



Kenya Aids NGOS Consortium & another v Ouko & another (Environment and Land Case Civil Suit 48 of 2007) [2022] KEELC 13615 (KLR) (18 October 2022) (Ruling)

Neutral citation: [2022] KEELC 13615 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 48 OF 2007
SO OKONG'O, J
OCTOBER 18, 2022**

BETWEEN

KENYA AIDS NGOS CONSORTIUM 1ST PLAINTIFF

CHRYSANTHUS MUCHORI GICHERU 2ND PLAINTIFF

AND

ANDREW OUKO 1ST DEFENDANT

DAVID SCOTT ONGOSI 2ND DEFENDANT

RULING

1. The plaintiffs brought this suit on April 19, 2007. The plaintiffs sought a permanent injunction to restrain the defendants from remaining on or continuing in occupation of a parcel of land known as LR No 11877(original number 3589/5), Nairobi (hereinafter referred to as 'the suit property') and an order for the eviction of the defendants from the property. The plaintiffs averred that they purchased the suit property at Kshs 16,200,000/= on January 19, 2006 from Kenya Commercial Bank Limited which had put up the property for sale in exercise of its statutory power of sale. The plaintiffs averred that even after the suit property was transferred to them on May 10, 2006, the defendants refused to deliver vacant possession and had vowed not to comply with their demand for possession of the premises.
2. The 1st defendant filed a statement of defence dated May 25, 2007. The 1st defendant denied that the plaintiffs purchased the suit property at a public auction conducted by Kenya Commercial Bank Ltd. (hereinafter referred to as 'KCB). The 1st defendant averred that the sale of the suit property to the plaintiffs was illegal and irregular in that the estate of Jason Atinda Ouko, deceased, who was the registered owner of the suit property was not served with a statutory notice and that the property was sold at an undervalue. The 1st defendant termed the sale of the suit property to the plaintiffs null and



void. The 2nd defendant filed a statement of defence on May 21, 2007 in which he adopted the 1st defendant's defence to the plaintiffs' claim.

3. On June 5, 2007, the plaintiffs brought an application by way of Notice of Motion of the same date seeking an order compelling the defendants to deliver up vacant possession of the suit property to the plaintiffs in default of which they be forcefully evicted from the property. The plaintiffs' application was heard and dismissed by Onyancha J on February 11, 2010. The plaintiffs were aggrieved by the decision and preferred an appeal against the same to the Court of Appeal. It is not clear from the record as to what became of the appeal.
4. There was very little activity in the matter after the plaintiffs' application was dismissed. On May 28, 2015, the suit was dismissed by Mutungi J for want of prosecution under Order 17 rule 2(1) of the Civil Procedure Rules. The plaintiffs moved the court through a Notice of Motion application dated July 18, 2016 seeking the setting aside of the dismissal order made on May 28, 2015 and the reinstatement of the suit for hearing on merit. The application was opposed by the 1st defendant through grounds of opposition dated July 27, 2016. In a ruling delivered on November 28, 2019, the court allowed the plaintiffs' application and reinstated the suit for hearing. In the ruling, the court stated as follows in part:

