



Lariak Properties Limited v Gitau & 2 others (Sued as the Administrator of the Estate of the Late Gitau Kio) (Environment and Land Case Civil Suit 1081 of 2015) [2022] KEELC 3594 (KLR) (14 July 2022) (Ruling)

Neutral citation: [2022] KEELC 3594 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 1081 OF 2015
MD MWANGI, J
JULY 14, 2022**

BETWEEN

LARIAK PROPERTIES LIMITED APPLICANT

AND

PETER KIMANI GITAU 1ST RESPONDENT

SUSAN WANJIRU GITAU 2ND RESPONDENT

JOSEPH KIMANI GITAU 3RD RESPONDENT

SUED AS THE ADMINISTRATOR OF THE ESTATE OF THE LATE GITAU KIO

RULING

Background

1. By the Notice of Motion application dated March 8, 2022, the plaintiff/applicant prays for orders that:
 - a. That the plaintiff be granted leave to amend its Complaint filed on October 30, 2015 in terms of the Draft Amended Complaint herewith annexed.
 - b. That the court be pleased to make such further or other orders as it may deem fit.
 - c. That costs of the application be in the cause.
2. The application is predicated on the ground that it has become necessary to amend the Complaint filed on October 30, 2015 in order for the court to determine the real questions in controversy between parties herein and afford the plaintiff/applicant an opportunity to seek additional and/or alternative reliefs in the circumstances.



3. The plaintiff avers that the proposed amendments are made in good faith and will ensure a comprehensive and appropriate resolution of the issues in dispute between the parties. The issues that the plaintiff raises in the proposed amendment and intends to raise at trial are pertinent to the determination of the suit between the parties. Leave of the court is required to effect the said amendments to the Plaint since pleadings are closed. It is the plaintiff's position that no prejudice will be occasioned to the defendants/respondents if the application is allowed as they too will have an opportunity to amend their Defence, if need be.
4. The application is further supported by the affidavit of John K Rotich, a director of the plaintiff/applicant herein, sworn on March 8, 2022 in which he restates the grounds in support of the application herein above stated.
5. The defendants/respondents opposed the application vide the Replying Affidavit sworn by Peter Kimani Gitau on April 13, 2022. The deponent is a co-administrator of the Estate of the Late Gitau Kio together with the 1st and the 3rd defendants/respondents herein.

Replying Affidavit

6. The defendants contend that the suit was filed way back in the year 2015, and parties complied with all pre-trial directions and the suit was subsequently certified ready for hearing sometimes back in 2016. The defendants contend that the application by the plaintiff is an abuse of the court processes coming 8 years after the suit was instituted.
7. The defendants further assert that the administrators of the deceased's estate are strangers to the impugned agreement; in any event it is unenforceable and void. That the agreement cannot form the basis of the amendments sought herein as the same is expired by effluxion of time. By the plaintiff's own admission, the lease had already expired.
8. The deponent further avers that the amendments sought by the plaintiff seeks to introduce a prayer for specific performance for the execution of an already voided contract and the same is therefore legally untenable.
9. Further the defendants contend that the application has been made too late in the day and the same is time barred in any event. The cause of action arose from a contract executed in August 2008 and therefore time barred by dint of section 4 (1) of the *Limitation of Actions Act*; 6 years having lapsed from the date the cause of action accrued. The prayer demanding loss of business rental income from the suit property is equally time barred by dint of section 8 of the *Limitation of Actions Act*.
10. The deponent further states that their late father passed on 2 years after the completion time agreed upon had lapsed. Therefore, the alleged contract had been vitiated during his lifetime. The plaintiff has no claim whatsoever against the defendants as they never received any money towards the purchase of the suit property and the alleged lease renewal. That if any money was paid, then the vendor's advocates is still holding it to be released upon completion of the transfer.
11. That defendants allege that the plaintiff should seek a refund from the said advocates rather than claim for specific performance as sought in the current application. Finally, the defendants aver that the application is just aimed at delaying the matter and frustrate the administration of justice. Therefore, the application ought to be dismissed with costs.



Court's directions

12. The court directed that the application be canvassed by way of written submissions. The parties complied and filed their submissions. The plaintiff/applicant filed its submissions dated May 27, 2022 whereas the defendant/respondents filed its submissions dated June 13, 2022. Both parties reiterated their respective positions backing them up with relevant legal provisions and cited a number of authorities.

