



**Bajaber Limited v Kenya Revenue Authority; Commissioner of Lands (Third party)
(Civil Suit 315 of 2000) [2022] KEELC 13746 (KLR) (26 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13746 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 315 OF 2000
M SILA, J
SEPTEMBER 26, 2022**

BETWEEN

BAJABER LIMITED PLAINTIFF

AND

KENYA REVENUE AUTHORITY DEFENDANT

AND

COMMISSIONER OF LANDS THIRD PARTY

*(Application for extension of time to file amended defence and counterclaim;
leave having been granted to file amended defence and counterclaim but none
filed within the specified period; leave granted but subject to payment of costs)*

RULING

1. This ruling is in respect of the application dated June 30, 2021 filed by the defendant. The application seeks the following orders :-
 - i. That the defendant be granted extension of time within which to file and serve its Amended Statement of Defence and Counterclaim as per leave granted by the Court on November 18, 2011.
 - ii. That the defendant to file and serve the Amended Statement of Defence and Counterclaim within seven (7) days of the Order.
 - iii. That the costs of this application be in the cause.
2. The application is opposed by the plaintiff.



3. To put matters into context, this suit was commenced through a plaint filed on July 11, 2000. In the plaint, the plaintiff asserted to be the registered owner of the leasehold title comprised in the Plots Numbers 9592 and 9593/Section I/Mainland North, for a term of 99 years from July 1, 1995. She complained that in the months of May and June 2000, the defendant forcefully entered the suit properties and commenced construction of a wall and building. In the suit, the plaintiff seeks orders inter alia to permanently restrain the defendant from the suit properties and for an order to compel the defendant to demolish her structures.
4. The defendant filed defence on August 15, 2000. In it, she denied that the plaintiff was the proprietor of the suit properties and pleaded that the properties are owned by the defendant. She averred that the wall and developments complained of were put up in the year 1995 for her training school. Through an application filed on April 15, 2008, the defendant applied to issue a Third Party Notice to the Commissioner of Lands, which application was allowed on October 17, 2008, and the Commissioner of Lands was consequently joined to the suit as Third Party.
5. The matter proceeded for hearing on October 21, 2009 when the plaintiff presented her director as her witness. He testified in chief and was partly cross-examined, for he was stood down before completing his cross-examination. The hearing was adjourned to December 14, 2009. Before that date, there was filed an application, by the defendant, dated December 1, 2009 (sometimes in the proceedings erroneously referred to as an application dated December 7, 2009) seeking leave to amend the defence. The nature of the proposed amendment was to elaborate in the defence the manner in which the defendant acquired proprietary interest in the suit properties and also to introduce a counterclaim. The counterclaim sought to sue the plaintiff and her directors, and Bank of Africa Limited who held a charge over one of the properties. The counterclaim inter alia sought a declaration that the suit properties are owned by the defendant and for an order of cancellation of the title of the plaintiff. That application was heard but dismissed by Odera J, through a ruling delivered on April 26, 2010, inter alia because the judge was not persuaded that the chargee was a necessary party.
6. Undeterred, the defendant filed another application dated October 13, 2010 again seeking to amend the defence. This time, the amendment inter alia sought to have a counterclaim, solely against the plaintiff, seeking cancellation of the title of the plaintiff to the suit properties. The application was again heard by Odera J, who allowed it in a ruling delivered on November 18, 2011. The court directed that the amended defence and counterclaim be filed within 14 days of the said ruling.
7. An amended defence and counterclaim dated December 15, 2011 was filed. However, that pleading did not conform to the leave granted on November 18, 2011, but instead, the pleading was in line with what the defendant wished to file as demonstrated in the draft amended defence annexed to the application dated December 1, 2009, which application was dismissed. In other words, what was filed included a counterclaim against the plaintiff and her directors, and Bank of Africa Limited as chargee, against what the court had directed. The amended pleading was served sometimes in November 2018, and immediately it was served, an application was filed seeking to have the amended defence and counterclaim struck out for failure to conform to the leave granted on November 18, 2011. I heard that application and allowed it through my ruling of May 6, 2021. It was apparent to me that what the defendant had filed was not commensurate to the leave that the court gave but was in fact filing the pleading that the court rejected in the ruling of April 26, 2010.
8. It is following that ruling that the defendant has now come back to court, through this application, seeking an extension of time to file the amended defence and counterclaim that was allowed on November 18, 2011. It will be recalled that the said pleading was to be filed and served within 14 days of the ruling.



9. The main ground upon which the application is based is that it was due to inadvertence that the amended pleading was not filed and served as directed. The application is supported by the affidavit of Grishon N Thuo, who is also counsel appearing in the matter instructed by the law firm of M/s Njoroge Regeru & Company Advocates. He has deposed that due to inadvertence on the part of counsel, the wrong pleading was filed and served. He avers that this was caused by the two applications to amend being filed in quick succession. He has added that the issue in court is of public interest.
10. The plaintiff has opposed the application through the replying affidavit of Swaleh Abubakar Ahmed, a director of the plaintiff. He has pointed out that leave to amend was granted on November 18, 2011 and that the amended pleading was to be filed and served in 14 days, which was not done, but instead the defendant filed a rejected pleading, and even then, only served it in the year 2018. He contends that more than 10 years have lapsed since leave was granted on November 18, 2011, and that this delay is inordinate and unconscionable, and militates against exercise of judicial discretion in favour of the defendant.
11. In his submissions, Mr Asige, learned counsel for the plaintiff, submitted that the order to amend ceased to have effect, as neither the amended defence and counterclaim were filed as directed. Counsel referred me to Order 8 Rule 6 which provides as follows :-

6. Failure to amend after order.

Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.