'Due to the nature of the dispute between the parties, I was inclined to give the 1st plaintiff a chance to prosecute its suit even if a Notice to Show cause had been served. I am not persuaded that the 1st defendant would suffer such prejudice that cannot be put right by payment of costs.'
5. After the said ruling, the plaintiffs once again took time to prepare the suit for trial. The last action by the plaintiffs was an application dated February 26, 2020 seeking leave to substitute the existing defendants with new defendants and to amend the plaint. The application was amended on October 5, 2020. On July 22, 2021, the court fixed the application for hearing on January 31, 2022.
6. After the court had given the plaintiffs a date for their application for substitution and amendment of the plaint as aforesaid, the plaintiffs appear to have got new ideas on how to get possession of the suit property from the defendants without trial. As mentioned earlier, this court had denied the plaintiffs an order for possession of the suit property on an interlocutory application. The 1st plaintiff went to the Chief Magistrate's Court at Milimani Commercial Court and filed a suit for possession of the suit property. The suit whose target was actually the defendants herein was brought against other parties whom the 1st plaintiff accused of trespassing on the suit property. The suit in the lower court namely, MCELC No E369 of 2021 was brought against, David Khatete, Paul Ogula, Austin Onyango, Kennedy Onyancha and Mark Ongera (hereinafter referred to as 'the defendants in the lower court'). Together with the plaint, the 1st plaintiff filed an interlocutory application in the lower court for the eviction of the defendants in the lower court from the suit property. On October 22, 2021, the lower court granted to the 1st plaintiff an order for the eviction of the said defendants in the lower court from the suit property with the assistance of the Officer Commanding Langata Police Station. The 1st plaintiff knew that the lower court had no jurisdiction to entertain its claim and that since there was an existing suit before this court touching on the suit property, it was out to abuse the process of the court in instituting the lower court suit. The suit property measures 11 acres and is situated in Langata area of Nairobi. The plaintiffs purchased the suit property that was already developed with several permanent houses at Kshs 16,200,000/- in 2006. As at the time the 1st plaintiff was moving the lower court for orders of eviction 15 years later, the value of the suit property was in excess of Kshs 500,000,000/- far beyond the jurisdiction of the lower court.
7. As the 1st plaintiff had intended while moving to the lower court, the 1st plaintiff used the said orders from the lower court to demolish the buildings belonging to the defendants herein on the suit property



and to forcefully evict them and their families from the property. The defendants herein challenged the said orders issued by the lower court and sought to have them set aside. In the lower court, the 1st plaintiff's advocate stated that the value of the suit property was Kshs 800,000,000/- and that the lower court had no pecuniary jurisdiction to entertain the suit and to grant the orders that it had granted. As at the time this admission was being made, the defendants herein and their families had already been evicted from the suit property and their homes destroyed.

8. In a ruling delivered on December 8, 2021, the lower court found that it was misled into entertaining the 1st plaintiff's suit and that its orders were issued in vain and in error. The court struck out the lower court suit with costs to the defendants herein and directed that the defendants pursue their reinstatement into the suit property in another forum.

9. The applications before the court:

Following this new development in the dispute between the plaintiffs and the defendants over the suit property, the 1st defendant appointed the firm of Prof Tom Ojienda & Associates Advocates to represent him alongside Lawrence M Mbabu & Associates Advocates which had been on record for the defendants. Following the striking out of the lower court suit and the refusal of the lower court to make an order for the reinstatement of the defendants into the suit property which should have flowed naturally from the lower court's finding that its orders for the eviction of the defendants were made in error without jurisdiction, the defendants moved this court through two applications one by the firm of Prof Tom Ojienda & Associates Advocates and the other by the firm of Lawrence M Mbabu & Associates Advocates.

10. In his application brought by way of Notice of Motion dated December 16, 2021 through the firm of Prof Tom Ojienda & Associates Advocates, the 1st defendant sought among others the following orders;

a. That the office of the officer commanding station Hardy Police Station and the office of the officer commanding station Langata Police Station (hereinafter referred to only as 'the police officers') be joined into the suit as parties.

b. That a temporary injunction be issued restraining the plaintiffs and the police officers from carrying out any constructions or erection of any structures, digging trenches, fencing, leasing, alienating, interfering with the boundary, or in any way dealing and interfering with the defendants' beneficial use and quiet enjoyment of the suit property pending the hearing and determination of the suit.

c. That summons be issued against the plaintiffs and the police officers to appear before court and show cause why they should not be committed to jail for a term of six (6) months.

d. That the plaintiffs and the police officers be cited for contempt of court and be committed to jail for a term of six (6) months.

e. That the plaintiffs be fined a sum of at least Kshs 500,000/- for being in contempt of court.

f. That the plaintiffs and the police officers be ordered to purge their acts of contempt by complying with the orders that were issued by the lower court on 5th, 18th and November 22, 2021 and December 9, 2021 by removing the fence that they had erected and allowing the defendants to access the suit property.

