



**Murphy Chemicals E.A Ltd v Hashba Company Limited & 7 others (Environment & Land Case 908 of 2012) [2022] KEELC 13844 (KLR) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 13844 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 908 OF 2012  
JO MBOYA, J  
SEPTEMBER 22, 2022**

**BETWEEN**

**MURPHY CHEMICALS E.A LTD ..... APPLICANT**

**AND**

**HASHBA COMPANY LIMITED ..... 1<sup>ST</sup> RESPONDENT**

**ABDALA SAID AHMED ..... 2<sup>ND</sup> RESPONDENT**

**EVANS MBOGO ..... 3<sup>RD</sup> RESPONDENT**

**ABDIRAHAMAN MOHAMED ABDI ..... 4<sup>TH</sup> RESPONDENT**

**AINU SHAMSI AUTOMOBILE & HARDWARE LTD ..... 5<sup>TH</sup> RESPONDENT**

**COMMISSIONER OF LANDS ..... 6<sup>TH</sup> RESPONDENT**

**PRINCIPAL REGISTRAR OF TITLES ..... 7<sup>TH</sup> RESPONDENT**

**DIRECTOR OF SURVEY ..... 8<sup>TH</sup> RESPONDENT**

**RULING**

**Background**

1. Vide the notice of motion application dated the June 27, 2022, the plaintiff/applicant herein has approached the court seeking for the following reliefs;
  - i. This honourable court be pleased to grant to the plaintiff/applicant leave to amend its plaint dated the November 28, 2012 in the manner indicated in the annexed amended plaint.
  - ii. The said amended plaint be deemed as hereby filed and served within seven days from the date of the order hereto.



- iii. The defendants/respondents do have corresponding leave to file any amended pleadings, if need be.
  - iv. This honourable court be pleased to grant leave to the plaintiff/applicant to file the annexed further list of witnesses and a supplementary list of documents.
  - v. The plaintiff/applicant be granted leave to re-call its witness, Mr Kimani Mathu, for the sole purposes of production of the supplementary list of documents.
  - vi. Cost of this application to abide the main cause.
2. The subject application is premised and/or based on the various grounds which have been enumerated in the body of the application and same is further supported by the affidavit of one Kimani Mathu, who states that same is a director of the plaintiff company and thus authorized to act on behalf of the plaintiff/applicant.
  3. Upon being served with the subject application only the 4<sup>th</sup> defendant/respondent filed grounds of opposition in opposition to the notice of motion application herein.
  4. For the avoidance of doubt, the rest of the defendants/respondent did not file any responses either by grounds of opposition nor a replying affidavit.

### **Submissions By The Parties:**

#### **a. Submissions by the plaintiff/applicant:**

5. The subject application came up for hearing and was indeed heard vide oral submissions on the July 27, 2022.
6. On behalf of the plaintiff/applicant, learned counsel submitted that the subject application has been influenced and/or necessitated as a result of the enactment/promulgation of the Constitution of Kenya 2010 and a plethora of legislation(s), that arose following the promulgation of the said constitution.
7. Further, learned for the plaintiff/applicant added that following the promulgation of the Constitution 2010, certain offices and departments of the Government which had hitherto existed were abolished and replaced by new offices and independent commissions.
8. Premised on the foregoing, learned counsel for the plaintiff/applicant therefore submitted that as a result of the abolition of certain offices/departments of the government and the birth of new offices and independent commissions, it was necessary to amend the plaint and remove the names of the abolished offices/government departments.
9. At any rate, counsel further added that if the abolished offices are not removed from the pleadings and new bodies/independent commissions impleaded, there is a likelihood that ultimate orders of the honourable court may not be enforceable.
10. Secondly, learned counsel for the plaintiff/applicant also submitted that the intended amendment would enable the plaintiff/applicant to bring fourth all the issues in controversy, as well as all the parties affected therewith, under on roof for purposes of effective and effectual determination, once and for all.
11. In this regard, learned counsel for the plaintiff added that the amendment will also be helpful to avert a plethora and/or multiplicity of suits, some of which may seek to address the omitted issues, unless same are brought on board.



