



REPUBLIC OF KENYA



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**Ethics & Anti-Corruption Commission v Holdings & 12 others (Environment & Land Case E203 of 2021) [2022] KEELC 15570 (KLR) (15 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15570 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE E203 OF 2021**

**JO MBOYA, J  
DECEMBER 15, 2022**

**BETWEEN**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**MITEMA HOLDINGS ..... 1<sup>ST</sup> DEFENDANT**  
**MAYWOOD LIMITED ..... 2<sup>ND</sup> DEFENDANT**  
**NOVA CONSTRUCTION COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**  
**SHITAL BHANDARI ..... 4<sup>TH</sup> DEFENDANT**  
**ROSEMARY WANJIKU IRUNGU ..... 5<sup>TH</sup> DEFENDANT**  
**FATMA ABDALLA AHMED ..... 6<sup>TH</sup> DEFENDANT**  
**HANNAH WANJIKU IHIGO ..... 7<sup>TH</sup> DEFENDANT**  
**ALI MALEKYA MWANZI ..... 8<sup>TH</sup> DEFENDANT**  
**JULIA OJIAMBO ..... 9<sup>TH</sup> DEFENDANT**  
**SAMUEL GATHOGO KI EMIA ..... 10<sup>TH</sup> DEFENDANT**  
**FREDRICK KIMANI KIMEMIA ..... 11<sup>TH</sup> DEFENDANT**  
**WILSON GACANA ..... 12<sup>TH</sup> DEFENDANT**  
**REGISTRAR OF TITLES ..... 13<sup>TH</sup> DEFENDANT**



## RULING

1. Vide Notice of Motion Application dated 20<sup>th</sup> June 2022, the 4<sup>th</sup> Defendant/Applicant herein has approached the Honourable court seeking for the following Reliefs;
  - i. That this Honourable Court be pleased to grant Leave to the 4<sup>th</sup> Defendant/Applicant to join the Honourable Attorney General, Inspector General of Police and the National Land Commission as Defendants in this matter.
  - ii. That this Honourable Court be pleased to grant Leave to the 4<sup>th</sup> Defendant/Applicant to, consequent to the order sought in paragraph (i) above, to file an amended Statement of Defence and Counterclaim.
  - iii. That the said 4<sup>th</sup> Defendant/Applicant's amended Statement of Defence and Counterclaim be deemed to have been duly filed upon payment of the requisite filing fees.
  - iv. That costs of this Application be provided for.
2. The subject Application is anchored and premised on the grounds named and contained at the foot thereof.
3. On the other hand, the Application is further supported by the affidavit of Shital Bandari (the 4<sup>th</sup> Defendant/Applicant), sworn on the 20<sup>th</sup> of June 2022. For clarity, the affidavit contains one annexure, to wit, the draft amended statement of defense and counterclaim.
4. Upon being served with the subject Application, the Plaintiff/Respondent filed a Replying Affidavit sworn by Rosemary Syokau and which affidavit has been sworn on the 11<sup>th</sup> of August 2022.
5. Suffice it to point out that the rest of the Defendants neither filed any Replying Affidavit nor grounds of opposition.
6. Be that as it may, when the Application came up for hearing, directions were given that same be canvassed and disposed of by way of written submissions.
7. In this regard, it is appropriate to state and observe that both the 4<sup>th</sup> Defendant/Applicant and the Plaintiff/Respondent, duly filed their respective written submissions. For clarity, the written submissions form part of the record of the court.

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

- a. 4<sup>th</sup> Defendant's/Applicant's Submissions:
  8. The 4<sup>th</sup> Defendant/Applicant filed written submissions dated 22<sup>nd</sup> September 2022, and same has highlighted and amplified three issues for consideration.
  9. First and foremost, counsel for the 4<sup>th</sup> Defendant/Applicant has submitted that the 4<sup>th</sup> Defendant/Applicant is keen to amend the statement of defense which was filed in respect of the subject matter.
  10. Further, counsel has added that where a Party, the 4<sup>th</sup> Defendant/Applicant, not excepted, seeks to amend her pleadings, then it behooves the court to consider the Application and where appropriate to grant the leave for purposes of amendment.