11. The application was brought on the grounds that pursuant to the orders that were issued by the lower court on October 22, 2021 aforesaid, a group of people invaded the suit property on November



- 4, 2021 at around 4.00am and started demolishing the defendants' properties thereon without any notice whatsoever. The 1st defendant averred that while carrying out the demolition of the defendants' properties, the plaintiffs were aware of the existence of this suit and another suit that was pending in the High Court over the suit property.
12. The 1st defendant averred that in order to protect his interest in the suit property, he filed an application dated November 5, 2021 in the lower court in which the lower court gave orders on 5th, 18th and November 22, 2021 and December 9, 2021 which were all disobeyed by the plaintiffs and the police officers. The 1st defendant averred that on November 5, 2021 the lower court made an order staying the orders that were made on October 22, 2021 and on November 18, 2021 and November 22, 2021, the lower court extended the said orders of November 5, 2021 and directed the police officers to ensure that peace prevailed on the suit property.
 13. The 1st defendant averred that on December 9, 2021, the lower court dismissed the 1st plaintiff's suit in the lower court. The 1st defendant averred that the effect of the orders made on December 9, 2021 was to return the parties to the position in which they were prior to the orders that were made on October 22, 2021.
 14. The 1st defendant averred that the said orders were served upon the plaintiffs and the police officers and/or they had personal knowledge of the same. The 1st defendant averred that despite the fact that the terms of the orders aforesaid were clear and unambiguous, the plaintiffs and the police officers deliberately disobeyed the same. The 1st defendant averred that the plaintiffs and the police officers continued to act in disregard of the said court orders that restrained the plaintiffs from evicting the defendants from the suit property and destroying their properties. The 1st defendant averred that in disregard of the said court orders, the plaintiffs had proceeded to evict the defendants from the suit property and to demolish their properties thereon. The 1st defendant averred that the plaintiffs had gone ahead to fence the suit property and had commenced construction of buildings thereon. The 1st defendant averred that court orders are not made in vain and urged the court to grant the orders sought.
 15. In their Notice of Motion application dated January 28, 2022 brought through the firm of Lawrence M Mbabu & Associates Advocates, the defendants sought the following orders;
 - a. That the 1st defendant be granted leave to amend his statement of defence and that the amended defence be filed within 14 days of the order granting leave.
 - b. That the 1st defendant and his siblings be reinstated into the suit property pending the hearing and determination of the suit.
 - c. That the court be pleased to restore the status quo ante, that is an order reinstating the 1st defendant and his siblings back to their portions on the suit property and allowing them to reconstruct their homesteads.
 - d. That the cost of the application be provided for.
 16. The 1st defendant averred that the amendment of the defence was necessary to enable the court to wholesomely and conclusively determine the issues in dispute between the parties. The 1st defendant averred that the proposed amendment was intended to bring before the court new developments in the dispute between the parties brought about by the proceedings that were instituted by the 1st plaintiff in the lower court in which the orders it had obtained against other people were used to evict the defendants from the suit property. The 1st defendant averred that the lower court subsequently discharged the said orders and dismissed the 1st plaintiff's lower court suit after making a finding in a



ruling delivered on December 8, 2021 that the 1st plaintiff was guilty of material non-disclosure and had engaged in abuse of the court process.

