



**Highland Plaza Limited v Ondieki & 5 others; Tuitoek & another
(Third party) (Environment & Land Case 104 of 2016 & 35 of 2007
(Consolidated)) [2022] KEELC 3525 (KLR) (10 May 2022) (Ruling)**

Neutral citation: [2022] KEELC 3525 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 104 OF 2016 & 35 OF 2007 (CONSOLIDATED)
LL NAIKUNI, J
MAY 10, 2022
FORMERLY HCCC. NO. 20 OF 2006**

BETWEEN

HIGHLAND PLAZA LIMITED PLAINTIFF

AND

EVANS ONDIEKI 1ST DEFENDANT

MANYALA AWOUR 2ND DEFENDANT

GEORGE OMONDI 3RD DEFENDANT

MOSES KURGAT 4TH DEFENDANT

CHARLES KOTUT 5TH DEFENDANT

SAFARICOM LIMITED 6TH DEFENDANT

AND

JACKSON KIPNG'ETICH TUITOEK THIRD PARTY

CHUMA NYUNDO ATHUMANI THIRD PARTY

RULING

I. Introduction

1. Before this Honorable Court for its determination is the notice of motion application dated November 22, 2021 filed by the plaintiff/applicants. It is brought to court under the Provisions of sections 3A and 100 of the *Civil Procedure Act* cap 21, order 2 and rule 5, order 8 rules 3 and 5, order 51 rule 1 of the *Civil Procedure Rules* 2010 and article 159 of *the Constitution* of Kenya.



II. The Plaintiff/Applicants Case.

2. The plaintiff/applicant has sought for the following orders:-
 - (a) That the Plaintiff be granted leave to amend Plaintiff in terms of the annexed draft amended Plaintiff.
 - (b) That the amended Plaintiff annexed herewith be deemed as filed and served upon the payment of the requisite fees.
 - (c) That the Costs of this application be in the cause.
3. The Notice of Motion application is premised on the facts, testimony and averments of the 24 paragraphed Supporting Affidavit of Hadassah Rimunya, an Advocate of the High Court of Kenya. She is practicing as such in the law firm of Messrs. Kittony Maina Karanja Advocates who are in conduct of this matter on behalf of the Plaintiff/Applicant hence competent and duly authorized to swear this Affidavit hereof. She deponed that by the time of filing the suit, the Plaintiff sought to have the Defendants removed from its property being Land Reference No. Mombasa/Block IX/238 on the grounds of trespass having unlawfully erected structures therein. She held that the case by the Plaintiff had gone undefended from the time of its institution. She stated that it was only until the June 14, 2021 when the 1st Defendant decided to file its Defence. She held that at the time of instituting the suit, the Plaintiff was under the impression that the Defendants were merely trespassers. But, nonetheless it had now come to its attention that the Defendant lay ownership claim onto the suit property as the legitimate owners. For instance, the 1st Defendant's claim to have bought part of the property subdivision No. 2 & 6 from the Third Parties.
4. She averred that their claim was marked by numerous fraudulent activities that had already taken place at the Ministry of Lands and Survey of Kenya. She provided the long history on how these alleged fraudulent activities had been occurring at the Ministry of Lands from the year 2004. She held that from the investigation undertaken it revealed that both James Taitoek and Chuma Nyundo Athmani respectively were involved in the falsifying of documents – which led to the cancellation of their Certificate of Lease. It was her testimony that all these criminal and fraudulent activities had been reported before the Director of Criminal Investigations offices.
5. Therefore in conclusion, she averred that the amendment being sort by the Plaintiff/Applicant would enable court to correctly address the issue in dispute taking that the matter was still fresh and not yet heard on its own merit. She pressed that there would be no prejudice occasioned to the Defendants, as indeed its only recently that the Defendants had taken interest in the matter by filing its Defence.

Further, she held that the amendment being sort by the Plaintiff/Applicant was also in line with the cause of action and therefore a legally valid claim. She prayed for the application and the orders sought therein to be allowed.