12. Thirdly, learned counsel for the plaintiff/applicant added that the intended amendment shall not prejudice the defendant/respondents in any way. For clarity, counsel pointed out that the defendants/respondents shall be at liberty to amend their statement of defense, if and when deemed necessary.
13. Nevertheless, counsel also pointed out that in the event of any prejudice and/or inconvenience arising, same is capable of being atoned for or remedied by way of costs.
14. Fourthly, it was the submissions of learned counsel for the plaintiff that the intended amendment is not calculated to introduce any new cause of action at all. For the avoidance of doubt, counsel invited the court to take cognizance of the proposed amendment and to appreciate that the amendment is only geared towards replacing the abolished government offices and also to eliminate certain prayers in the plaint, whose presence had been rendered superfluous.
15. Finally, learned counsel for the plaintiff/applicant acknowledged that indeed the application ought to have been filed earlier and with exercise with due diligence. However, counsel contended that the delay, which was admitted was nevertheless, not inordinate.
16. Based on the foregoing, learned counsel for the plaintiff implored the honourable court not to drive away the plaintiff from the seat of justice, merely on the basis of the delay, which is regretted.

**b. Submissions by the 5<sup>th</sup> defendant/respondent:**

17. Learned counsel for the 5<sup>th</sup> defendant/respondent commenced his submissions by admitting and acknowledging that same had not filed any responses to the application. In this regard, counsel underlined that his submissions will only relate to issues of law.
18. Having stated as above, counsel for the 5<sup>th</sup> defendant/respondent submitted that the application before hand has been brought with unreasonable and inordinate delay, which delay has not been explained.
19. In any event, counsel submitted that the Government offices and departments, which are sought to be replaced *vide* the amendments were abolished as at the August 27, 2010, when the constitution was promulgated.
20. Premised on the foregoing, it was pointed out that the subject suit, which was filed in the year 2012 therefore ought to have taken into account the changes brought forth by the Constitution, 2010.
21. Secondly, counsel for the 5<sup>th</sup> defendant/respondent submitted that even though the plaintiff/applicant has acknowledged the delay in the filing of the subject application, same has not proffered any reason why the application was not made with due promptitude.
22. Thirdly, it was submitted on behalf of the 5<sup>th</sup> defendant/respondent that the application herein has been brought in bad faith and that same is solely intended to defeat the pertinent issues that arose during the cross examination of the plaintiff's witness.
23. In the premises, counsel added that the purpose of the current application is to fill the gaps that were discerned and/or became evident during the cross examination.
24. Fourthly, learned counsel for the 5<sup>th</sup> defendant also added that the intended amendment is calculated to bring fourth and/or introduce new causes of action, which are at variance with what was hitherto pleaded.
25. In view of the foregoing, learned counsel for the 5<sup>th</sup> defendant/respondent has therefore contended that the subject application ought not to be allowed. For clarity, counsel stated that the intended amendment shall unduly prejudice the 5<sup>th</sup> defendant.



26. In support of his submissions learned counsel for the 5<sup>th</sup> defendant/respondent cited and relied on *inter-alia* the case of [Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd](#) (2013)eKLR, [Central Bank of Kenya v Trust Bank Ltd \(in liquidation\)](#) (2000)eKLR and [Catherine Koriko & 3 others versus Evaline Rosa](#) (2020)eKLR.