17. The 1st defendant averred that the plaintiffs evicted the defendants from the suit property together with their siblings and demolished all their houses on November 4, 2021 during the pendency of this suit. The 1st defendant averred further that the 2nd defendant died on March 26, 2010 and had not been substituted. The 1st defendant averred that it was necessary for him to plead all matters and issues that had arisen for proper and just determination of the suit. The 1st defendant annexed to the affidavit in support of the application several documents including a draft amended defence and counter-claim.
18. The 1st defendant's application by the firm of Prof Tom Ojienda & Associates Advocates was opposed by the plaintiffs through a replying affidavit sworn by Allan Ragi on February 8, 2022. The plaintiffs contended that the 1st defendant had not made out a case for the contempt alleged against the 1st plaintiff and the injunctive orders sought against the plaintiffs. The plaintiffs averred that as at the time the stay order was issued on November 5, 2021, the eviction order issued by the lower court on October 22, 2021 had already been executed. The plaintiffs averred that in the circumstances, the order of November 5, 2021 had been overtaken by events and as such could not be obeyed or disobeyed. The plaintiffs averred that the issue of reinstatement of the defendants into the suit property was raised by the 1st defendant in the lower court and the court directed that the same be litigated in the right forum. The plaintiffs averred that the order made on December 9, 2021 did not require the plaintiffs to reinstate the defendants into the suit property or to restore the status quo prior to October 22, 2021. The plaintiffs averred that failure to reinstate the defendants into the suit property could not therefore amount to contempt of court. The plaintiffs contended that the 1st defendant's application was frivolous, vexatious and an abuse of the process of the court and urged the court to dismiss the same.
19. The plaintiffs opposed the 1st defendant's application brought by Lawrence M Mbabu & Associates Advocates dated January 28, 2022 through a replying affidavit sworn by Allan Ragi on February 8, 2022. In the affidavit, the plaintiffs averred that in his proposed amendment, the 1st defendant sought to bring in a counter-claim that introduced a new cause of action which did not arise from the same facts as the original suit. The plaintiffs urged the court to disallow the amendment sought as it would change the character of the original suit. With regard to the prayer for reinstatement into the suit property, the plaintiffs averred that the prayer was in the nature of a mandatory injunction that can only be granted in cases where the claimant's case is strong. The plaintiffs averred that the 1st defendant had no title to the suit property and as such the only order the court could grant was that which would preserve the suit property pending the hearing of the suit. The plaintiffs averred that in any event, the houses that the 1st defendant had on the suit property had already been demolished and as such the status quo prior to the order of the lower court made on October 22, 2021 could not be restored until after the hearing of the suit. The plaintiffs urged the court to dismiss the 1st defendant's application with costs.
20. On January 31, 2022, the court granted a temporary order compelling the 1st plaintiff to grant the 1st defendant and his family unrestricted access to the portions of the suit property that they occupied prior to their forceful eviction pending the hearing and determination of the two applications. The court also restrained the 1st plaintiff on a temporary basis from carrying out any further construction or development on the suit property.

Determination:

21. The 1st defendant's two applications were heard by way of written submissions. The firm of Prof Tom Ojienda & Associates Advocates filed submissions in respect of the Notice of Motion dated



December 16, 2021 on March 31, 2022 while the firm of Lawrence M Mbabu & Associates Advocates filed submissions in respect of the Notice of Motion dated January 28, 2022 on March 2, 2022. The plaintiffs filed submissions only in respect of the Notice of Motion dated December 16, 2021. The submissions were filed on June 29, 2022.

22. I have considered the two applications before me together with the affidavits in support of and in opposition thereto. I have also considered the submissions by the parties and the authorities cited in support thereof. I will consider the two applications together. The applications starting with the first one are seeking, the joinder of the police officers as parties to the suit, committal of the plaintiffs and the police officers to jail for contempt of the orders that were made by the lower court and a prohibitory temporary injunction restraining the plaintiffs and the police officers from carrying out any activity or dealing with the suit property pending the hearing of the suit. The second application is seeking; leave to amend the defence, and an order reinstating the 1st defendant and his siblings into the suit property and allowing them to reconstruct their homesteads thereon.