The plaintiff's submissions

13. The plaintiff submits that the defendants recently filed a 'Further List and Bundle of Documents' comprising a valuation report for the suit property. That this prompted the plaintiff to undertake an independent valuation of its own to establish the current market value of the suit property as well as the approximate monthly rents from 2013 to 2022. A copy of the said valuation report is annexed to the Draft Amended Plaintiff.
14. The plaintiff's valuation report therefore aims to assist the plaintiff prove its case and broaden the scope of the reliefs available to it including specific performance, lost business rental income and an alternative prayer that the defendants do pay it the market value of the property being kshs 35,000,000/=. The amendment also seeks an alternative prayer for refund of all costs incurred by the plaintiff in securing the renewal of the Lease in respect of the suit property by the Government of Kenya totalling kshs 8,462,314/=.
15. The plaintiff further submits that the amendments sought are not time barred. The defendants filed their valuation report on October 21, 2021 which prompted the plaintiff to undertake an independent valuation; hence the need for the amendment to include a prayer for specific performance, lost business rental income and an alternative prayer for payment of the market value of the property at the sum of kshs 35,000,000/=, as well as refund of all costs incurred in the renewal of Lease.
16. The plaintiff therefore submits that the defendants will not suffer any prejudice. On the issue as to whether the amendments sought to be introduced are time-barred, it was the applicant's submission that the court's discretion is unfettered and is not constrained by the defence of limitation of time. The plaintiff relies on the case of *Harit Sheth and Richard Kariuki t/a Harit Sheth Advocates vs NIC Bank Limited* (2014) eKLR.
17. The plaintiff further argues that its claim and the amendments sought constitutes a continuing breach and arises out of a subsisting contract between the parties over the sale of the suit property. The plaintiff cites the case of *Kuloba vs Oduol* (2001) eKLR to that effect.

Defendants' submission

18. The defendants/respondents submit that the amendments sought are legally untenable and unavailable in equity. Courts will normally allow amendments of pleadings at any stage of the proceedings if it can be done without occasioning any injustice or prejudice to the other party and where such prejudice can be compensated by an award of costs. The right to amend should be cautiously exercised so that no party may not turn his suit or defence into a gamble at the opponent's expense.
19. The defendants further submit that there is no new evidence to inform the amendments sought. They term the plaintiff as a negligent pleader. The delay in seeking to amend is inordinate. That the doctrine of laches extinguishes the applicant's claim as the application is being sought 7 years after the suit was filed.



20. The defendants submit that they have incurred losses that cannot otherwise be compensated by an award of costs as they have been denied their proprietary rights to the suit land. Further, that the plaintiff's actions have stalled and halted the distribution of the estate of the deceased.

Issues for determination

21. Having considered the plaintiff's application herein, the affidavit tendered in rebuttal as well as the rival submissions by the parties, the only issue for determination is whether the applicant's Notice of Motion application seeking amendment of the Plaintiff is meritorious.

Analysis and determination

22. The law as regards the grant of leave to amend, I should say is 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 vs Castelino* (1958) EA 461).
23. In the case of *Joseph Ochieng and 2 others Trading as Aquiline Agencies -vs- First National Bank of Chicago* (1995) eKLR the Court of Appeal citing with approval from *Bullen and Leake and Jacob's Precedents of Pleading*, 12th Edition restated the principles which courts must consider in an application for leave to amend pleadings as follow:-
- a. the powers of the court to allow amendments is intended to determine the true, substantive merits of the case;
 - b. amendments should be timeously applied for;
 - c. power to so amend can be exercised by the court at any stage of the proceedings; (including appeal stages)
 - d. 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;
 - e. the plaintiff will not be allowed to re-frame his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
 - f. the exact nature of proposed amendment sought, ought to be formulated and be submitted to the other side and the court;
 - g. that adjournment should be given to the other side if necessary if an amendment is to be allowed;
 - h. that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed;
 - i. that the proposed amendment must not be immaterial or useless or merely technical;
 - j. that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed;
 - k. 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;