III. The 1st and 2nd Defendants Replying Affidavit

6. On 7th December, 2021, the 1st and 2nd Defendants while opposing the aforementioned Notice of Motion application filed a 16 paragraphed Replying Affidavit sworn by Evans Ondieki Anyona and dated on the even date. He deposed that he made this affidavit on his own behalf and that of Manyalla Owuor – the 2nd Defendant herein. He held that the Supporting Affidavit – sworn by the Plaintiff's Advocate Hadassah Rimunya was of zero probative value as she deposed over contentious issues that she had no personal knowledge about and hence should be struck out from this proceedings. He referred to the order of this court from a ruling delivered 27th September, 2021 whereby he was



penalized a sum of Kenya Shillings Thirty Thousand (Kshs. 30,000/=) for filing a Defence out of time and a sum of Kenya Shillings Ten Thousand Shillings (Kshs. 10,000/=) as Court Adjournment Fees (CAF) and held that it was ironical that this application was being brought at this stage very late in the day. He held that, the Plaintiff had never been ready for the matter to be heard and there had been no good reason adduced as to the long delay of a period of six (6) years taken to have filed this application for amendment of its pleading. Besides, he argued that all along the Plaintiff had always been aware of the Defendant's proprietary interest in the property.

7. He held that having come to court in the year 2016, it was evident that the Plaintiffs continued altering the status of the subject matter. He averred that all these were in breach of the sub-judice rule with the objective of stealing a match against the other litigants in the matter. To home it amounted to the abuse of the due process of court and law. He underscored the fact that there were now efforts being made to cause amendments of pleadings after 12 years and after the then letter dated 5th May, 2004 written by the then Commissioner of Lands, filed by the Plaintiff/Applicant herein would tremendously alter the cause of action in this matter. This would be to the detriment of the defendant and which would not be possible to get compensation by way of Costs. Hence, for this reason alone, the application should not be allowed at all.
8. He further argued that to hold since the suit had remained undefended, it never altered the fact the Plaintiff had never had the full disclosure of the material facts of the property. By saying so, he held that the Plaintiff had always been privy to the contents of the afore mentioned letter by the then Commissioner of Lands dated May 5, 2004 and the averments of the Supporting Affidavit by me Falliance Oriri filed in Court on July 28, 2008 in the Civil Case – ELC No. 35 of 2007 where the Plaintiff/Applicant is a party. Hence, it was not true that Plaintiff/Applicant as alleged only became aware of the 1st and 2nd Defendant's interest in the suit property upon him filing his Defence in the year 2021.

He wondered why the Defendant had to take such a long period of over twelve (12) years to have decided to file the Notice of Motion application for amendment. In conclusion, he held that there was not good reason advanced by the Plaintiff for seeking for amendment of the pleadings as the same were contradictory. He urged the Honorable Court to dismiss the application with costs.

IV. Submissions

9. On 8th December 2021 while in the presence of all the parties the Honorable Court directed that the Notice of Motion application dated November 22, 2021 be disposed off by way of written submissions. Pursuant to that all the parties obliged and court reserved a date for delivering the Ruling thereof.

A. The Plaintiff/Applicant Written Submissions.

10. On 21st January, 2022 the Leaned Counsel for the Plaintiff/Applicant the law firm of Messers. Kittony Maina Karanja Advocates filed their written submissions dated January 17, 2022. M/s. Rimunya Advocate submitted that from the time the Plaintiff instituted their suit via a Plaint filed on May 16, 2016 new information had come up which necessitated for the amendment of the Plaint to fully ventilate the Plaintiff's case.

