



**Erdemann Property Limited v Safaricom Staff Pension Scheme Registered Trustees
(Environment & Land Case 9 of 2019) [2022] KEELC 13590 (KLR) (12 October 2022) (Ruling)**

Neutral citation: [2022] KEELC 13590 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 9 OF 2019
CA OCHIENG, J
OCTOBER 12, 2022**

BETWEEN

ERDEMANN PROPERTY LIMITED PLAINTIFF

AND

**SAFARICOM STAFF PENSION SCHEME REGISTERED
TRUSTEES DEFENDANT**

RULING

1. What is before court for determination is the plaintiff's notice of motion application dated the May 12, 2022 brought pursuant to the provisions of sections 1A, 1B(a) and 100 of the Civil Procedure Act; order 8 rules 3 and 5 and order 51 rule 1 of the Civil Procedure Rules as well as article 159(2) (d) of the Constitution. The plaintiff seeks for the following orders:
 1. Spent
 2. Spent
 3. Spent
 4. That the honourable court be and is hereby pleased to grant leave to the plaintiff to amend the plaint dated January 3, 2019 in terms of the amended plaint dated and lodged in court on May 4, 2022, annexed to the application.
 5. That consequent to the grant of leave, the amended plaint dated and lodged on May 4, 2022 be and is hereby deemed as duly filed and admitted as part of the record of the proceedings before this honourable court, subject to prompt payment of the assessed court fees.
 6. That the honourable court be and is hereby pleased to issue any such consequential orders as may be necessary to give effect to the proceeding orders herein in the interests of justice and fairness.



7. That costs of the application be in the cause.
2. The application is premised on the grounds on the face of it and supported by the affidavit of one Otieno John Kenneth Rajwayi. He deposes that an amendment of the plaint would be necessary to enable a just determination of the real issues in controversy and the most lucid presentation of the claim and obviate real prejudice in light of the recent developments which have significantly impacted the nature of the plaintiff's claim over the subject suit. He avers that the defendant had on the 18th, 19th and February 20, 2022 embarked on unrestrained demolition of the plaintiff's sub-trunk sewer line. He contends that the defendant had in defiance of subsisting injunctive court orders been involved in destruction of the plaintiff's property on diverse occasions including between 1st and February 5, 2019, subsequently between 15th and April 18, 2019 visiting further financial losses on the plaintiff. He states that the amendments sought will be necessary to accord the plaintiff an opportunity to present its case in the best way possible and also accord the honourable court the benefit of wholesomely considering all the relevant information and evidence pertinent to the dispute before it. He reiterates that it has no interest in delaying the matter and that the defendant stands to suffer no prejudice if the instant application is allowed since the injunctive orders issued by the court on June 5, 2020 were vacated on March 7, 2022.
3. The application was opposed by the defendant that filed a replying affidavit sworn by Richard Gitahi. He argues that the instant application ought to be dismissed as the proposed amendments are being sought over 3 years since the suit was instituted after case management had been undertaken on November 24, 2021, with the matter being certified ready for hearing. He avers that the information giving rise to the amendment was well known and in the custody of the plaintiff all along but it has waited till it is too late to present the same. He contends that there is bad faith on the part of the plaintiff since it engaged a quantity surveyor whose report was availed on February 28, 2022. He explains that, in its application dated the February 10, 2022, the plaintiff did not disclose to court that it was engaging the surveyors yet it had presented itself as being ready to proceed with the hearing. He reiterates that the defendant would suffer prejudice as it would incur extra costs in defending this suit by engaging an expert opinion to counter the quantity surveyor's report as well as filing additional witness statements. Further, that the pendency of the suit is denying the defendant income by way of renting the units to the public since it cannot freely advertise for their Crystal Rivers project. He reiterates that, from the plaintiff's previous conduct, it has not been keen on prosecuting this matter on its merit taking into account that it enjoyed injunctive orders for over 3 years until the same was recently discharged by the court. He reaffirms that, as per the order issued by the court on March 7, 2022 a condition for reinstatement of the suit was that the same was to be heard within 90 days. Further, that the plaintiff does not merit court's favourable discretion.

Analysis and determination

3. Upon consideration of the instant notice of motion application including the respective affidavits, the only issue for the determination is whether the court should allow the plaintiff to amend its plaint as per the attached draft.
4. Section 100 of the *Civil Procedure Act* makes provisions on the general power to amend and gives the court discretion on whether to allow an amendment or not.
5. While order 8 rule 3(1) and (2) of the *Civil Procedure Rules* provides that:
 - (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.



(2) Where an application to the court for leave to make an amendment such 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 sub rule if it thinks just so to do.”

6. Further, order 8 rule 5 of the [Civil Procedure Rules](#) provides *inter alia*:

(1) For purposes 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.”

7. In the case of [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited \[2013\] eKLR](#), the Court of Appeal while dealing with issues of amendment held a follows:

The law on amendment of pleading in terms of section 100 of the [Civil Procedure Act](#) and order 8 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 vs. 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.”

8. In the case of [St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd \[2018\] eKLR](#) the court set out the principles governing the amendment of pleadings and stated 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 ought to be made it should be allowed if made in good faith provided costs can compensate the other side.

9. See also the case of [Joseph Ochieng & 2 Others v First National Bank of Chicago Civil Appeal No 149 of 1991\(1995\) eKLR](#).

10. It is trite that amendments to pleadings sought before the hearing should be freely allowed if it is made in good faith, without injustice to the opposing side, who can be compensated by costs. I note the proposed amendments seek to introduce an expert opinion on how much damage the plaintiff has



been occasioned by the alleged actions of the defendant. I opine that since the instant suit seeks claims for both liquidated and general damages, the proposed expert report would be relevant in this instance.

11. Insofar as the defendants contend that the amendment sought has not been brought timeously, but on perusal of the court record, I note that this matter had not been heard. Further, since this court reinstated the suit in 2022, even though the court had directed that the matter was to be heard in ninety days, the plaintiff sought for leave to amend its plaint to avail information which is relevant to the dispute herein. Further, the draft amendments are material and will aid the court in determining the real question in controversy between the parties herein. The defendant contends that it will suffer prejudice if the amendments are allowed as it will seek to obtain expert evidence but to my mind, I find that there is no prejudice it will suffer, as it will also be granted time to obtain an expert report to counter the plaintiff's report and it can be compensated by way of costs. Further, insofar as the defendant claims there is an element of bad faith, except for the introduction of the expert report, I find that it has failed to demonstrate any other tenets of bad faith.
12. In the circumstance while relying on the legal provisions quoted above and the decisions cited, I find that the amendments sought by the plaintiff are necessary for the determination of the real question in controversy.
13. In the foregoing, I find the notice of motion application dated the May 12, 2022 merited and will allow it.
14. I direct the plaintiff to file and serve the amended plaint within seven (7) days from the date hereof, after which the defendant is granted leave of twenty-one (21) days to file the amended defence.
15. Costs of the notice of motion application is awarded to the defendant.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 12TH DAY OF OCTOBER, 2022

CHRISTINE OCHIENG

JUDGE