11. Additionally, counsel for the 4<sup>th</sup> Defendant/Applicant has submitted that leave to amend ought to be freely granted, particularly where the substantive hearing has neither began nor commenced.
  12. In this regard, counsel therefore contended that insofar as the hearing in respect of the subject matter has not commenced, it is appropriate, just and expedient for the Honorable court to afford the 4<sup>th</sup> Defendant/Applicant liberty to amend his pleadings.
  13. Secondly, counsel for the 4<sup>th</sup> Defendant/Applicant has submitted that the 4<sup>th</sup> Defendant/Applicant bought and purchased the suit property and hence same acquired lawful and legitimate rights thereto.
  14. Premised on the purchase of the suit property, counsel has contended that the 4<sup>th</sup> Defendant/Applicant is therefore entitled to protection under the law.
  15. Consequently, counsel for the 4<sup>th</sup> Defendant/Applicant has stated that it would be appropriate to allow same to amend the statement of defense and to implead a counterclaim and therefore seek the requisite reliefs against persons who are responsible for the preparation and issuance of the Title to the suit property.
  16. Thirdly, counsel for the 4<sup>th</sup> Defendant/Applicant has submitted that the law as pertains to amendment is now well settled and that it behooves the Honourable court to consider whether or not the intended amendment will necessitate the bringing on board of all issues in controversy for purposes of determination, once and for all.
  17. Finally, counsel for the 4<sup>th</sup> Defendant/Applicant has acknowledged that though same had hitherto filed ELC Petition No. 36 of 2018, the filing of the said Petition cannot be the basis of a bar to granting leave to amend.
  18. In support of the foregoing submissions, counsel for the 4<sup>th</sup> Defendant/Applicant has cited and relied on the various decisions, *inter-alia*, *Central Bank of Kenya v Trust Bank Ltd & 5 Others* [2000]eKLR, *Peter Irungu Wainaina v Chege Njehia & 2 Others* [2018]eKLR, *JMK v MWM & Another* [2015]eKLR and *DT Dobie & Company Kenya Ltd v Joseph Mbaria Muchina & Another* [1980]eKLR.
  19. Premised on the foregoing, counsel for the 4<sup>th</sup> Defendant/Applicant has therefore implored the Honourable court to find and hold that the 4<sup>th</sup> Defendant/Applicant has established and proved sufficient cause to warrant the grant of the subject Application.
- b. Plaintiff's/Respondent's Submissions
20. Similarly, the Plaintiff/Respondent also filed written submissions and same has highlighted and amplified two issues for consideration.
  21. The first issue that has been raised and ventilated by the Plaintiff/Respondent relates to the fact that the 4<sup>th</sup> Defendant/Respondent had previously filed and lodged ELC Petition No. 36 of 2018 and in respect of which same had sued various named parties.
  22. Further, counsel for the Plaintiff/Respondent has submitted that the previous suit which was filed by the 4<sup>th</sup> Defendant/Applicant herein raises similar issues and claims, as the ones contained at the foot of the proposed counterclaim.
  23. Premised on the foregoing, counsel for the Plaintiff/Respondent has therefore submitted that to allow the 4<sup>th</sup> Defendant/Applicant leave to amend and introduce a counterclaim, would be tantamount to allowing the 4<sup>th</sup> Defendant/Applicant to file a parallel suit similar to the one which is pending before this very court.



24. To this end, counsel for the Plaintiff/Respondent has submitted that such a scenario would be contrary to and in contravention of the rule of Sub-judice.
25. Secondly, counsel for the Plaintiff/Respondent has submitted that the court herein proceeded to and issued an order for stay of proceedings as relates to ELC Petition No. 36 of 2018, pending the hearing and determination of the current suit.
26. Owing to the fact that the said suit, namely, ELC Petition No. 36 of 2018 was stayed, the grant of the subject Application would be tantamount to reviewing the said orders of stay, albeit through the backdoor.
27. In the premises, counsel for the Plaintiff/Respondent has submitted that the current Application for leave to amend, is informed by ulterior motives and therefore same is bad in law.
28. In view of the foregoing, counsel for the Plaintiff/Respondent has submitted that the subject Application is therefore devoid of merits and ought to be dismissed.

