



REPUBLIC OF KENYA



**Shah & another v Wanyoike & 2 others (Environment & Land Case
54 of 2019) [2022] KEELC 3903 (KLR) (18 August 2022) (Ruling)**

Neutral citation: [2022] KEELC 3903 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 54 OF 2019**

**BM EBOSO, J
AUGUST 18, 2022**

BETWEEN

ASHWIN PUNJALAL SHAH 1ST PLAINTIFF

MITESH PUNJALAL SHAH 2ND PLAINTIFF

AND

PAULINE MUMBI WANYOIKE 1ST DEFENDANT

DAVID KARANJA MWANGI 2ND DEFENDANT

LAND REGISTRAR THIKA 3RD DEFENDANT

RULING

1. Through a notice of motion dated February 21, 2022, the plaintiffs seek leave to amend their reply to defence and defence to counterclaim. Secondly, they seek leave to file a supplementary bundle of documents and a supplementary list of witnesses. Thirdly, they seek leave to recall the 1st plaintiff (PW1) to give further evidence. Lastly, they seek witness summons relating to one Peter Kago Gachiri t/a Kago Gachiri Advocates and the land registrar – Thika.
2. The application is premised on the grounds set out on the face of the application. It is supported by an affidavit sworn on February 21, 2022 by the 1st plaintiff. The applicants' case is that, pursuant to a ruling rendered by Gacheru J on December 1, 2020, the 1st and 2nd defendants were allowed to file a supplementary bundle of documents after the plaintiffs' key witness had already given his evidence. They contend that the supplementary bundle of documents filed and served by the 1st and 2nd defendants contains evidence that is adverse to their case. It is their case that the new evidence can only be controverted: (i) through an amendment to the defence to the counterclaim dated May 7, 2019; (ii) by filing additional documents; and (iii) by recalling the 1st plaintiff to tender further evidence. They further contend that the proposed amendments are necessary for the determination of the real questions in the dispute.



3. The 1st and 2nd defendants opposed the application through grounds of opposition dated February 24, 2022. They contended that the application was: (i) bad in law, incompetent and meant to delay and derail the hearing and determination of this suit; (ii) frivolous, vexatious and an abuse of the court process as it was purely meant to embarrass the trial process; (iii) an afterthought and brought in bad faith, nine days to the date scheduled for further hearing of the suit; (iv) misleading and portrayed the plaintiffs as litigants who were not prepared to institute a suit in the first place; and (v) an embarrassment to fair trial and brought in violation of Gazette Notice No 189 on adjournment of cases. The 3rd defendant did not file a response to the application.
4. The application was canvassed through written submission dated March 8, 2022, filed by M/s Kaluki Muriu Ndiritu & Company Advocates. Counsel for the applicants identified the following as the three issues that fell for determination in the application: (i) Whether the application was merited; (ii) Whether the application had been overtaken by events; and (iii) Whether prejudice would be occasioned to the respondents.
5. On whether the application was merited, counsel submitted that order 8 rule 5(1) of the *Civil Procedure Rules* gave this court wide discretion in relation to its jurisdiction to grant leave to a party to amend pleadings. Relying on the decision in *Boosire Ongero v Royal Media Services* (2015) eKLR, counsel submitted that the application was merited.
6. On whether the application had been overtaken by events, counsel submitted that the fact that PW1 had already testified did not defeat the application. Counsel cited order 18 rule 10 of the *Civil Procedure Rules* and section 146(4) of the *Evidence Act* and submitted that the court had powers to recall a witness at any stage of the trial. Counsel added that under order 8 rule 5(1) of the Civil Procedure Rules, the court had powers to grant an order permitting amendments to documents for the purpose of determining the real question in controversy between parties to a suit. Counsel added that no prejudice would be occasioned to the defendants if the orders sought in the application were granted.
7. The 1st and 2nd defendants filed written submissions dated March 14, 2022 through M/s Ishmael & Company Advocates. Counsel for the 1st and 2nd defendants identified the following as the three issues that fell for determination in the application: (i) Whether the applicants should be granted leave to file supplementary lists of documents and witnesses; (ii) Whether the applicants should be granted leave to amend their pleadings; and (iii) Whether prejudice would be occasioned to the respondents.
8. On whether the applicants should be granted leave to file supplementary lists of documents and witnesses, counsel submitted that the applicants had not demonstrated that the additional documents could not have been obtained and filed earlier. Counsel added that the applicants had not exhibited the additional documents which they intended to file. Neither had they exhibited written statements of the additional witnesses whom they intended to call. Citing the decision in *Concord Insurance Co Ltd v NIC Bank Ltd* [2013] eKLR, counsel submitted that the applicants were playing lottery with the court.
9. On whether the applicants should be granted leave to amend their pleadings, counsel submitted that the plea for leave to amend pleadings was an afterthought and a delaying tactic. Counsel added that the intended amendments constituted a departure from the original pleadings and introduced a new claim. Counsel contended that if the intended amendments were allowed, they would defeat the defence and counterclaim of the 1st and 2nd defendants.
10. On whether prejudice would be occasioned to the respondents, counsel submitted that the application had been brought after “considerable delay” and the delay had not been sufficiently explained by