23. In *Hardkinson v Hardkinson [1952] ALL ER 567*, the court stated that:

'It was the plain and unqualified obligation of every person against or in respect of whom an order was made by a court of competent jurisdiction to obey it unless and until it was discharged and disobedience of such order would as a general rule result in the person disobeying being in contempt and punishable by committal or attachment and in an application to the court by him not being entertained until he had purged his contempt.'

24. In *Mutitika v Baharini Farm Ltd [1985] KLR 227* it was held that:

- i. 'A person who knowing of an injunction, or an order of stay, willfully does something, or causes others to do something, to break the injunction, or interfere with the stay, is liable to be committed for contempt of court as such a person has by his conduct obstructed justice.
- ii. The standard of proof in contempt proceedings must be higher than proof on a balance of probabilities and almost but not exactly beyond reasonable doubt.
- iii. The principle must be borne in mind that the jurisdiction to commit for contempt should be carefully exercised with great reluctance and anxiety on the part of the court to see whether there is no other mode which can be brought to bear on the contemnor.'

25. In *Micheal Sistu Mwaura Kamau v Director of Public Prosecutions & 4 others [2018] eKLR* the Court of Appeal set out the law on contempt as follows:

'It is trite that to commit a person for contempt of court, the court must be satisfied that he has willfully and deliberately disobeyed a court order that he was aware of. That is made absolutely clear by section 4 of the *Contempt of Court Act* and the ruling of the Supreme Court in *Republic v Ahmad Abolfathi Mohammed & Another* (supra). Secondly, as this Court emphasized in *Jiban Freighters Ltd v Hardware & General Stores Ltd* and in *AB & Another v RB [2016] eKLR*, to sustain committal for contempt of court, the order of the court that is alleged to have been deliberately disobeyed must be clear and precise so as to leave no doubt as to what a party was supposed to do or to refrain from doing. Lastly, the standard of proof in committal proceedings is higher than proof on a balance of probabilities, though not as high as proof beyond reasonable doubt. (See *Mutitika v Baharini Farm* (supra) and *Republic v Ahmad Abolfathi Mohammed & Another* (supra).'



26. In *Shimmers Plaza Limited v National Bank of Kenya Limited [2015] eKLR*, the court stated as follows:

'We now revisit the issue of service. Was there service of the order said to have been disobeyed on the respondent? There is no dispute that no formal order was extracted and personally served on the respondent and an affidavit of service filed to that effect. In that respect, this case can be distinguished from *Justus Kariuki Mate & Another vs Hon Martin Wambora* (Wambora case) supra cited by learned counsel for the applicant. On the other hand however, this Court has slowly and gradually moved from the position that the order along with the penal notice must be personally served on a person before contempt can be proved. This is in line with the dispensations covered under 81.8 (1) (supra). Kenya's growing jurisprudence right from the High court has reiterated that knowledge of a court order suffices to prove service and dispense with personal service for the purposes of contempt proceedings. For instance, Lenaola J in the case of *Basil Criticos Vs Attorney General and 8 Others [2012] eKLR* pronounced himself as follows:-

'The law has changed and as it stands today knowledge supersedes personal service where a party clearly acts and shows that he had knowledge of a Court Order; the strict requirement that personal service must be proved is rendered unnecessary'

27. This position has been affirmed by this Court in several other cases including the Wambora case (supra). It is important however that the court satisfies itself beyond any shadow of a doubt that the person alleged to be in contempt committed the act complained of with full knowledge or notice of the existence of the order of the Court forbidding it. The threshold is quite high as it involves possible deprivation of a person's liberty.

Would the knowledge of the judgment or order by the advocate of the alleged contemnor suffice for contempt proceedings? We hold the view that it does. This is more so in a case such as this one where the advocate was in Court representing the alleged contemnor and the orders were made in his presence. There is an assumption which is not unfounded, and which in our view is irrefutable to the effect that when an advocate appears in court on instructions of a party, then it behoves him/her to report back to the client all that transpired in court that has a bearing on the client's case.'