### **c. Submissions By Counsel for the 4<sup>th</sup> Defendant**

27. Counsel for the 4<sup>th</sup> defendant/respondent opened his submissions by starting that same wishes to adopt and rely on the submissions rendered by counsel for the 5<sup>th</sup> respondent.
28. Further, learned counsel proceeded to state that after listening to the able submissions by the learned counsel for the 5<sup>th</sup> respondent, same was not adding any new issues

### **Issues for Determination:**

29. Having reviewed the notice of motion application dated the June 27, 2022, the supporting affidavit thereto and the grounds of opposition filed by the 4<sup>th</sup> defendant/respondent; and having similarly appraised the oral submissions that were made by the respective counsel, the following issues do arise and are thus pertinent for determination;
- i. Whether the proposed amendment shall introduce any new cause/causes of action, contrary to the existing pleadings.
  - ii. Whether the defendants/respondents shall suffer any prejudice and if so whether the prejudice is compensable by an award of costs.
  - iii. Whether the subject application has been made with inordinate delay and if so, whether the delay is such that the intended amendments ought to be declined.

### **Analysis and Determination**

#### **Issue number 1 whether the proposed amendment shall introduce any new cause/causes of action, contrary to the existing pleadings.**

30. The starting point in answer to the first issue herein is by acknowledging and affirming the established principle as far as amendments are concerned and essentially, to the effect that any amendment that proposes to introduce a new cause of action, contrary to the existing cause of action, ought to be declined.
31. To underscore the foregoing principle, it is apt to recollect the observation of the Court of Appeal *vide* the decision in the case of [Central Kenya Ltd v Trust Bank Ltd & 5 others](#) [2000]eKLR, where the court stated and observed as hereunder;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol2, 6th Ed at P2245, of the AIR Commentaries on the *Indian Civil Procedure Code* by Chittaley and Rao, in which the learned authors state:

“that a party is allowed to make such amendments as maybe 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.



32. Thirteen years later, the Court of Appeal revisited the same principle and highlighted the aspect that an amendment ought not to alter the character of the existing cause of action.
33. For coherence, the re-visitation was *vide* the case of [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) [2013] eKLR, where the Court of Appeal stated as hereunder;

The law on amendment of pleading in terms of section 100 of the [Civil Procedure Act](#) and order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others v First National Bank of Chicago, civil appeal No 149 of 1991 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 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.” (underline supplied)

34. Having established and reinforced the foregoing trite principles, the question for determination is whether the proposed amendments are disposed to alter the character of the cause of action, that was hitherto pleaded or to introduce a new cause of action.
35. To be able to answer the question herein, one needs to take a glance at the proposed amended plaint, which has been attached to the supporting affidavit.
36. For coherence, I have looked at the draft amended plaint and the first aspect of the proposed amendment relates to the elimination of the 6<sup>th</sup> and 7<sup>th</sup> defendant/respondent and their replacement with the respective offices that took over and/or assumed the functions of the previous officers/departments.
37. The second aspect of the proposed amendments reflects and relates to the deletion of two (2) prayers which are contained in the existing plaint.
38. According to the plaintiff/applicant, the two (2) prayers had sought that the plaintiff be registered as the owner of the suit property, but it is now contended that same are superfluous and otiose, insofar as the plaintiff/applicant is already registered as the owner of the suit property.
39. Having looked at the proposed amendment, whose details are amplified in the preceding paragraphs, it is difficult to appreciate the basis upon which the 4<sup>th</sup> and 5<sup>th</sup> defendant/respondents contend that the proposed amendments shall introduce new causes of action.
40. To my mind, the proposed amendments other than the deleting the names of the offices/government departments which have since been abolished and replacing same with the existing offices/corresponding bodies on one part and deleting two (2) prayers that are deemed obsolete, there is no any new addition.



41. In the premises, I find and hold that the proposed amendments are not altering the existing texture/ character of the cause of action, or is there any new cause of action being introduced.
42. Further, I find and hold that the import of the proposed amendment is indeed to bring on board all the affected Parties on one hand; and to clarify the issues in controversy, for ease of determination.
43. In a nutshell, my answer to issue number 1 is in the negative.