the applicants. Counsel added that the orders sought in the application would delay the hearing and disposal of the suit. Counsel urged the court to dismiss the application.

11. I have considered the application, the response to the application, and the parties' respective submissions on the application. I have also considered the relevant legal frameworks and jurisprudence on the key questions that fall for determination in the application. The following are the three key issues that fall for determination in the application: (i) Whether the criteria for grant of leave to amend pleadings has been satisfied; (ii) Whether the criteria for recalling a witness has been satisfied; and (iii) Whether a proper basis has been laid to warrant grant of leave to file a supplementary list of witnesses and a supplementary bundle of documents. I will make brief sequential pronouncements on the three issues in the above order.
12. The first issue is whether the criteria for grant of leave to amend pleadings has been satisfied. The Court of Appeal [A B Shah JA] summarized the relevant criteria in *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) 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; that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment, it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: 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.”
13. I have considered the proposed amendments to the defence to the counterclaim. The first limb of the proposed amendment focuses on the validity of the 1st and 2nd defendant's counterclaim against the plaintiffs in the absence of the Bank of Baroda which holds a legal charge over Thika Municipality Block 9/23 [the suit property]. The second limb of the proposed amendment seeks to introduce the defence of limitation.
14. The plaintiffs on one part and the 1st and 2nd defendants on the other part are waving parallel titles relating to the same piece of land. The title purportedly held by the plaintiff is alleged to have been charged to the Bank of Baroda. In their counterclaim, the 1st and 2nd defendants contend that the title held by the plaintiffs is a fraudulent document and they want it nullified. Even without considering any other aspect of the plea for amendment, the fact that the Bank of Baroda is contended to be holding



a legal charge against one of the parallel titles is a sufficient ground for this court to suo motto invoke its powers under Order 1 rule 10(2) of the *Civil Procedure Rules* and direct amendment to the parties' pleadings to join the Bank of Baroda as an interested party in the primary suit and as a defendant in the counterclaim. In my view, as long as the purported charge in favour of the Bank of Baroda subsists, the Bank is a necessary party to this suit, for the complete and effectual adjudication and settlement of all questions that arise in the suit.

