



REPUBLIC OF KENYA



**KENYA LAW**  
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**Mwanzia v Kaumba (Environment & Land Case 448 of 2017)  
[2022] KEELC 14707 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14707 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 448 OF 2017  
A NYUKURI, J  
NOVEMBER 9, 2022**

**BETWEEN**

**BENSON NZIOKA MWANZIA ..... PLAINTIFF**

**AND**

**MUTISO WAMBUA KAUMBA ..... DEFENDANT**

**RULING**

1. What is before court is the application dated January 24, 2022, filed by the plaintiff/applicant in this suit, seeking the following orders;
  - a) Spent.
  - b) That the plaintiff be granted leave to amend his plaint dated November 6, 2017.
  - c) That the annexed plaint be deemed duly filed upon payment of requisite court fees.
  - d) That costs of the application be in the cause.
2. The application is supported by the affidavit sworn on January 24, 2022, by Benson Mwanzia Nzioka, the plaintiff in this suit. The applicants' case was that the proposed amendments are intended to include some information erroneously left out during the editing and printing of the plaint. He stated that the plaint as filed did not have the preliminary contents preceding the word "plaint", the same having been erroneously left out during the editing and filing of the pleadings. He averred that the amendment does not change the substance of the matter and that the defendant would not be prejudiced by the intended amendments.
3. The application was opposed. The respondent filed a replying affidavit on February 17, 2022. He averred that the applicant who was enjoying orders of interlocutory injunction, was determined to frustrate the hearing of the suit to his detriment as the latter cannot utilize the suit property. He further



stated that sections 1A, 1B, 3 and 3A of the [Civil Procedure Act](#) upon which the application is anchored require the court to inter alia, facilitate just, expeditious and timely disposal of suits.

4. It was the respondent's contention that order 21 rule 12 and order 22 of the [Civil Procedure Rules](#), upon which the application was premised provide for payment of decretal sum in instalments and circumstances under which the court may stay execution respectively, and therefore the same were erroneously cited herein.
5. It was the respondent's position that the application was incurably defective and a delay tactic by the plaintiff and should be dismissed.
6. The application was canvassed by way of written submissions. The applicant filed their submissions dated May 10, 2022. The respondent did not file any submissions.

### **Submissions**

7. Counsel for the applicant submitted that the application sought to make amendments to the name of the court, case number and parties as they appear on all the other documents as filed with the plaint. They placed reliance on section 100 of the [Civil Procedure Act](#) which gives the court unfettered discretion whether or not to allow amendment of pleadings. They further cited order 8 rule 3 (1) which provides that;  
  
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. They referred to the cases of [St. Patrick's Hill School Limited v Bank of Africa Limited \[2018\]](#) and [Tridesley v Harper \[1878\], 10 Ch D at p 296](#) for the proposition that amendments to pleadings sought before the hearing should be allowed without injustice to the other side, and there is no injustice if the other party can be compensated by costs.

### **Analysis and Determination**

9. I have carefully considered the application, the response thereto and the submissions by the applicant. The sole issue for determination herein is whether the prayer for amendment of the plaint is merited.
10. The law that provides for amendments of pleadings is order 8 rule 3 of the [Civil Procedure Rules](#). The same provides 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.
  - 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 subrule if it thinks just so to do.
  - 3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.



- 4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
  - 5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.
11. Essentially, where leave to amend has been sought, the general rule is to allow amendments if the same is properly sought, without undue regard to technicalities. This position was upheld by the court of appeal in *John Gakuo & another v County Government of Nairobi & another [2017] eKLR*, where the court echoed the words of Sir Kenneth O'Connor P in *Eastern Bakery v Castelino (1958) EA 461*, as follows;
- "It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing 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.... The court will not refuse leave to allow an amendment simply because it introduces a new case...."
12. Similarly, in the case of *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & Another [2016] eKLR*, the Court of Appeal held that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments.
13. In the instant application, the applicant sought to amend the plaint by adding a heading, which he avers was erroneously removed at the point of editing the plaint before filing. The effect of this amendment will definitely not affect the substance of the suit. I note that all the other pleadings have the proper title, save the plaint. The respondent has not, in my view, demonstrated any injustice that he will suffer if the amendment is allowed. Therefore, I find that no injustice will be suffered by the defendant that may not be compensated in costs.
14. The respondent in his replying affidavit has argued that the applicant is keen on enjoying the temporary injunction orders he obtained for a longer period of time, hence the application. In my view, there is no nexus between the instant application and the orders of injunction. Nothing stops the defendant from applying for the discharge of any orders he deems prejudicial to him.
15. In the end, I find and hold that the application dated January 24, 2022 is merited and consequently the same is allowed as follows;
- a) Leave be and is hereby granted to the plaintiff to amend his plaint.
  - b) The plaintiff to file and serve his amended plaint within 14 days of this ruling.
  - c) Costs of the application shall be in the cause.
16. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A NYUKURI**

**JUDGE**



**In the Presence of;**

**Mr Muriithi holding brief for Mr. Nzaku for plaintiff/applicant.**

**Mr Muli for the defendant/respondent.**

**Court Assistant - Josephine**

