



**Lishamba v Spencon Company Ltd & another (Environment & Land Case 594 of 2014) [2022] KEELC 131 (KLR) (31 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 131 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KAKAMEGA  
ENVIRONMENT & LAND CASE 594 OF 2014**

**DO OHUNGO, J  
MAY 31, 2022**

**BETWEEN**

**JUDITH ASAMBA LISHAMBA ..... PLAINTIFF**

**AND**

**LAKE VICTORIA WATER SERVICES BOARD ..... 1<sup>ST</sup> DEFENDANT**

**SPENCON COMPANY LTD ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. By Notice of Motion dated December 10, 2021, the plaintiff seeks the following orders:
  - a) The plaintiff/applicant be granted leave to amend her plaint and that the amended plaint be filed and served upon the proposed defendant/respondent within Seven (7) days from the date of granting of leave.
  - b) The proposed defendant be at liberty to file and serve and reply to the plaint within fourteen (14) days upon service by the plaintiff/applicant.
  - c) Costs of this application be in the cause.
2. The application is supported by an affidavit sworn by the plaintiff. She deposed that the defendant was wound up and subsequently the suit against it was withdrawn on October 26, 2020, leaving the suit to proceed against the 3<sup>rd</sup> party. That it is necessary to amend the plaint so as to make the 3<sup>rd</sup> party a defendant. She annexed a copy of the draft amended plaint.
3. The third party opposed the application through grounds of Opposition in which it took the position that the application is frivolous, vexatious, an abuse of the court process, is misconceived, bad in law, is instituted in bad faith and is unfounded in law.



4. The application was canvassed through written submissions. The applicant argued that the amendment sought is consistent with the original pleadings and that the substance of the pleadings remains intact. That the need to amend the plaint arose after the defendant who was contracted by the 3<sup>rd</sup> party was wound up. That in the circumstances, the plaintiff is innocent of any omission. Citing Order 5 rule 1 of the Civil Procedure Rules and the case of St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR, the plaintiff argued that the proposed amendment will not prejudice the 3<sup>rd</sup> party and urged the court to allow it.
5. The 3<sup>rd</sup> party argued that following the winding up of the defendant, the defendant's suit against the 3<sup>rd</sup> party became extinct and the court no longer had jurisdiction in the matter since there were no proper parties before it. The case of James Ochieng' Oduol t/a Ochieng Oduol & Co. Advocates v Richard Kuloba [2008] eKLR was cited in support of that argument.
6. It was further argued that the proposed amendment in effect initiates a new tort claim against the 3<sup>rd</sup> party. That since the cause of action accrued in January 2010, the claim is barred under Sections 4 (1) and (2) and 8 of the Limitation of Actions Act. Relying on the cases of Gathoni v Kenya Co-operative Creameries Ltd [1982] eKLR and Iga v Makerere University [1972] EA 65, the 3<sup>rd</sup> party urged the court to dismiss the application.
7. I have considered the application, the affidavits and the submissions. The principles applicable to an application for amendment are that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. See R v AG & Another [2004] eKLR.
8. The record shows that this suit was filed on October 27, 2010, in the High Court. It was later transferred to this court, hence its new case number. The original parties were the plaintiff and Spenco Company Ltd as defendant. The plaintiff averred in the plaint that in January 2010, the defendant trespassed into her parcel of land known as Butso/4409 and constructed a wash out manhole in the middle of it. She therefore prayed for a declaration that she was entitled to exclusive use and possession of the suit property, a permanent injunction to restrain the defendant from trespassing onto the suit property or interfering with her exclusive use of it and eviction of the defendant from the suit property.
9. The defendant filed defence on December 15, 2010 and later issued a third party notice against the 3<sup>rd</sup> party pursuant to leave granted on 1<sup>st</sup> July 2011. The 3<sup>rd</sup> party filed its defence on November 9, 2020. On September 25, 2019, counsel for the defendant informed the court that the defendant had been placed under receivership. Ultimately, the case against defendant was withdrawn on October 26, 2020.
10. A perusal of the draft amended plaint shows that the plaintiff intends to make the 3<sup>rd</sup> party the sole defendant in the case. To that extent I agree with the 3<sup>rd</sup> party that the plaintiff is commencing a new cause of action against it. All along, the plaintiff was litigating against the defendant while the defendant was litigating against the 3<sup>rd</sup> party. Third party proceedings are by their nature a claim by a defendant against the third party. At no point in this matter did the plaintiff have any claim against the 3<sup>rd</sup> party. The original plaint does not disclose any such claim. If the plaintiff thought that it had a claim against the 3<sup>rd</sup> party, nothing would have been easier than joining it as a defendant from the onset.
11. As was stated in Iga v Makerere University (supra):

A plaint which is barred by limitation is a plaint "barred by law". Reading these provisions together it seems clear to me that unless the appellant in this case had put himself within the limitation period by showing grounds upon which he could claim exemption the court



“shall reject” his claim. .... The Limitation Act does not extinguish a suit or action itself but operates to bar the claim or remedy sought for, and when a suit is time barred, the court cannot grant the remedy or relief sought.

12. Other than change of its status from 3<sup>rd</sup> party to defendant, the draft amended plaint repeats the same claim that the plaintiff had against Spencon Company Ltd, complete with January 2010 as the date when the cause of action accrued. The cause of action remains one of trespass, which is a tort claim. Pursuant to Section 4 (2) of the *Limitation of Actions Act*, an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. In other words, the proposed claim in the draft amended plaint is statute barred since it is brought over 12 years after accrual of the cause of action. To allow the amendment would occasion an injustice to the 3<sup>rd</sup> party since it will be made to defend a claim that is statute barred.
13. The 3<sup>rd</sup> party has argued that the court no longer has jurisdiction since there are no proper parties before it. In any litigation, there must be a claimant and a party responding to the claim. The claimant cannot litigate against itself. After October 26, 2020 when the plaintiff withdrew its claim against the defendant, the plaintiff was not litigating against anybody. As noted earlier, the plaint discloses no claim against the 3<sup>rd</sup> party. In turn, the 3<sup>rd</sup> party has no claim against the plaintiff. The proceedings ought to have come to an end on October 26, 2020.
14. In view of the foregoing discourse, I find no merit in Notice of Motion dated December 10, 2021. I dismiss the application. Since there are no proper parties to the proceedings, the court has no jurisdiction to continue entertaining a suit in which the plaintiff is litigating against no one. In the circumstances, the plaint is struck out. No order on costs both of the application and the suit.

**DATED, SIGNED AND DELIVERED AT KAKAMEGA THIS 31 ST DAY OF MAY 2022.**

**D. O. OHUNGO**

**JUDGE**

**Delivered in open court in the presence of:**

Ms Aligula for the plaintiff

No appearance for the third party

Court Assistant: E. Juma