Firstly, while submitting, the Learned Counsel brought out several issues. With regard to the grounds raised by the Defendants in their Replying Affidavit to the effect that the contents of the Supporting Affidavit to be struck out for lacking probative value, the Learned Counsel sought refuge and solitude from the provisions of rule 9 of the *Advocates (Practice Rule)* and order 19 rule 3 (1) of the Civil Procedure Rules 2010 to wit that affidavits ought to be confined to such facts as the deponents was able of his own knowledge to prove. Therefore, she argued that being the counsel in the matter she was



fully informed and versed with the facts involving their clients cases. To buttress this point she relied on the cases of:-

*“John Muli and another –Versus- Thomas Nzioka Wambua & another (2021) eKLR and
Factory Guards Limited –Versus- Factory Guards Limited (2014) eKLR.*

11. Secondly, on the issue of amendment of the pleadings generally the Learned Counsel submitted it was a rule of the thumb which courts had in exercising its wide and unfettered discretion that historically it allowed amendment of pleadings. This was done in order to permit parties clearly ventilate their claim especially where no prejudice would be occasioned upon the other party. It was also to assist court in just determination of a matter. To further back up her point, she relied on the decision of *Andrew Ouko –Versus- Kenya Commercial bank limited & 3 others (2014) eKLR.*
12. On the application of the above legal ratio to this case, the Learned Counsel submitted that the instant case had yet to progress for full hearing on its merit the same having just been consolidated with another – ELC No. 35 of 2007. Hence, she argued that it was still at the preliminary stages and could not occasion the Defendants to any disadvantage. In deed the fact that the suit had been consolidated, it necessitated parties to proceed for the amendment of their pleadings. She reiterated the fact that from the time the suit was instituted, it went on undefended until the year 2021 when the 2nd Defendant entered appearance and filed their defences. Initially the Plaintiff had assumed the Defendant were only mere trespassers but now come to discover that they were making claims of being legitimate owners to the whole suit property. She submitted that these were serious issues of law and ought to be well ventilated from the filed pleadings. She further averred that there had been change of Advocates for the Plaintiff and all the material development which had occurred in the matter ought to be addressed well. She also relied on the provisions of order 2 rule 5 of the *Civil Procedure Rules 2010* to wit that a party would in any pleadings plead any mater which had arisen at any time. Whether before or since the filing of the Plaintiff.
13. She denied that the Plaintiff had interfered with the suit property. To the contrary she held that on their own admission, the 1st Defendant had stated that they had erected some structures on the suit land and thus the presence of the 7th Defendant – Safaricom Limited, on the suit property was evidence enough. She refuted the allegations that the amendment of pleadings would alter the cause of action as indeed all the way through the cause of action and facts were over the disputed suit property and nothing changed as all the way through the Plaintiff had been assuming to be the legitimate owner while the Defendants were mere trespassing on the suit land. But now this had not drastically changed as the 1st and 2nd Defendant were seeking legal ownership to the whole suit property.

She relied on the provisions of order 8 (2) (5) where it provided that an amendment would be allowed notwithstanding that its effect would be to add or substitute a new cause of action. Further, it provided the amendment would be allowed if the new cause of action arose out of the same facts or substantially the same facts as a cause of action in respect of the relief had already been claimed in the suit by the party for leave to make the amendment.

The Learned Counsel held that the reliefs sought in the Plaintiff would have the same effect of determining and asserting ownership over the disputed property.

14. She concluded her submissions by stating that the 1st and 2nd Defendants had tried through fraudulent and dubious means to legitimize their stay over the suit land. She stated that they even tried to sell the property off to third parties hence the more need to cause the amendment of the pleadings hereof. She prayed for the orders sought from the filed application with costs as there was need for court to be in a better position to determine the real question in controversy between parties.



