



**Egoli Estates Limited v Bluebill Enterprises Limited (Environment & Land  
Case E395 of 2021) [2022] KEELC 2810 (KLR) (27 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 2810 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E395 OF 2021**

**JA MOGENI, J  
JUNE 27, 2022**

**BETWEEN**

**EGOLI ESTATES LIMITED ..... PLAINTIFF**

**AND**

**BLUEBILL ENTERPRISES LIMITED ..... DEFENDANT**

**RULING**

1. This Court is called upon to determine two applications. Each of the parties have applications as follows: -
  - a. The Plaintiff's Application dated 20/04/2022 brought under the provisions of Section 3A of the *Civil Procedure Act*, Order 2 Rule 15(1)(d) and Order 8 Rule 2 of the *Civil Procedure Rules*, 2010 and all other enabling provisions of the Law. The Applicant is seeking for the following Orders:
    1. That this Honourable Court do strike out the Defendant's Further Amended Statement of Defence and Counterclaim.
    2. That in the alternative the Honourable Court do disallow the amendments in the Defendant's Further Amended Statement of Defence and Counterclaim.
    3. That the cost of this Application be borne by the Respondent in any event.
  - b. The Defendant's Application dated 09/05/2022 was filed under the provisions of Sections 1A, 1B, 3A and 95 of the *Civil Procedure Act* and Order 50 Rule 6 of the Civil Procedure Rules. The Applicant is seeking for the following Orders:
    - A. That this Honourable Court be pleased to admit the Defendant's further amended Defence and Counterclaim dated 7/04/2022.



B. That this Honourable Court be pleased to grant leave to the Plaintiff to file an amended reply to the further amended Defence and Counterclaim.

C. That the cost of the application be in the cause.

2. The grounds are on the face of both applications dated 20/04/2022 and 09/05/2022 and are listed as in paragraph 1-3 and 1-7 respectively. I do not need to reproduce them here.
3. The application dated 20/04/2022 is supported by the affidavit sworn by Eric Gitonga Bengi, a director of the Plaintiff/Applicant herein sworn on 20/04/2022 and the application dated 9/05/2022 is supported by the affidavit sworn by Nehemiah K. Rotich, a director of the Defendant/Applicant herein, sworn on 9/05/2022.
4. Both Applications are opposed. There is a Replying Affidavit sworn by Nehemiah K. Rotich, a director of the Defendant/Respondent Company on 9/05/2022. There is also a Replying Affidavit and a Further Affidavit sworn by Eric Gitonga Bengi, a director of the Plaintiff/Applicant Company on 30/05/2022.
5. On 10/05/2022, the Court directed that both Applications be canvassed together by way of written submissions. The parties submitted and a Ruling date was reserved.
6. By the time of writing this Ruling, it is only the Plaintiff/Applicant who had filed its submissions in regard to the Applications dated 20/04/2022 and the Respondent's Application dated 9/05/2022. The Applicant's submissions are dated 30/05/2022 and filed on 31/05/2022.
7. The Court has now carefully read and considered both the Applications dated 20/04/2022 and 9/05/2022 respectively, plaintiff/applicant's written submissions and the Pleadings in general and finds that the issues for determination is whether the Applications dated 20/04/2022 and 9/05/2022 are merited.
8. The key provisions on amendment of pleadings are contained in Order 8 Rule 3 of the Rules which stipulates as follows;

“3(1) Subject to Order 1, rules 9 and 18, 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.”
9. The law as regards the grant of leave to amend are well settled. The general rule on this subject is 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 *Eastern Bakery v Castelino* (1958) EA 461 (U.) at p.462 wherein the Court held that:-

“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 if the other side can be compensated by costs.”
10. Similarly, in the case of *Central Kenya Ltd vs Trust Bank Ltd & 5 Others* [2000] eKLR, the Court of Appeal pronounced the following principles;

“...the overriding consideration in applications for such 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 party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