15. Consequently, my finding on the 1st issue is that, arising from the revelation that the Bank of Baroda is alleged to hold a charge against one of the parallel titles relating to the suit property, there is need to amend the plaint and the counterclaim to join the said Bank as an interested party to the primary suit and as a defendant to the counterclaim. The plaintiffs will be at liberty to plead the defence of limitation as contemplated in their proposed amendments.
16. The second issue is whether the criteria for recalling a witness has been satisfied. And the third issue is whether a proper basis has been laid to warrant grant of leave to file a supplementary list of witnesses and a bundle of documents. The second and third issues are related and will therefore be disposed simultaneously.
17. Section 146(4) of the *Evidence Act* grants this court jurisdictions at any stage of the suit to recall any witness who has been examined, for further examination-in-chief or for further cross-examination. Whenever this jurisdiction is exercised, the other party or parties to the suit are entitled to the right of further cross-examination and/or re-examination. Order 18 rule 10 of the Civil Procedure Rules similarly grants this court powers to recall a witness at any stage of the suit.
18. In the present suit, the 1st plaintiff testified on November 26, 2019. He was cross examined and re-examined on the same day. Further hearing of the plaintiffs' case was adjourned to January 29, 2020. On January 29, 2020, hearing did not take off. Hearing was adjourned to May 18, 2020. Similarly, there was no hearing on May 18, 2020 due to the Covid-19 pandemic. Hearing was adjourned to October 5, 2020. On October 5, 2020, counsel for the 1st and 2nd defendants applied for an adjournment on the ground that the advocate seized of the case was indisposed. Counsel further intimated to the court that the 1st and 2nd defendants intended to introduce new documentary evidence. The 1st and 2nd defendants subsequently made an application to seeking leave to introduce new evidence through a supplementary bundle of documents. The application was disposed through orders made by the court on December 1, 2020, granting the 1st and 2nd defendants leave to file and serve a supplementary bundle of documents. The court rendered itself thus:

“Given that the 1st and 2nd defendants have a counterclaim and taking into account the overriding objective of the civil Procedure Act as set out in section 1A and 1B of the said Act and the spirit of article 159(2)(d) of the *Constitution*, justice will be seen to have been done by allowing the introduction of the said document. The plaintiff will be granted time to go through it, give fresh instructions to his counsel and may be recalled for further evidence and comments on the said forensic document. The application is hereby allowed and objection is overruled.”

19. It is therefore clear from the above order which granted the 1st and 2nd defendants leave to introduce new documentary evidence that the plaintiffs were entitled to the right to challenge the new evidence through fresh evidence.
20. It does emerge from the court record that at that point, no order had been made marking the plaintiff's case as closed. It does also emerge that the same day [December 1, 2020], counsel for the 3rd defendant applied to the court to take the evidence of Mr Robert Simiyu who was in court on that day, pending



the filing of a supplementary bundle of documents by the 1st and 2nd defendants. The request was granted and Mr Robert Simiyu testified as DW1. No subsequent hearing took place in the suit. In September 2021, the trial Judge [Gacheru J] left Thika ELC Station on transfer. The application under consideration was subsequently brought in February 2022.

21. It is clear from the foregoing that on December 1, 2020, this court expressly granted the plaintiffs leave to recall their witness (PW1). Secondly, there is no formal order on record indicating that the plaintiffs had closed their case as at the time the 1st and 2nd defendants were granted leave to introduce new documentary evidence. Given the above circumstances, the court is satisfied that the criteria for recalling a witness has been satisfied and that there is a proper basis for allowing the plaintiffs to tender further evidence in response to the new documentary evidence introduced by the 1st and 2nd defendants. Those are my findings on the second and third issues. The plea for witness summons will be dealt with at the time of issuing hearing directions.
22. In the end, the notice of motion dated February 21, 2022 is disposed in the following terms:
 - a) The plaintiff shall within 10 days amend their plaint to join the Bank of Baroda as an interested party in the primary suit. The amended plaint shall be served within the 10 days period.
 - b) Upon service of the amended plaint, the 1st and 2nd defendants shall amend their defence and counterclaim to join the Bank of Baroda as a defendant in the counterclaim, among other amendments.
 - c) The land registrar shall similarly be at liberty to amend his pleadings.
 - d) Directions on a fast-tracked hearing of this suit shall be given on a date to be set by the court.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA ON THIS 18TH DAY OF AUGUST 2022

B M EBOSO

JUDGE

In the Presence of: -

****Mr Nguringa for the 1st and 2nd for the defendants**

Court Assistant: Ms Osodo

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