B. The 1st and 2nd Defendant's Written Submissions

15. On February 1, 2022 the Learned Counsel for the 1st and 2nd Defendants, the law firm of Messrs. Jengo Associates filed their written submissions dated January 31, 2022. Mr. Jengo Advocate submitted that the Supporting Affidavit to the Notice of Motion application was sworn by the Plaintiff's Advocates. He argued that the Learned Counsel in so doing devolved into contentious matters of facts which ideally would be between the parties and where upon the Advocate would then only be basing whatever she had deponed on hearsay. It was his argument then. Otherwise she would be called to testify as a witness. For instance, he referred to the annexure marked "AR -1" on the issue of there being a subsisting certificate of title in place from May 5, 2004 when the then Commissioner of Lands wrote to the Plaintiff – by that time the year 2004 the Advocates were not in conduct of the matter. On this point, the Learned Counsel relied on the case of "[*Francis Kimutai Bii –Versus- Kaisugu \(K\) Limited*](#) ELRC No. 25 of 2015" to the effect that ".....as submitted by the Claimant/Applicant, it is trite law and practice that an Advocate cannot and should not depose or engage himself in the realm of evidence in a matter he is appearing. This is more particularly in exercise of deposing on contentious issues thereon. As earlier intimated, the Replying Affidavit by Mr. Oyugi sworn on December 4, 2015 cannot stand, it is therefore struck out of the record of court".
16. Additionally, in his submissions, he distinguished the case of [*John Muli & Another*](#) (Supra) and [*Factory Guards Limited*](#) (Supra) relied up on by the Plaintiff to wit that an Advocate would only swear an affidavit on matters which he/she had personal knowledge. He held that the issue of fact that whether the Defendants were trespassers or rightful owners of title and whether the Plaintiff were aware of this or when they became aware of this could not be issues within the Advocates personal knowledge as proceeding beyond that point the facts adduced by an Advocate could only become hearsay. To this extend he urged for the Supporting Affidavit to be struck out.

The Learned Counsel admitted and conceded on the legal ratio founded in the case of [*Andrew Ouko*](#) (Supra) cited by the Plaintiff on the Principles to be considered while granting an order of an amendment. He agreed that amendment more so where the hearing of the case had not started should generally be granted unless it could be shown that they would be prejudicial to the other party. Nonetheless, he deferred with the Plaintiff as he held that the amendment would be prejudicial to the Defendant as it introduced the tort of fraud in the amended Plaintiff. He stated that the said prejudicial amendment could be seen from the contents of Paragraph 11 of the proposed amended Plaintiff and which could be contrary to the Provisions of sections 4 and 26 of the [*Limitation of Actions Act*](#) cap 22. To support his point he relied on the case of [*Joseph Ochieng & 2 Others Trading as Aqualine Agencies –Versus- First National Bank of Chicago*](#) (1995) eKLR.
17. He held that the amendment envisaged by the plaintiff/applicant drastically changed the cause of action from trespass which was based purely on entry without permission hence the application to remove all facts pertaining to it in the amended Plaintiff and introduced new issues about ownership of the lease and/or title. He urged court to find that through the ostensible amendments the Plaintiff which was a corporate body wanted to put the 1st and 2nd Defendants through some turmoil by shifting the goal posts and pleading completely conflicting facts simply because they could not meet the Defence that had been raised. He cited the court of Appeal case of [*James Ochieng Oduol t/a Ochieng Oduol and Company Advocates –Versus- Richard Kuloba*](#) (2008) eKLR holding that parties were bound by their own pleadings and the court could not go out of their ambit. His contention was that the Supporting Affidavit never stated that there were any peculiar or exceptional circumstances why an amendment taking away an accrued right should be allowed.



18. Finally, the Learned Counsel informed court that while this case was pending, the Plaintiffs had sought to alter and actually altered the position of the lease in their favour. By interfering with the subject matter while it was in court other than maintaining the status quo the Plaintiff/Applicant were in breach and violation of “the Doctrine of Les Pendens” which is founded on public , policy and equity. The doctrine means:- “the jurisdiction, power or control acquired by a court over property while a legal action is pending” in other words its purpose is to preserve the suit property until the suit is finally determined or until the court issues orders and given terms on how the suit property should be dealt with”

He argued that having interfered with the status of the property which was the subject matter before court, the Plaintiff could not now come before court to ask that it exercises its discretion in their favour so as to perfect the acts. According to the Learned Counsel they had themselves occasioned to this situation which had undermined their own case. He urged court not to consider the application but to dismiss it with costs.