28. It is on the foregoing principles that the limb of the 1st defendant's application seeking committal of the plaintiffs and the police officers for contempt of court falls for consideration. I am not satisfied that the 1st defendant has proved the charge of contempt against the alleged contemnors for various reasons. First, as rightly submitted by the plaintiffs, the contempt application is incompetent the same having been filed in a wrong court. Under section 10 of the *Magistrate's Court Act 2015*, the Magistrates have power to cite and commit any person disobeying their orders to jail. Since the orders said to have been disobeyed by the alleged contemnors were made by the lower court, the contempt application should have been made in that court. Secondly, I am not persuaded that the order that was made by the lower court on November 5, 2021 that was subsequently extended by the same court was disobeyed by the alleged contemnors. The evidence before the court shows that the 1st defendant and his siblings were forcefully evicted from the suit property on November 4, 2021 before the said order was issued and there was no order issued by the court for their reinstatement on the property. I am not in agreement with the 1st defendant that the order made on December 8, 2021 required the plaintiffs to reinstate the 1st defendant back to the suit property. For the foregoing reasons, the prayers seeking the joinder of the police officers to the suit for the purposes of the contempt application and the order seeking the punishment of the said police officers and the plaintiffs through committal to jail and payment of a fine for contempt of court are not for granting.



29. With regard to the prohibitory and mandatory injunction sought by the 1st defendant, my view is as follows: The principles upon which this court exercises its discretion in applications for a temporary injunction are now well settled. In *Giella v Cassman Brown & Co Ltd [1973] EA 358*, it was held that an applicant for a temporary injunction must establish a prima facie case with a probability of success and the injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury which cannot be adequately compensated by an award of damages. It was held further that if the court is in doubt as to the foregoing, the application would be determined on a balance of convenience.
30. In *Nguruman Limited v Jan Bonde Nielsen & 2 Others [2014] eKLR* the Court of Appeal adopted the definition of a prima facie case that was given in *Mrao Limited v First American Bank of Kenya Limited & 2 Others [2003] KLR 125* and went further to state as follows:
- 'The party on whom the burden of proving a prima facie case lies must show a clear and unmistakable right to be protected which is directly threatened by an act sought to be restrained, the invasion of the right has to be material and substantive and there must be an urgent necessity to prevent the irreparable damage that may result from the invasion. All that the court is to see is that on the face of it the person applying for an injunction has a right which has been threatened with violation. The applicant need not establish title it is enough if he can show that he has a fair and bona fide question to raise as to the existence of the right which he alleges. The standard of proof of that prima facie case is on a balance or, as otherwise put on a preponderance of probabilities. This means no more than that the court takes the view that on the face of it, the applicant's case is more likely than not to ultimately succeed.'
31. For a temporary mandatory injunction, the applicant must show that he has a very strong case that is likely to succeed at the trial. The likelihood of success must be higher than that which is required for a prohibitory injunction. The general principles which the court apply in applications for interlocutory mandatory injunction were set out in *Locabail International Finance Limited v Agro-Export (1988) 1 All ER 901*, where the court stated that:
- 'A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances, and then only in clear cases either where the Court thinks that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant has attempted to steal a march on the Plaintiff. Moreover, before granting a mandatory injunction, the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard that was required for a prohibition injunction.'
32. In *Shepherd Homes Ltd v Shandabu [1971] 1 Ch 304*, Meggery J stated as follows:
- 'It is plain that in most circumstances a mandatory injunction is likely other things being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires; but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation'.
33. In *Redland Bricks Ltd v Morris [1970] AC 652*, it was stated that jurisdiction to issue a mandatory injunction 'is a jurisdiction to be exercised sparingly and with caution but in a proper case,



unhesitatingly'. In the Court of Appeal case of, *Jaj Super Power Cash and Carry Limited v Nairobi City Council & 2 others, Nairobi, Civil Appeal No 11 of 2002*, the court observed that a mandatory injunction at an interlocutory stage 'merely serves to redress the status quo ante in deserving cases until the main dispute is determined.'