11. It is not in dispute that the Further Amended Defence and Counterclaim dated 7/04/2022 was filed without leave of this Court. The contestation is whether the Further Amended Defence and Counterclaim dated 7/04/2022 is properly on record.
12. The court has considered the Defendant’s said application in light of the above guiding principles. The courts are generally liberal in granting applications for leave to amend pleadings sought before the hearing. However, it is the Plaintiff’s contention that close of pleadings was on 8/02/2022.
13. Unless expressly provided for in law, a party who wishes to amend his pleadings may do so with leave of the court. In the *Institute for Social Accountability & Another vs. Parliament of Kenya & Two Others* HCCP No 71 of 2013 [2014] eKLR it was stated as follows:

“(17) 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 Castelino* (1958) EA 461; *Ochieng and Others v First National Bank of Chicago* CA Civil Appeal Number 149 of 1991, *Kenyatta National Hospital v Kenya Commercial Bank Ltd & Another* [2003] 2 EA.”
14. In *Boniface Mutinda Kabaka vs. David Mutua Kamonde Katua & 51 others* [2018] eKLR, the trial judge expressed:

“28. ....Having filed the Amended Defence and Counter- claim without the leave of the court, I find that the Amended Defence and Counter-claim dated 10<sup>th</sup> May, 2016 and filed on the same day is a nullity.”
15. In *Aribo Emmanuel & another vs. Centenary Rural Development Bank Limited & 2 others*, Uganda HCCC No. 14 of 2016, the trial judge expressed as follows:

“The Amended pleadings were without leave of Court filed on the 10th/06/2016 which is clearly beyond the 14 days allowed under the Rule..... and are hereby struck off the record as against the 1st and 2nd Defendants.”
16. Counsel for the Defendant claims that it was an inadvertent mistake that should not be punished on the litigant. Counsel purports that they believed that Mr. Njoroge who was holding brief for Mr. Mereke on 17/02/2022 has also sought leave to amend the Amended Defence and Counterclaim and that the same is regretted.
17. From the Court record, Mr. Njoroge informed the Court that the Defendant had complied with order 11 and that they had filed the amended defence. He added that the Defendant had not filed their witness statement and proceeded to ask for 30 days to do so.
18. Additionally, I note that the Further Amended Defence and Counterclaim was filed on 11/04/2022 and then the Application dated 9/05/2022 seeking to allow the said Further Amended Defence and Counterclaim was filed on 9/05/2022 after the Plaintiff had filed its application dated 20/04/2022 seeking to disallow the Further Amended Defence and Counterclaim.



19. It is true that Article 159(2) (b) of *the Constitution* provides that justice shall be administered without undue regard to technicalities. Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer but I agree with the Plaintiff/Applicant that the Application dated 9/05/2022 is an afterthought.
20. From the record, counsel only sought for 30 days to put in a witness statement. 30 days from 17/02/2022 meant that they should have filed the witness statement on or before 31/03/2022. If they intended to file any application to seek leave to amend their amended defence and counterclaim or seeking to admit them should have done so within the 30 days that had been granted.
21. The common thread from the decisions cited herein is that where leave of court is required, any pleading filed without leave is a nullity and liable to be struck out.
22. Taking into account that the Amended Defence and Counterclaim was filed amended without leave of court and the Further Amended Defence and Counterclaim dated 7/04/2022 without leave, it follows the Further Amended Defence and Counterclaim dated 7/04/2022 is not properly on record and I hereby order it to be struck out.
23. In the final analysis, I find that the Defendant's Application dated 9/05/2022 for leave to further amend his amended defence and counterclaim is devoid of merit and is hereby dismissed with costs to the Plaintiff. The Plaintiff/Applicant's Applications dated 20/04/2022 is partially meritorious and I make the following orders: -
  1. The Further Amended Defence and Counterclaim dated 7/04/2022 be and is hereby struck off the record as being incompetent for having been amended and filed without leave of this Court.
  2. I award costs of this Application to the Plaintiff/Applicant.
  3. The Defendant's Application dated 9/05/2022 is dismissed with costs to the Applicant.

It is so ordered.

**DATED, SIGNED and DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF JUNE 2022.**

**MOGENI J**

**JUDGE**

**IN THE PRESENCE OF:**

Mr. Duncan Otieno holding brief for Mr. Omulamba for the Plaintiff

Ms Njoroge holding brief for Mr. Mereka for the Defendant

Vincent Owuor Court Assistant