VI. Analysis And Determination

19. The Honorable Court has considered all the pleadings, the well and articulate written submissions, the cited authorities by the parties and the relevant provisions of law with regard to Notice of Motion application dated November 22, 2021. In order to arrive at an informed, just, fair and equitable decision the Honorable Court only has two (2) issues for its determination hereof. These are:-
- a. Whether the Notice of Motion application dated November 22, 2021 by the Plaintiff/Applicant meets the threshold for amendment of the Plaintiff and hence the draft amended Plaintiff should be deemed as duly filed.
 - b. Who will bear the costs of the Notice of Motion application dated November 22, 2021

ISSUE NO. (a) Whether the Notice of Motion application dated 22nd November, 2021 by the Plaintiff/Applicant meets the threshold for amendment of the Plaintiff and hence the draft amended Plaintiff should be deemed as duly filed.

20. Under this sub – heading, I have two (2) broad issues to tackle herein. These are, one on amendment of pleadings and the other is on the striking out averments from the supporting affidavit by the Advocate by the Plaintiff. First issue on amendment, the legal provisions for amendment of pleadings is founded under the provisions of order 8 rules 1, 2, 3, 4 and 5 of the *Civil Procedure Rules 2020*. Primarily, amendments of pleadings may be undertaken without the leave of court. Its trite law that this occurs where the pleadings are not yet closed. Nonetheless, when the pleadings have been closed then leave of court is required. In all purposes, the leave of court is sort for the very fundamental reason that court is able to keenly assess the aspects of amendment and so that the parties do not take advantage or prejudice the other party through forceful amendments. Legally speaking to grant leave court have unfettered discretion which need to be exercised judicially and not capriciously. It’s an extremely delicate balancing act. On this legal preposition, I am strongly persuaded by the authorities cited by both the Advocates for the Plaintiff/Applicant and the Defendant being in the cases of “*Andrew Ouko* Supra, and which I hereby cite to wit:-

“The sole purpose of amending pleadings is to give the court an opportunity to adequately consider the issues in dispute. This means that the court must be very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny party leave to amend its pleadings as a last resort and with good sufficient cause. ...The overriding considerations in application for leave is



whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite side beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless allowing them the opposite side would be prejudiced or suffer injustice which cannot be properly compensated by costs.

Additionally, I have also Cited a case relied on by the Defendant's Advocates of Joseph Ochieng & 2 others (Supra) where the Honorable Court held inter alia:-

“Whether an amendment should be granted in a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his own assessment of where justice lies. Many and diverse facts will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot always be measured in terms of money and in my view a Judge is entitled to weight in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporation the anxieties occasioned by facing new issues one way or the other”

21. From the historical legal evolution courts, have endeavored to grant leave for the amendments of pleadings. This has been particularly if the amendment is to add value and assist the court arrive in a fair and just determination of the disputed question of the subject matter. With regard to the amendment as sought by the Plaintiff are particulars of fraud and ownership of the suit land they have held that when the suit was filed they were under the illusion the Defendants were merely trespassers. The suit remained undefended until the 2nd Defendant filed its defence in the year 2021 when it now became clear they were claiming legal ownership to the suit property. Definitely, this issue needs to be fully ventilated in the Plaintiff to allow the court get the value of appreciating these issues of trespass and ownership of Land. While at that, I completely disagree with the Learned Counsel for the Defendants that the Plaintiff is now introducing new cause of action being a tort of fraud in the pleadings through amendment. Looking critically at the amended Plaintiff the proposed amendments are mainly at the introductory, general paragraphs and particulars of the body and not the prayers of the pleading. My assessment is that the prayers of the Plaintiff do not make any reference to the tort of fraud or fraudulent but only praying on how the certificate of title deed or leases were allegedly acquired. This cannot alter the cause of action as they are merely empirical evidence which is vital to the suit. These were areas which can be fully controverted and argued during full trial. Be that it may, this court has taken cognizance that it delivered a ruling to have the consolidation of the ELC No. 35/2007 and ELC No. 104 of 2016 as the subject matter and parties were similar. In such circumstances, and as the only stand-alone ground amendment of pleadings would be inevitable as the same follows suit.
23. Finally, it's my understanding that although the Defendants argues that the amendment has been made in an inordinate delay of 17 years from the time of the letter dated 5th March, 2004, by the then Commissioner of Lands, its trite law that amendments can be undertaken at any stage before the proceedings have ended. Besides, and interestingly all the parties seem to fully concur that this matter is still fresh having not yet started and pursuant to the consolidation of the files may call for a pre-trial conference by all parties before the matter is fixed for full trial.