Counsel also relied on the case of *Alice Njeri Waminga vs Central Bank of Kenya* (2007) eKLR, where Khamoni J *inter alia* held as followed :-

“it may as well be said that even if this Court were to extend the time to amend the Plaintiff, the very time to extend is no longer there because the same expired years back, in fact after seven days from the date of leave to amend was granted, and you cannot humanly and in law extend what does not exist.”

12. Mr Asige added that the application has been made after unreasonable and inexcusable delay and relied on the case of *Phoebe Wangui Gakui vs Mohamed Abmbed Gabarye* (2021) eKLR where an application to reinstate suit was dismissed after being made after lapse of one and a half years. Counsel pointed out that in this instance, the delay is of 10 years. In addition, counsel submitted that there will be immense prejudice to the plaintiff which cannot be compensated by way of damages.
13. To support the application, Mr Thuo, learned counsel for the defendant, more or less reiterated what was in his affidavit, i.e, that the wrong pleading was filed and served out of inadvertence. He relied on the case of *Mwangi S Kimenyi vs Attorney General & Another* (2004) eKLR where it was *inter alia* held that “prolonged delay alone should not prevent the court from doing justice to all the parties.” He also relied on other authorities which emphasise that mistake of counsel ought not to be visited upon the parties. He further referred me to Section 95 of the *Civil Procedure Act*, which gives court discretion to enlarge time.
14. I have considered all the above.
15. Mr Asige’s reliance on Order 8 Rule 6 is correct, though it will be seen that within that rule, there is power given to the court to extend the time for the filing of an amended pleading out of the time that



had been specified. In other words, the court still retains discretion to extend the time for the filing of the amended pleading. This is a court's discretion, which, as in all other instances where the court is granted discretion, needs to be exercised judiciously taking into consideration all relevant factors.

16. I observe that the main reason upon which this application is based is that it was due to inadvertence of counsel that the wrong pleading was filed. It is alleged that this was a result of the two applications to amend being filed in quick succession. I am not persuaded. The fact that the wrong pleading was filed and served was pointed out in the application dated October 29, 2019. I note that instead of the defendant conceding that it had filed the wrong pleading, it proceeded to oppose that application, and attempt to justify its actions of filing a pleading that had already been rejected by court. It was never, within that application, submitted that the wrong pleading was filed out of inadvertence of counsel. If a wrong pleading had been filed out of inadvertence, you would have expected that to be mentioned within the application dated October 29, 2019. You would expect the defendant to accept its error and commit to file the proper pleading when the said application was being canvassed. A party who commits a mistake and who is acting in utmost good faith comes out clean immediately her error is pointed out. This is not what happened here. I am not therefore persuaded by the reasons given herein, that the cause of the delay was due to inadvertence or a mistake of counsel. As far as I can see, the assertion of inadvertence and mistake of counsel is clearly an afterthought. With due respect, I think the defendant and her counsel were simply looking for an excuse that would curry favour with the court and I am not persuaded as to the genuineness of the reasons given. A court would not wish to exercise its discretion to a party who has deliberately attempted to mislead the court and who is clearly not acting in good faith which is exactly the case here.
17. I would out rightly have dismissed this application if it was not for the fact that there appears to be a public element to it. The position of the defendant is that the suit properties are public land reserved for public use through the institution of the defendant. I think it is only fair to the public that this claim be ventilated. If I am to shut out the defendant, I will essentially be shutting out the public from presenting its claim to the land. It is for that reason that I will exercise my discretion in favour of the defendant and extend the time given by court for the defendant to file and serve its amended defence and counterclaim. I now direct the defendant to file and serve her amended pleading within 7 days from the date hereof (subject to the orders herebelow on payment of costs). If this is not done, then the leave to amend will lapse and the defendant will have to proceed on the basis of its original defence.
18. Having said that, it would be remiss for this court not to rebuke the defendant and her counsel for the tardiness that they have demonstrated in this matter. Even assuming that the defendant filed the correct pleading (which was not the case), the amended pleading was prepared on December 15, 2011, way outside the 14 days given on November 18, 2011. It was eventually served in November 2018, about 7 years later. When I gave directions on the hearing of the subject application, I directed the applicant's counsel to file submissions 7 days after being served with the replying affidavit. The replying affidavit was filed on February 24, 2022. No submissions were forthcoming from counsel for the applicant within the 7 days given. In fact, given that no submissions were forthcoming from counsel for the applicant, we ended up with the untidy situation where the respondent's counsel is the one who first filed submissions on March 10, 2022.
19. I have exercised my discretion in favour of the defendant, but the defendant cannot continuously hope for the court to close its eyes to its faults, and especially its failure to abide by court orders. I have already mentioned that the defendant does not deserve the discretion of this court given its reprehensible conduct and I have only exercised my discretion solely because of the public element displayed. It is also apparent that great inconvenience has been caused to the plaintiff. For those reasons, the defendant will not escape sanction. I will order the defendant to pay throw away costs to the plaintiff in the sum



of Kshs 100,000/= within 30 days. If the payment of the thrown away costs is not done, within the specified time (need I emphasise ?), then the leave hereinabove granted will be of no effect, and the application herein will stand dismissed with costs. Any amended pleading filed will also be struck out.

20. Orders accordingly.

DATED AND DELIVERED THIS 26TH DAY OF SEPTEMBER 2022.

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

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