34. From the material before the court, I am satisfied that the 1st defendant is entitled to both prohibitory and mandatory injunctions. The 1st defendant has established that it has challenged the plaintiffs title to the suit property. The 1st defendant has established further that when the plaintiffs acquired the suit property, they were in possession thereof. The 1st defendant has established further that this court had denied the plaintiffs an order for possession of the suit property before the hearing of the suit. The 1st defendant has established further that the plaintiffs using misrepresentation and falsehood obtained invalid orders from the lower court while this suit was pending which they used to forcefully evict the 1st defendant from the suit property. The lower court declared the proceedings that were instituted before it invalid and the order that was obtained and used by the plaintiffs to evict the 1st defendant and his family from the suit property erroneous. The lower court proceedings having been struck out as an abuse of the process of the court, the plaintiffs cannot be allowed to maintain the status quo that they obtained through an illegal process. In *Kamau Mucuba v The Ripples Ltd (Civil Application No Nai 186 of 1992)*, Justice Cockar, JA stated that, 'A party, as far as possible ought not to be allowed to retain a position of advantage that it obtained through a planned and blatant unlawful act.'
35. I am satisfied that a case has been made out for the reinstatement of the 1st defendant and his siblings into the suit property with full rights to rebuild their houses that were illegally demolished by the plaintiffs pending the hearing and determination of this suit and for an order of a prohibitory injunction to restrain the plaintiffs from interfering with their occupation of the property.
36. With regard to amendment of the defence, the following is my view: The principles upon which this court exercises its discretion on applications for amendment of pleadings are similarly well settled. In *Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition* that was cited in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago, Civil Appeal No 149 of 1991*, the authors stated as follows:
- '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 the 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.'
37. The law on amendments is that, parties should be allowed to make such amendments as may be necessary for the determination of real questions in controversy or to avoid multiplicity of suits, provided, no 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. See also, *Central Kenya Ltd v Trust Bank Limited & 4 others, Court of Appeal at Nairobi, Civil Appeal No 222 of 1998*.
38. From the foregoing, what is expected of an applicant for leave to amend a pleading is to satisfy the court that the amendment sought is necessary for the determination of real questions in controversy between the parties. The onus then shifts to the party opposing such amendment to show that the amendment sought would result in prejudice to him which cannot be compensated in costs and/or that the amendment sought would introduce an inconsistent cause of action and/or that the amendment if



allowed would take away interests or legal rights that have accrued to him and/or that the amendment would cause injustice to him.

39. I have perused the affidavit in support of the 1st defendant's application for leave to amend the defence together with the draft amended defence and counter-claim annexed thereto. I am satisfied that the amendment sought would enable this court to effectually and completely adjudicate upon and settle all questions in controversy between the parties. I am not in agreement with the plaintiffs that the proposed counter-claim would introduce a new cause of action that is inconsistent with the cause of action in the original suit. I am also not persuaded that the proposed amendment will prejudice the plaintiffs or that the same would cause them any injustice. The 1st defendant is therefore entitled to the leave sought to amend the defence.

Conclusion:

40. In conclusion, I hereby make the following orders:
1. The 1st defendant's application dated December 16, 2021 is allowed in terms of prayers 4 thereof as against the plaintiffs.
 2. The 1st defendant's application dated January 28, 2022 is allowed in terms of prayers 1, 2, 3, and 4 thereof.
 3. The orders issued pursuant to prayers 3 and 4 of the 1st defendant's application dated January 28, 2022 are on a temporary basis pending the hearing and determination of the suit.
 4. The 1st defendant shall have the costs of both applications.

DELIVERED AND DATED AT KISUMU THIS 18TH DAY OF OCTOBER 2022

S. OKONG'O

JUDGE

Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of;

N/A for the 1st plaintiff

N/A for Defendants

Ms. J.Omondi-Court Assistant