Suffice it to say, and in order to ameliorate the situation, and meet the wheels of justice through a fair balancing of the scales the Defendants will also be granted corresponding leave to amend their statement of Defence and Counter Claim should they find it necessary. For these reason, I find that the Plaintiff has succeeded in their application for amendment of the Plaintiff.



On the second issue. This is on whether to struck out averments of the Supporting Affidavit by the Plaintiff's Advocate I fully concur with the Learned Counsel for the 1st and 2nd Defendants, that the Advocate should only swear an affidavit onto issues he/she is fully conversant and/or had personal knowledge to otherwise Advocates should as much as possible avoid indulging into the arena of litigation otherwise their averments would be termed as hearsay and/or them being summoned to testify as witnesses which is extremely awkward if not embarrassing as far as conflict of interest is concerned. For these reasons, I do hereby direct that all the aspects of averments which are not sufficiently direct evidence within the personal knowledge of the Advocates should be struck out from the pleadings mainly the supporting affidavit hereof.

ISSUE No. (b) Who will bear the costs of the Notice of Motion application dated 22nd November, 2021

24. Its trite law that courts have discretion on issues of costs. The Provisions of section 27 of the Civil Procedure Act, cap.21 provides that costs follow events. Whereupon events mean results of the case. Despite if the fact that the plaintiff/applicant in this case have succeeded as the amendment application has been allowed but due to public interest and equality each party should bear its own costs.

V. Conclusion and Disposition

25. Arising from the indepth and through analysis of the aforementioned issues, I now wish to proceed to grant the following orders.

- (a) That the Notice of Motion application dated November 22, 2021 by the plaintiff/applicant be and is hereby allowed for being meritorious.
- (b) That order be and is hereby made to the effect that only those aspects of the supporting affidavit sworn by Hadassah Rimunya dated November 22, 2021 to wit averments under Paragraphs 10 to 15 of the said affidavit which have been found to be unsubstantiated for delving into contentious matters and which are not based on personal knowledge of the Advocate for the Plaintiff be struck out from these proceedings and record.
- (c) That the Plaintiff/applicant be and is hereby granted three (3) days to file and serve the Amended Plaintiff.
- (d) That the 1st, 2nd, 3rd, 4th, 5th, 6th and 7th defendants be and are hereby granted 14 days to file and serve their amended statement of defence and counter claim if they find it necessary.
- (e) That for expediency sake to have this suit heard and determined within the next ninety (90) days from this date hence there be a mention on 27th June 2022 for purposes of:-
 - (i) Ascertaining full compliance of today's orders.
 - (ii) Conducting a Pre-trial conference under the Provisions of order 11 of Civil Procedure Code and
 - (iii) Fixing a hearing date within the stipulated time frame hereof.
- (f) That each party to bear their own costs.

It is so Ordered Accordingly.

DATED, DELIVERED, SIGNED AND READ IN OPEN COURT AT MOMBASA THIS 10TH DAY OF MAY 2022.



HON. JUSTICE L.L. NAIKUNI (JUDGE)
ENVIRONMENT & LAND COURT
AT MOMBASA

In presence of:-

M/s. Yumna, Court Assistant.

Non appearance for the Plaintiff.

Non appearance for the Defendant.

Non appearance for the 1st Third Party

Non appearance for the 2nd Third Party

