank of Chicago Civil Appeal 147 of 1991** set out the principles to be considered in amendment of pleadings as follows:

a. the power to amend pleadings is intended to allow the court determine the true nature of the dispute between the parties,

b. the amendment should be timeously applied for;

c. power to amend can be exercised at any stage of the proceedings;

d. that as a general rule, however late an amendment is sought, the same should be allowed if made in good faith provided costs can compensate the other side;

e. the plaintiff will not be allowed to reframe his case or if by an amendment of the plaintiff the Defendant would be deprived of his right to rely on Limitations Act subject to the powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation.

11. Counsel also placed reliance on the case of **St Patrick's Hills School Limited vs Bank of Africa Limited [2018] eKLR.**

12. The 1st Defendant's counsel submitted that under **Section 7** as read with **Section 9(1)** of the **Limitation of Actions Act**, an action for recovery of land must be brought within 12 years from the time the cause of action arose; that pursuant to the Plaintiff, the cause of action arose on 10th July, 2009, and therefore lapsed on 10th July, 2021; that the present application to amend the Plaintiff is with respect to the claim for special damages and that the same is intertwined with the main cause of action and is statute barred.

13. Counsel for the 1st Defendant submitted that the proposed amendment seeks to adjust the claim for special damages to over Kshs 600,000,000 contrary to procedure and practice; that vide the initial amendment to the Plaintiff on 7th May, 2010, the Plaintiff adjusted the special damages to a higher figure; that unavailability of a witness is not grounds for remaking a report and that the Plaintiff ought to have substituted the witness instead of amending the Plaintiff.

14. The 2nd Defendant's counsel submitted that the application lacks in merit, is frivolous and vexatious; that the Plaintiff has not demonstrated that the amendment is necessary for the determination of the questions in controversy; that the proposed amendments introduce new claims which require further evidence to be given by the Plaintiff and yet no application has been made to recall the Plaintiff's witness and that the claims sought to be introduced are statute barred.

15. The 2nd Defendant's counsel urged the court to be guided by the case of **Garley Enterprises Ltd vs Agricultural Finance Corporation and Another [2018] eKLR** where the court dismissed an application to further amend a Plaintiff.

Analysis and Determination

16. Having analysed the pleadings and submissions by the parties, the sole issue for determination is whether the Plaintiffs' application for amendment is merited. The general powers of the court to grant leave to a party to amend pleadings is drawn from **Order 8 Rule 3 (1),(2) and (5)** of the **Civil Procedure Rules** which provides as follows:

“(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.

(3) (2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (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 sub rule if it thinks just so to do.

“(3) (5) 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 in the suit by the party applying for leave to make the amendment.”

17. **Order 8 Rule 5(1)** of the **Civil Procedure Rules** provides as follows:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.”

18. The principles upon which a court acts in an application to amend a pleadings were set out by the Court of Appeal in **Central Kenya Limited vs Trust Bank limited (2000) eKLR** which referred to commentaries in the *Indian Civil Procedure Code* by *Chittaley and Rao* where the learned authors stated as follows with regards to the rule to amendment of pleadings;

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

19. More recently, the Court of Appeal in **Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR** affirmed that the law applicable to amendment of pleadings is as stated in *Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition* and captured in the Court of Appeal decision in **Joseph Ochieng and 2 others vs First National Bank of Chicago, Civil Appeal No. 149 of 1991** thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitation Acts.”

20. It is apparent that the courts' discretion to amend pleadings at any stage of the proceedings is wide and unfettered except that it should be exercised judicially and upon the defined principles so as to bring out the real issues in controversy between the parties and on such terms as may be just.

21. The Plaintiff instituted this suit against the Defendants alleging that having duly purchased the suit property and taken possession, the 1st and 2nd Defendants published notices in the daily papers claiming to be the owners of the property and thereafter entered into the suit property and demolished the houses thereon and causing it great losses entitling it to special and general damages. In the original Plaintiff, the

Plaintiff claimed special damages to the tune of Kshs. 200,000,000.

22. The record shows that on 17th May, 2010, the Plaintiff filed an Amended Plaintiff in which it demanded special damages changed from Kshs. 200,000,000 to Kshs. 500,000,000. The Plaintiff also included the Commissioner of Lands as the 4th Defendant in the amended Plaintiff.