#### **Issues For Determination:**

29. Having reviewed the subject Application, the supporting affidavit thereto and the Replying Affidavit filed in opposition and having similarly considered the written submissions filed, the following issues are pertinent and thus deserving of determination:
  - i. Whether the Honourable court has the requisite Jurisdiction to grant an Application for amendment?
  - ii. Whether the 4<sup>th</sup> Defendant/Applicant has established and proved the requisite grounds to warrant the intended amendment or at all?

#### **Analysis And Determination**

##### **Issue Number 1**

Whether the Honourable court has the requisite jurisdiction to grant an Application for amendment.

30. The subject Application has been brought pursuant to and in line with the provisions of Order 1 Rule 10 and Order 8 Rule 3 of the *Civil Procedure Rules*, 2010.
31. Suffice it to point out that by dint of the provisions of Order 1 Rule 10 of the *Civil Procedure Rules*, 2010, the Honourable court is bestowed and vested with the requisite discretion to allow the joinder, addition or substitution of any Party, provided that such a Party is a necessary Party or better still, that the presence of such a Party would enable the court to effectually and effectively determine all the issues in controversy.
32. Similarly, under the provisions of Order 8 Rule 3 of the *Civil Procedure Rules*, 2010, the court is also vested discretion to grant leave to amend any pleadings, subject only to known and established limitations.
33. For coherence, where a Party seeks leave to amend his/her pleadings, then it behooves the claimant to establish that the intended amendment is geared towards or calculated to bringing on board all the issues in controversy for effective and effectual determination, once and for all.
34. Additionally, the claimant, is also obligated to show and establish that the intended amendment is not calculated to alter and change the character of the suit or the cause of action, as hitherto pleaded.



35. Suffice it to state that the law on amendment of pleadings is now well settled. In this regard, it is imperative to refer to and adopt the holding of the Court of Appeal in the case of Central Bank of Kenya v Trust Bank Ltd & 5 Others [2000]eKLR, where the Court of Appeal stated and observed as hereunder:

“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.

36. Additionally, the principles that govern amendment were re-visited and reiterated vide the holding in the case of Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd (2013)eKLR, where the court observed 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.”

37. Nourished and guided by the principles espoused and underscored vide the decisions alluded to in the preceding paragraphs, I find and hold that the court is conferred with the requisite jurisdiction and discretion to grant an Application for amendment, albeit in appropriate cases and circumstances.

38. Nevertheless, as to whether or not the court would be persuaded to grant the Application for amendment depends on several factors and same is done on a case by case basis.

## **Issue Number 2**

Whether the 4<sup>th</sup> Defendant/Applicant has established and proved the requisite grounds to warrant the Intended amendment or at all.

39. It is common ground that the 4<sup>th</sup> Defendant/Applicant herein had hitherto filed and mounted a suit, namely, ELC Petition No. 36 of 2018.



40. On the other hand, it is appropriate to state and observe that the said suit/proceedings are still pending hearing and determination before the Honourable court, save that there is an Order of Stay of Proceedings in respect of the Constitutional Petition.
41. Similarly, it is imperative to reiterate that the Respondents at the foot of the said Petition essentially include inter-alia, Attorney General and the National Land Commission.
42. Suffices to point out that the Respondents in the subsisting Petition, are indeed the ones that the 4<sup>th</sup> Defendant/Applicant (who is the Petitioner in the other suit), is seeking to join and implead at the foot of the intended counterclaim.
43. Other than the foregoing, it is also important to recall that the reliefs at the foot of the pending Petition, replicates and are synonymous with the reliefs articulated at the foot of the intended counterclaim.
44. Essentially, what the 4<sup>th</sup> Defendant/Applicant is seeking to do is to duplicate the cause of action which is contained at the foot of the pending Petition and to bring same within the purview of the instant matter.
45. To my mind, what would then arise is that the 4<sup>th</sup> Defendant/Applicant would be having two parallel suits, touching on the subject matter/cause of action, running before the same court at the same time.
46. Certainly, such a scenario would run contrary to and be in contravention with the doctrine of *Sub-judice*. In this regard, the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya, are appropriate, relevant and applicable.
47. Besides, it is also important to note that no single party, the 4<sup>th</sup> Defendant/Applicant, not excepted, can be allowed to agitate a similar cause of action vide two separate and distinct suits. Clearly, such a scenario would amount to a recipe for chaos and anarchy.
48. As pertains to the import, tenor and scope of the doctrine of Sub-judice, it is appropriate to take cognizance of the holding of the Supreme Court of Kenya in the case of *Kenya National Commission of Human Right v Attorney General; Independent electoral & Boundaries Commission & 16 Others* [2020]eKLR, where the court stated as hereunder;

[67] The term ‘*sub-judice*’ is defined in Black’s Law Dictionary 9<sup>th</sup> Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives.