## **Issue Number 2**

### **Whether the Defendants/Respondents shall suffer any prejudice and if so, whether the prejudice is Compensable by an award of costs.**

44. Learned counsel for the 4<sup>th</sup> and 5<sup>th</sup> defendants/respondent, who were the only counsel who appeared before the court and participated in the hearing of the application, submitted that their respective clients would be disposed to suffer grave injustice and prejudice.
45. Nevertheless, even though counsel submitted on the likelihood of suffering grave injustice, same however did not venture to identify, the aspects, if any, of the prejudice and/or injustice to be suffered.
46. To the contrary, the plaintiff/applicant submitted that once the amendment is allowed, the defendants would be at liberty to file and serve amended statement of defense, where appropriate.
47. Besides, it is common knowledge that once the amended pleading are filed, the parties herein shall also be at liberty to file further list of witnesses, witness statement and bundle of documents, to respond to any new/additional aspect, that may become necessary.
48. Other than the foregoing, counsel for the 5<sup>th</sup> respondent, pointed out that the proposed amendment has been inspired or necessitated by the cross examination of the plaintiff and hence what the plaintiff/ applicants seeks to achieve is to plug the gaps that were discerned during the cross examination.
49. The contention may or may not be true, that the point worthy of consideration is whether the proposed amendment can defeat or better still delete evidence that already forms part of the record.
50. To my mind, the proposed amendment are not bound to defeat or delete the evidence that has since been taken and recorded by the honourable court. For clarity, such evidence will remain on record and can be relied on or be invoked by either party.
51. Notwithstanding the foregoing, the fears and apprehension by counsel for the 5<sup>th</sup> defendant, are not likely to come fruition, because the plaintiff/applicant has indicated *vide* prayer 5 that same will not be inclined to start the matter *de novo*, save that same would be inclined to recall the plaintiff for a limited purpose of producing supplementary list of documents only.
52. Owing to the foregoing, I find and hold that the defendants/respondents shall not suffer any prejudice and if there is any prejudice, same is compensable by an award of costs.
53. To fortify this observation, I adopt and endorse the holding in the case of *Eastern Bakery v Castelino*, (1958) EA461 (U) at p462:, where the court stated and observed as hereunder;

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.



### Issue Number 3

#### **Whether the subject application has been made with inordinate delay and if so, whether the delay is such that the intended amendments ought to be declined.**

54. In respect of the instant issue, it is appropriate to point out that indeed the subject suit was filed in the year 2012. However, it is also imperative to recall that despite having been filed in the year 2012, the hearing in respect of the matter herein only commenced on the May 5, 2022, when PW1 testified in chief and was partly cross examined.
55. Secondly, it is also imperative to note that the current application has effectively been made and/or mounted at the onset/ the commencement of the hearing and hence if the duration of the lodgment of the application is computed from the commencement of formal hearing, then there is no inordinate delay, insofar as same was mounted within a duration of forty-five (45) days.
56. Nevertheless, if the computation is premised on the basis of the timeframe from when the suit was filed, then certainly there would be inordinate delay.
57. Be that as it may, it is my considered view that the extent of delay that is apparent and discernable in the subject matter was graciously conceded by the learned counsel for the plaintiff who acknowledged the lapse and/or mistake on his part.
58. Premised on the foregoing, the question that I must address is whether the lapse or mistake, which has been graciously acknowledged should form a basis for meting out punishment against the plaintiff or otherwise.
59. In my humble view, I wish to state that courts of law are temples or bastions of justice and same do not exist for purposes of disciplining and/or punishing the parties beforehand, more particularly, where the mistake or infraction complained of, is pardonable.
60. In this regard, I am moved and persuaded by the age long remarks rendered in the case of *Philip Keito Chemwolo & another v Kubende* (1986)eKLR, where the court of appeal stated and observed as hereunder;
- “Blunders will continue to be made from time to time and it does not follow that because a mistake has been made that a party should suffer the penalty of not having his case determined on its merits.”
61. Finally, I also wish to point out that lateness and/or delay in the filing of an application for amendment, though not condonable, must not by itself disentitle a deserving litigant of being granted leave. In this regard, the court is obliged to look at each case, on individual basis and taking into account the obtaining circumstances.
62. However, the honourable court must at all times recall that the grant or refusal of an application for an amendment is discretionary, albeit to the exercised reasonably and judiciously.
63. To this end, I beg to take cognizance of the dictum of the Court of Appeal in the case of *Ochieng and others v First National Bank of Chicago* civil appeal number 147 of 1991 (unreported).
64. For coherence, the court of Appeal clearly set out the principles under which courts may grant leave to amend the pleadings. The same is as follows:



- a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b) the amendments should be timeously applied for;
  - c) power to amend can be exercised by the court at any stage of the proceedings;
  - 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 reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.
65. In view of the foregoing, I am inclined to find and hold that the delay in the filing of the subject application per se, which was acknowledged by senior counsel ought not do drive away the plaintiff/applicant the litigant from the seat of justice.
66. In my considered view, to do so, would be contrary to the national values and principles of governance enumerated *vide* article 10(2) (b) of the *Constitution* 2010 and essentially the principle of equity and social justice.

**Final Disposition:**

67. Having analyzed and addressed the thematic issues which were identified, amplified and highlighted in the body of the ruling herein, it must have become evident and apparent that the honourable court is inclined to allow the subject application.
68. Consequently, what remains outstanding are the terms of the orders that the court proposes to grant and/or issue.
69. Be that as it may, the interest of justice and the dictates of the rule of law, necessitate the grant of the following orders;
- i. Leave be and is hereby granted to the plaintiff/applicant to file and serve a suitable amended plaint in line with the draft amended plaint which was attached to the supporting affidavit and that same be filed and served within fourteen (14) days from the date hereof.
  - ii. For the avoidance of doubt, the plaintiff/applicant is also granted liberty to file a compliant verifying affidavit to the amended plaint.
  - iii. The defendants/respondents be and are hereby granted liberty to file and serve amended statement of defense, where necessary and same to be filed and served within fourteen (14) days of service of the amended plaint.
  - iv. The plaintiff/applicant shall have leave to file a reply to the amended statement of defense, if any within seven (7) days of service of the amended statement of defense.
  - v. The parties herein be and are hereby granted liberty to file further/supplementary list of witnesses, witness statement and additional documents, if any and same to be filed and exchanged with fourteen (14) days from the close of the pleadings, reckoned from the date of service of the last pleading filed.



- vi. In default, to file and serve either of the documents alluded to in accordance with clause (v) hereof, the party at fault shall be deemed to have forfeited his/her rights.
- vii. The plaintiff/applicant herein shall be recalled for purposes of producing the supplementary list of documents, if any, filed and thereafter same shall be cross examined/further cross examined.
- viii. Given the fact that there are new parties being brought on board, same shall be at liberty to enter appearance and file statement of defense, if any, within fourteen (14) days and shall also be at liberty to file the incidental documents in line with order 7 rule 5 of the *Civil Procedure Rules 2010*.
- ix. The matter herein shall thereafter be mentioned before the court to ascertain and/or authenticate compliance with the directions herein and thereafter a hearing date shall be fixed.
- x. The parties are forewarned that the timelines alluded to herein are not for cosmetic purposes and must be adhered to.
- xi. Costs of the application assessed and certified at Kshs 15, 000/= only, each shall be paid to the 4<sup>th</sup> and 5<sup>th</sup> defendants/respondents only and same are payable within fourteen (14) days from the date hereof.
- xii. In default, to comply with (xi) hereof the 4<sup>th</sup> and 5<sup>th</sup> defendant shall be at liberty to execute, irrespective of the provisions of order 51 rule 11 (2) of the *Civil Procedure Rules, 2010*.

70. It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF SEPTEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

Kevin Court Assistant

Mr. Waweru Gatonye S.C for the Plaintiff/Applicant.

Mr. Kenneth Gichuhi for the 4<sup>th</sup> Defendant/respondent.

Mr. S M Mwenesi for the 5<sup>th</sup> Defendant/Respondent.

No appearance the rest of the Defendant/Respondent.