23. The matter proceeded for hearing on 25th October, 2018 where the Plaintiff's first witness testified. The Plaintiff's witness sought to produce into evidence the bundle of documents filed in support of the claim, which the Defendants agreed to, save for the expert report prepared by Apollo Associates. Counsel for the Defendants argued that the maker of the report should testify and be cross examined on his report.

24. According to the Plaintiff, it intended to rely on the aforesaid expert report to prove the special damages claimed; that its attempt to procure a witness from the firm of Apollo Associates to testify has been futile because the firm is no longer a going concern and that there is need to procure the services of a new firm to prepare a new report in support of the claim for special damages necessitating the application for amendment.

25. In response to the application, the 1st and 2nd Defendants filed Grounds of Opposition in which they opine that the application is frivolous and an abuse of court process; that the same has been brought after inordinate delay and is a time wasting tactic; that the application introduces a new cause of action and is statute barred and that the production of further and other evidence and/or witness is not a ground for amendment of pleadings in law.

26. The Defendants contend that the proposed amendment of the special damages sought to be introduced by the Plaintiff is linked to the main cause of action which is one for recovery of land and the same is statute barred by virtue of **Section 7** as read together with **Section 9(1)** of the **Limitation of Actions Act**. The Plaintiff did not submit on this contention.

27. The court has perused the draft further Amended Plaintiff and notes the changes are with respect to the sum for "the cost of demolished work at the current market value being Kshs 257,823,351" down from Kshs 500,000,000; Kshs 40,682,997 being consultancy fees for the architect and engineer; the loss of projected income from the development being Kshs. 467,500,000 and the cost incurred towards procuring the services of the Quantity Surveyor and Valuer being Kshs 39,834,530."

28. It would appear from the analysis of the draft further Amended Plaintiff *vis a vis* the Amended Plaintiff, that that the amendments are within the same set of facts already pleaded in the Amended Plaintiff and are a natural consequence thereof such that they cannot be said to be new causes of action. Indeed, considering that a different expert will be called to produce a report on the alleged special damages incurred by the Plaintiff, the changes in the initial figures was bound to occur.

29. Consequently, the Plaintiff having not introduced a new cause of action in the proposed amendments, it follows that the question of the suit being time barred is moot.

30. The Defendants have accused the Plaintiff of having taken inordinately long to file the application. It is apparent that the power to allow amendment of pleadings is within the discretion of the court, and where the court is convinced that there exists justifiable cause to amend, may nevertheless allow the amendment notwithstanding that the application was not filed timeously as long as the opposite side will not be prejudiced or suffer injustice which cannot be compensated by costs.

31. This court has already determined that the nature of the amendments being introduced by the Plaintiff do not introduce a new cause of action. Whereas there was some delay in making the application, the same is not in itself sufficient to decline the application. The Defendants still have an opportunity to cross examine the witness who will be called to produce the yet to be filed and served report on the alleged special damages.

32. Indeed, even if the parties had closed their cases, the court is empowered by **Order 18 rule 10** of the **Civil Procedure Rules** to recall witnesses. The order states as follows:

"The court may at any stage of the suit recall any witness who has been examined, and may, subject to the law of evidence for the time being in force; put such questions to him as the court thinks fit."

33. Further **Section 146 (4)** of the **Evidence Act** provides that:

"The court may in all cases permit a witness to be recalled either for further examination in chief or for further cross examination, and if it does so, the parties have the right of further cross –examination and re – examination respectively."

34. This power, envisaged in the provisions of **Order 18 Rule 10** of the Civil Procedure Rules and **Section 146 (4) of the Evidence Act** are intended to ensure that each party is afforded a fair trial guaranteed under **Article 50 (1)** of the **Constitution**. Considering that the Defendants can still apply for the recalling of PW1, it is the finding of this court that the Defendants will not be prejudiced if the proposed amendments are allowed.

35. For those reasons, the Plaintiff's application dated 20th September, 2021 is allowed as follows:

i. The Plaintiff be and is hereby granted leave to further amend its Plaintiff.

ii. The further Amended Plaintiff to be filed and served within 14 days from the date of this Ruling.

iii. The Defendants are granted corresponding leave to amend, file, and serve further Amended Defences within 14 days from the date of service of the further Amended plaintiff.

iv. Each party to bear its own costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 24TH DAY OF MARCH, 2022

O. A. ANGOTE

JUDGE

In the presence of:

Mr. Masore Nyangau for the Plaintiff

Mr. Onyango for the Defendants

Court Assistant - Okumu