- l. that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.
24. The above-mentioned parameters are not exhaustive as far as the grant of leave to amend plaintiffs is concerned. What that means is that the court has a very wide berth in granting leave to amend. This position was restated in the case of *St Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR
25. The plaintiff alleges that the amendment sought will enable it proof its case and broaden the scope of the prayers available to it. The amendment seeks to include a prayer for specific performance, lost business rental income and an alternative prayer that the defendants do pay the current market value of the property being kshs 35,000,000/= . The amendment also seeks a 2nd alternative prayer for refund of all costs incurred by the plaintiff in securing the renewal of the Lease in aspect of the suit property totalling to kshs 8,462,314/= . The amendments as the plaintiff submits became necessary after the defendants filed a valuation report (albeit without leave of court).
26. The defendants on the other hand oppose the application on the basis that the amendments are time barred, they are introducing new issues and that the delay in seeking the amendment is inordinate.
27. In the Plaint originally filed herein, the plaintiff sought an order to compel the defendants to complete the sale and transfer of a parcel of land known as L R No 209/2490/49 (hereinafter "the suit property") in its favour and in default, the deputy registrar to execute all the necessary documents on behalf of the defendants to enable the said property to be transferred to the plaintiff. In the amendments sought, the plaintiff seeks among other prayers, an order of specific performance against the defendants who are administrators of the estate of the late Gitau Kio.
28. In my view and contrary to the defendants allegation that the plaintiff is introducing new issues, the amendment sought for specific performance is just the same as in the initial prayer. The only thing the plaintiff is seeking to do is to paraphrase the prayer initially sought. The alternative prayer is equally in order as it is a fall-back prayer in the event that the prayer for specific performance is not tenable should the plaintiff's suit succeed.
29. On the issue of the loss of rental income and the costs incurred for the renewal of the lease, the plaintiff allege that the defendants filed a Valuation Report hence prompting it to undertake an independent valuation of the suit property and the rent they would have collected had the contract been fully performed. The defendants have not denied filing the said valuation report out of time. The defendants having filed the said report, the plaintiff is entitled to respond accordingly.
30. As for the amounts claimed for the costs incurred for the renewal of the lease, the plaintiff has all along averred that it incurred some costs for the renewal of the lease. All that the plaintiff seeks to do in the amendment is to specify the said amounts.
31. It is therefore evident that the plaintiff is not introducing any new issue in the amendments sought. The amendments sought herein arises out of a subsisting contract which has been the borne of contention between the parties all along. The defendants cannot allege that they will suffer any prejudice as they have known the plaintiff's case since its inception. In the case of *Simonian v Johar*, (1962) EA. 336, the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.



32. The defendants have further not demonstrated any prejudice that they will suffer if the amendments are allowed. Although the defendants argue that justice will be delayed due to the delayed hearing and the fact that the distribution of the deceased estate has stalled, I have perused the record and the plaintiff is not solely to blame for the delay in the hearing and determination of this suit. Each party has its share of blame in the delay.
33. On the timing of the application, I find that although the amendment is being done several years after filing of the suit, hearing of the suit has not commenced. The delay in seeking the amendment has been explained by the plaintiff/ applicant. The right to a fair trial is guaranteed under article 50 (1) of the Constitution. It is just and reasonable that the applicant be accorded the right.
34. With regards to the allegation that the amendments sought are time barred, the issue was addressed by S Okong'o J, who had the conduct of this matter, in his ruling delivered on April 28, 2017. The learned judge held that;
- “ ... I am not persuaded that the sale agreement which the plaintiff had entered into with the deceased expired by effluxion of time or that the suit is time barred. There is no material before this court in support these contentions. It is true that the agreement for sale was to be completed within 90 days. There was however a provision for extension of this limited period. Whether or not that period was extended is a matter which can only be determined at the trial. The same applies to the defendants' contention that this suit is time barred. Whether or not the suit is time barred would depend on the determination on when the cause of action accrued. Again, the issue cannot be determined on the affidavit evidence before the court.”
35. I fully associate myself with the above position by Justice Okong'o and I have no reason to vary the said position at this point in time. That is an issue that should be canvassed during the hearing of the case and determined alongside the other issues in this case.
36. In addition, the court has inherent power to permit a party to amend his or her pleadings any time before judgement as stated in the above cited case and in the case of *J C Patel V D Joshi 1952 19 EACA 12* where the court stated as follows:
- “The rule of conduct of the court in such a case is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”
37. As held in numerous judicial precedents, a party may be allowed by the court to amend the pleadings any time before trial for the purpose of determining the real question in controversy. In the instant case, I do find that the applicant has reasonably explained the delay and justified the need for the amendments.
38. For the above reasons and having regard to the cited authorities on amendment of pleadings, and the unique circumstances of this case, this court will allow the plaintiff's application as follows: -
- a) The plaintiff is granted leave to amend its plaint.
 - b) The amended plaint to be filed and served within 7 days from the date of this ruling.
 - c) The defendants are granted corresponding leave to amend, file and serve an amended defence, if need be, within 14 days from the date of service of the amended plaint.



d) The costs of the application shall abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 14TH DAY OF JULY 2022.

M D MWANGI

JUDGE

In the virtual presence of:-

Mr Wachira for the plaintiff/applicant.

N/A for the defendants/respondents.

Court assistant- Hilda

M D MWANGI

JUDGE

