



REPUBLIC OF KENYA



KENYA LAW
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**Marete v Mwidau & another (Environment & Land Case 224 of 2021)
[2022] KEELC 13348 (KLR) (27 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 224 OF 2021
NA MATHEKA, J
SEPTEMBER 27, 2022**

BETWEEN

JANE GAKII MARETE APPLICANT

AND

AHMED ABDALLA MWIDAU 1ST RESPONDENT

PRIME BANK LIMITED 2ND RESPONDENT

RULING

1. The application is dated 12th May 2022 and is brought under Sections 3A and 100 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 8 Rules 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Article 159 of *the Constitution* of Kenya (2010) seeking the following orders:
 1. That this application be certified as extremely urgent, service thereof be dispensed with and the same be heard ex parte in the first instance.
 2. That this Honourable Court be pleased to hear and determine this application in priority to the 1st Defendant's application dated 17th March, 2022.
 3. That the Honourable Court be pleased to grant the Plaintiff leave to amend his Plaintiff in terms of the annexed Draft Amended Plaintiff.
 4. That the annexed Draft Amended Plaintiff be deemed as duly filed and served, upon payment of the requisite court fees.
 5. That costs of this Application be in the cause.
2. It is based on the grounds that it is necessary to amend the Plaintiff to comprehensively and articulately capture all the real issues in controversy, and all the remedies being sought by the Plaintiff, so as to have this matter adjudicated upon and determined once and for all. The amendments sought by the Plaintiff



simply seek to cover and address all issues in controversy, and which issues are directly and substantially relevant to her claim. The amendments sought arise out of the same facts or substantially the same facts; hence no prejudice shall be visited upon the Defendants. The issues and/or facts sought to be introduced by the intended amendment are already covered by the evidence filed by the parties. This application deserves to be heard and determined in priority to the 1st Defendant's application dated 17th March, 2022, for the reason that the 1st Defendant's application dated 17th March, 2022 seeks final orders at an interlocutory stage, and which orders shall effectively dispose the instant suit. It is therefore prudent and just that this application for amendment be heard in priority to the 1st Defendant's aforesaid application. This application has been made in a timely-fashion, pre-trial directions having not been issued and the suit having not been fixed for hearing. This application has been made in good faith and with the sole intention of all real issues in controversy. In the event that his application is not allowed, the Plaintiff shall be occasioned substantial loss and hardship thereby suffering grave injustice. It is in the interest of justice and fairness that the Plaintiff be granted leave to amend the Plaintiff so as to plead the whole of her claim she is entitled to make in respect of her cause of action. It is in the interest of justice that the prayers sought herein be granted.

3. The 1st Defendant stated that the purported relationship with the Plaintiff is contractual based on the contents of an Agreement of Sale dated 4th June, 1998 which he denies to have ever signed and indeed it is a forgery, a copy of the Agreement of Sale is attached marked as "AAM-1". That from the clear terms and conditions of the purported Agreement of Sale there was absolutely no room to infer any issues of Trust ever arises or at all. That he took a loan from the 2nd Defendant which he is now servicing and to date has paid a total sum of Kshs.1,232,750/= to the 2nd Defendant and his Contractual Agreement with the 2nd Defendant has nothing to do with the Plaintiff. Indeed the Plaintiff has no contractual obligation with the 2nd Defendant and hence the issues of estoppel, acquiescence to waiver, conspiracy, connivance and on condonation does not arise as alleged in the purported intended amended Plaintiff. The allegations are purely afterthought issues which does not go to the root of the issues between me and the Plaintiff (which is purely governed by an Agreement of Sale) and between him and the 2nd Defendant. Attached a copy of letter dated 22nd April, 2022 which is at pages 4 to of Exhibit marked as "AAM-1" and a reply to the same dated 28th April, 2022 which is on page 7 of the Exhibit marked as "AAM-1" showing that he has already servicing the loan with the 2nd Defendant and he does not need the help of the Plaintiff to do so.
4. That the Plaintiff has previously filed other matters related to this issue and at no time did she ever raise the issues she wants now to raise in the intended Amended Plaintiff and hence the intended Amended Plaintiff is totally belated and a clear afterthought meant to fill gaps in the Plaintiff's Case that might arise during the hearing. The Suit in any event is time barred taking into account the claim is based on a contract that was signed on 4th June, 1998 which is twenty-four (24) years ago. This Suit was filed on 4th November, 2021 it was a period of after twenty-three (23) years, hence the Plaintiff's Suit is indeed time barred. Any purported amendments cannot cure the issue of the matter having been time barred.
5. That for the sake of clarity he attached the Plaintiff's previous matters where the issues she wants to raise were never mentioned:-A copy of the Originating Summons in Case No. ELC No. 296 of 2016 - on pages 8 to 12 of the Exhibit marked as "AAM-1". A copy of the Judgement in above- Case on pages 13 to 18 of the Exhibit marked as "AAM-1". v A copy of the Judgement in Originating Summons No. ELC 28 OF 2012 which is on pages 19 to 26 of the Exhibit marked as "AAM-1" from the above matter the Plaintiff at no time did she ever aver, refer and or use the intended issues related to the intended Amended Plaintiff.



6. The 2nd Defendant submitted that the intended amendment of the pleadings are intended to fill the gaps in the Plaintiff's case or to bring a new cause of action when in fact the suit is time barred. That the 1st Defendant has a contractual Agreement with the 2nd Defendant which has nothing to do with the Plaintiff. That it is not true that the Plaintiff has approached the 2nd Defendant with a view to redeeming the mortgage debt outstanding.
7. This court has considered the application and the submissions therein. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court as follows: -
 - (1) 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.
8. Further, Order 8, Rule 5 gives the court the general power to amend.
 5. (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 the case of *Institute for Social Accountability & another vs Parliament of Kenya & 3 others* (2014) eKLR the court held that;

The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
10. In the case of *Central Kenya Ltd vs Trust Bank & 4 Others*, CA No. 222 of 1998, the court stated that, the guiding principle in amendment of pleadings is that:

all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”
11. It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. It is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added even at the appellate stage. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings in the case of *AAT Holdings Limited vs Diamond Shields International Ltd* (2014) eKLR, the court cited the principles as set out by the Court of Appeal in *Central Kenya Ltd Case No. 222 OF 1998* as shown below:-



- (i) That are necessary for determining the real question in controversy.
- (ii) To avoid multiplicity of suits provided there has been no undue delay.
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- (iv) That no vested interest or accrued legal rights is affected; and
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

12. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered but should be exercised judicially upon the foregoing defined principles. I have perused the proposed amended plaintiff and under paragraph 7a the Plaintiff introduces the issue of the 1st Defendant holding the property in trust for her and the issue of breach of the said trust and seeks a declaration on the same. I find that this introduces a new cause of action which is substantially different in character. I find that there have been other matters touching on the suit subject matter in the past and find that this is an afterthought and the Plaintiff is acting in bad faith. I find that the application dated 12th May 2022 is not merited and I dismiss it with costs.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 27TH DAY OF SEPTEMBER 2022.

N.A. MATHEKA

JUDGE

