



Mwai v Kinyua & 2 others; Gatama (Proposed Interested Party) (Environment & Land Case 879 of 2012) [2022] KEELC 12826 (KLR) (30 September 2022) (Ruling)

Neutral citation: [2022] KEELC 12826 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 879 OF 2012
OA ANGOTE, J
SEPTEMBER 30, 2022**

BETWEEN

JOTHAM KANJAH MWAI PLAINTIFF

AND

MICHAEL NDEGE KINYUA 1ST DEFENDANT

DISTRICT LAND SURVEYOR THIKA 2ND DEFENDANT

DISTRICT LAND REGISTRAR THIKA 3RD DEFENDANT

AND

DANIEL GATAMA PROPOSED INTERESTED PARTY

RULING

Background

1. *Vide* a notice of motion application dated November 24, 2021 brought under the provisions of order 51 of the *Civil Procedure Rules*, the 1st defendant/applicant is seeking for the following reliefs;
 - i. That the 1st defendant/applicant be granted leave to amend his defence as set out in the draft amended 1st defendants' statement of defence herein annexed.
 - ii. That this honourable court be pleased to grant leave to the applicant to have the interested party joined in the suit.
 - iii. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of the motion and supported by the affidavit of Michael Ndege Kinyua, the applicant herein who deponed that he has a valid claim against the plaintiff;



that he sold a portion of the suit property to the intended interested party and that the orders sought by the plaintiff will directly affect the intended interested party.

3. According to the defendant/applicant, due to the foregoing, it is necessary to join the intended interested party in the suit to avoid multiplicity of actions and that the plaintiff stands to suffer no prejudice if the orders sought are granted.
4. In response to the application, the plaintiff/respondent filed a replying affidavit where he deponed that the purported amended defence and counter-claim constitute an abuse of court process as they seek to introduce novel issues more than nine years after close of pleadings and that the counter-claim further discloses no cause of action as against him and seeks to delay the determination of the suit.
5. It was deponed by the plaintiff that the 1st defendant benefitted from an illegal and un-procedural sale of land and cannot claim restitution therefrom; that the 1st defendant sold the suit property in contravention of a caution that had been placed thereon on November 1, 2011 and that the interest of justice will be served by joining the interested party to the suit.
6. The 1st defendant filed a further affidavit in which he stated that at the time of the sale, he conducted due diligence wherein he established that there was no encumbrance against the suit property after which he transferred it to the interested party.
7. In response to the further affidavit, the plaintiff/respondent filed a further affidavit and deponed that the draft amended defence and counter-claim is an afterthought and based on an illegality and that contrary to his assertions, the applicant did not conduct the requisite due diligence before transferring a portion of the suit property to the intended interested party.
8. The parties filed submissions which I have considered.

Analysis and Determination

9. Having considered the motion, the affidavits in support and in opposition thereto and submissions, the issues that arise for determination are;
 - i. Whether the intended interested party should be joined in these proceedings?
 - ii. Whether the prayer for amendment is merited?
10. The applicant seeks to have the intended interested party joined into these proceedings. This prayer has not been opposed by the respondent. That being the case, and considering that a portion of the suit property has since been transferred to the proposed interested party, he should be allowed in the suit.
11. Order 8 rule 3(1), (2) and (5) of the [Civil Procedure Rules](#) provide as follows:
 - “(3) Subject to order 1, rules 9 and 10, order 24, rules 3,4,5 and 6 and the following
 - (1) 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.
 - (3) Where an application to the court for leave to make an amendment such
 - (2) as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.



“3(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.”

12. Whereas order 8 rule 5(1) provides;

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.”

13. The principles upon which a court acts in an application to amend pleadings were set out by the Court of Appeal in *Central Kenya Limited v Trust Bank limited* (2000)eKLR which referred to commentaries on *The Indian Civil Procedure Code* by Chittaley and Rao where the learned authors stated as follows with regards to the rule to amendment of pleadings;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol 2, 6th Ed at P 2245, of the *AIR Commentaries on the Indian Civil Procedure Code* by Chittaley and Rao, in which the learned authors state: A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

14. More recently, the Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR affirmed that the law applicable to amendment of pleadings is as stated in Bullen and Leake & Jacob's *Precedents of Pleadings* – 12th Edition and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others v First National Bank of Chicago*, civil appeal No 149 of 1991 thus:

“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 the proposed amendment must not be immaterial or useless or merely technical; 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.”

15. What lends itself from the foregoing is that applications to amend pleadings ought to be liberally and freely granted, unless prejudice and injustice will be occasioned to the opposite party and where costs can appropriately compensate the opposing party, leave to amend should be granted as a matter of course subject to payment of costs.



16. The 1st defendant herein wishes to amend his defence so as to effect joinder of the intended interested party as well as to introduce a counter-claim against the plaintiff. While conceding to the need for the intended interested party, the respondent is opposed to any other amendment on the grounds that the same constitutes an abuse of court process as it seeks to introduce novel issues more than nine years after close of pleadings; that the counter-claim further discloses no cause of action as against him and seeks to delay the determination of the suit and that the 1st defendant is guilty of inordinate delay.
17. Beginning with the opposition on the grounds of delay, it is noted that the application has been filed nine years after the initial plaint and defence and the actions complained of in the draft counter-claim. Clearly, the application has not been filed timeously. Nevertheless, the power to allow amendment of pleadings is within the discretion of the court and where a court is convinced that there exists justifiable cause to amend, it may nevertheless allow the amendment notwithstanding that the application was not filed timeously.
18. In the draft counter-claim, the 1st defendant contends that as a result of the plaintiffs' interference with the suit property and the halting of his construction thereon, he suffered losses and damages amounting to Kshs 3,474,000, particulars of which include loss of rent for the house under construction since 2012.
19. Having regard to the foregoing, the court is of the view that the draft counter-claim does not derogate from the main issue in dispute, being ownership of the suit property. The counter-claim only asserts that the plaintiff, while evicting the 1st defendant from the suit property, destroyed his premises.
20. In this court's considered view, the proposed amendment is meant to assist the court in making a determination on the issues raised in the suit herein on merit. Considering that the matter has not proceeded for hearing, the plaintiff is at liberty to respond to the allegations raised in the proposed counter claim, and cross examine the 1st defendant on the same.
21. As to the contention that the 1st defendant's claims are time barred, this court opines that this is a question that can only be established once the intended amended statement of defence and counter claim and a response thereto have been filed. The court cannot address that issue at this stage.
22. In the end, the court finds that the application dated November 24, 2021 is merited and allows it in the following terms;
 - i. Leave be and is hereby granted to the 1st defendant/applicant to amend his defence as set out in the draft amended 1st defendant's statement of defence within 14 days of this ruling.
 - ii. The proposed intended interested party be and is hereby joined in this suit.
 - iii. The costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED IN NAIROBI VIRTUALLY THIS 30TH DAY OF SEPTEMBER, 2022.

O. A. Angote

Judge

In the presence of;

Jonathan Kanjah for the Plaintiff

Ms Ngetich holding brief for Mitei for 1st Defendants

Court Assistant - June

