



Nyamai & 291 others v South Eastern University College (Environment & Land Case E001 of 2021) [2022] KEELC 3791 (KLR) (21 June 2022) (Ruling)

Neutral citation: [2022] KEELC 3791 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITUI
ENVIRONMENT & LAND CASE E001 OF 2021**

**LG KIMANI, J
JUNE 21, 2022**

BETWEEN

WILLIAM NYAMAI & 291 OTHERS PLAINTIFF

AND

SOUTH EASTERN UNIVERSITY COLLEGE RESPONDENT

RULING

1. The application subject of this ruling is the Notice of Motion dated 3rd December 2021 brought under Rule 3 of the [Civil Procedure Rules](#) and Section 1A, 1B and 3A of the [Civil Procedure Act](#). The application seeks the following orders: -
 - a. That this Honorable court do grant leave to the Applicants to amend the Notice of Motion dated October 19, 2021 in terms of the annexed draft.
 - b. That this Honorable court do grant leave to the Applicants to amend the Originating Summons dated 19th October 2021 in terms of the annexed draft.
 - c. That costs of this application be provided.

The Application and submissions

2. The application is based on the ground that there was a typographical error in the pleadings that inadvertently described the suit land as LR No.13629 instead of LR No. 13529 and that the error was not discovered until the matter was placed before the court. The Notice of Motion sought to be amended was seeking a temporary injunction against the Respondent from dealing with the suit property pending the hearing and determination of the application and also the suit.
3. Counsel for the Applicants Francis Kalwa stated that he inadvertently captured the wrong land reference number as he was drafting the pleadings which mistake was also carried forward and captured



in the Court order issued on 25th October 2021. Counsel for the Applicants apologized for the mistake and that the mistake was innocent and that it should not be visited upon the Applicants. He also stated that the application has been brought without delay and that the proposed amendments do not introduce a new cause of action.

4. The Applicants filed written submissions and stated that contrary to the Defendant's allegation, the amended pleadings have not yet been filed without leave. The Applicant submitted that the Court has wide discretion to allow any party to amend their pleadings and cited the case of *City Clock Ltd v County Clock Kenya Ltd & Another* HCC No.6 of 2016(2020) eKLR where the judge quoted from the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No.147 of 1991 and laid down principles governing amendment of pleadings. He stated that they have fulfilled the conditions set out therein.

The Respondent's case and submissions

5. The Respondent filed a replying affidavit sworn by Prof. Geoffrey M. Muluvi on 20th December 2021 and stated that the Applicants have filed and served the amended pleadings without leave of the court in disregard of the law and there is nothing on record to show that the filed amended documents are drafts. The Respondent further states that what is stated in the supporting affidavit that Counsel for the Applicant that he inadvertently typed the property number as L. R. No. 13629 instead of L. R. No. 13529 is not true since the Applicants through their representative Mr. William Nyamai swore an affidavit agreeing and confirming the averments therein. That the purported amendment is not a minor alteration but the same is intended to occasion prejudice to the Respondent and defeat its rights of ownership and thus occasion them irreparable damage that cannot be compensated by costs.
6. In submissions the Respondent claims that filing the amended documents before leave is granted by the court is contrary to Order 8 Rule 5(1) of the *Civil Procedure Rules* 2010. They relied on the cases of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* (2018) eKLR and *City Clock Ltd v County Clock Kenya Ltd & Another* HCC No.6 of 2016 (2020) eKLR.
7. The Respondent also stated that it is a public institution that is spending a lot of money on development of its main campus and if this amendment was to be allowed, it would cause serious injustice on the Respondent which cannot be cured by way of compensation and therefore prays for the Notice of Motion Application dated 3rd December to be dismissed with costs.

Analysis and Determination

8. Order 8 Rule 3 provides for amendment of pleadings with leave of the court and states that:

“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.”

Further the *Civil Procedure Rules* provide for the general power to amend under Order 8

(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.”



9. In *Eastern Bakery v Castelino* [1958] EA 461 the Court of Appeal held:

“It will be sufficient to say, for the purposes of the present case, to say that amendments to pleadings sought before the hearing 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. This was the same position in the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR.

11. In my opinion, the Applicants have explained the reason for amending their pleadings as a typographical error in the land reference number of the suit land. I find the explanation to be credible and sufficient. I further find that the application was filed in a timely manner before close of pleadings. The amendment goes to the core of the subject matter which is the suit land, therefore proceeding without the amendment being made would defeat the entire purpose of the suit.

12. With regard to the Respondent’s contention that the Applicants went ahead to amend, file and serve the amended pleadings without leave of the court, it is noted from the court record that this issue was raised in court on 23rd November 2021 as a result of which the Applicant withdrew the application dated 22nd November 2021 and the Amended Originating summons amended on 22nd November 2021 was ordered expunged from the court record for the reason that the amendment had been effected without leave of court. This must be what prompted the filing of the application dated 3rd December 2021 which application is the one under consideration. What remains properly on record then is the application for amendment of the Notice of Motion dated 19th November 2021 and the Origination Summons dated the same date and the draft amendments are attached to the supporting affidavits as is the usual practice when making such an application.

13. The Respondent further claims that granting the application herein will occasion irreparable damage. The court finds that the amendment involves change of the Land reference number of the suit property. The amendment does not of itself amount to proof that the Applicants occupy the suit land as they claim. The said issue is still subject to proof by the Applicants at the time of hearing and final determination by the court and I do not agree with the Respondents that the change of the Land reference number in the pleadings will occasion them irreparable damage that cannot be compensated by an award of costs.

14. In the case of *Joseph ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR Shah JA confirmed that grant of leave to amend is discretionary when he quoted as follows: -“I also agree with what Lord Griffiths said in *Ketteman v Hansel Properties Limited* (1988) 1 ALL ER at page 62:

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors 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.”

15. I find that for the purpose of determining the real question in controversy between the parties herein and in the interests of justice the application herein dated 3rd December 2021 is merited and the same is allowed in the following terms: -

- a. That the Applicant is hereby granted leave to amend the Notice of Motion dated 19th October 2021 in terms of the annexed draft.



- b. That the Applicant is hereby granted leave to amend the Originating Summons dated 19th October 2021 in terms of the annexed draft.
- c. That the two amended documents to be filed and served within seven days from the date hereof.
- d. That the Respondent is at liberty to file any further pleadings in reply to the Amended Notice of Motion and Originating summons.
- e. Costs of this application are awarded to the Respondent.

DELIVERED, DATED AND SIGNED AT KITUI THIS 21ST DAY OF JUNE 2022

HON. L. G. KIMANI

ENVIRONMENT AND LAND COURT JUDGE

Ruling read in open court and online in the presence of-

C. NziokaCourt Assistant

Kalwa Advocate for the Applicant

Mutisya Advocate holding brief for Gichohi for the Respondent