49. Guided by the holding alluded to in the preceding paragraph, it is evident and apparent that where there exists two suits raising similar or near similar issues, then it is imperative that the subsequent suit be stayed.



50. Nevertheless, in respect of the subject matter, there does exist a previous suit between the 4<sup>th</sup> Defendant/Applicant and the intended Defendants to the counterclaim.
51. Be that as it may and despite the existence of the said previous suit, which is still pending before this court, the 4<sup>th</sup> Defendant/Applicant is seeking leave to be allowed to implead the same parties via a counterclaim, albeit in another suit.
52. Effectively, what would arise would be that the court would be allowing the 4<sup>th</sup> Defendant/Applicant to generate a second suit, in respect of the same cause of action and against same Defendants.
53. To my mind, allowing the subject Application would be tantamount to affording the 4<sup>th</sup> Defendant/Applicant a latitude to violate and breach the clear provisions of Section 6 of the Civil Procedure Act, Chapter 21 Laws of Kenya.
54. For convenience, the provisions of Section 6 of the Act, provides as hereunder;

6. Stay of suit

No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same Parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

Explanation.—The pendency of a suit in a foreign court shall not preclude a court from trying a suit in which the same matters or any of them are in issue in such suit in such foreign court. [Act]

55. Other than the implication pertaining to and arising from the doctrine of Sub-judice, there is also another perspective that merits consideration.
56. In this regard, it is appropriate to recall that given the nature of the subject suit, the Parties agreed that the previous suits, namely, ELC Petition No. 36 of 2018, be stayed pending the hearing and determination of the current suit.
57. For coherence, the order of stay of proceedings over and in respect of ELC Petition No. 36 of 2018, has neither been discharged, vacated nor reviewed.
58. In the premises, what would arise if the current Application were allowed would be that the 4<sup>th</sup> Defendant/Applicant would be granted the liberty to agitate and canvass the same issues which are pending at the foot of the Petition, albeit during the existence/subsistence of the order of stay.
59. In my considered view, the current Application for leave to amend and implead a counterclaim is a subtle scheme to evade and defeat the existing orders of stay of proceedings, which the 4<sup>TH</sup> Defendant/Applicant is aware of.
60. In the circumstances, it is my view that the current Application, whose import and tenor is meant to circumvent existing orders of the Honourable court, amounts to an abuse of the due process of the court.
61. In a nutshell, even though the court has the requisite jurisdiction and discretion to entertain and adjudicate upon an application for amendment, such an amendment cannot be granted where same



will culminate into violation of clear provisions of the law and in particular the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21 Laws of Kenya.

**Final Disposition:**

62. Having analyzed, evaluated and addressed the named issues for determination, I come to the conclusion that the subject Application is a recipe for anarchy and amounts to an invitation to violate the provisions of Section 6 of the *Civil Procedure Act*, Chapter 21, Laws of Kenya.
63. Additionally, I have also found and held that the subject Application is calculated to defeat the existing orders of stay of proceedings relating ELC Petition No. 36 of 2018, between the current 4<sup>th</sup> Defendant and the intended Defendants to the counterclaim.
64. Consequently and in the premises, the Application dated the 20<sup>th</sup> of June 2022, is not only misconceived, but same is also Bad in law and legally untenable.
65. In a nutshell, the Application be and is hereby Dismissed with costs to the Plaintiff/Respondent, being the only party who opposed the Application.
66. It is so Ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15<sup>th</sup> DAY OF NOVEMBER 2022.**

**OGUTTU MBOYA**

**JUDGE**

**In the Presence of;**

**Benson - Court Assistant.**

**Mr. Khakula for the 4<sup>th</sup> Defendant/Applicant.**

**Ms. Bridgit Maina h/b for Ms. Shamala for the Plaintiff/Respondent.**

**Mr. Arthur Ingutia for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Respondents.**

**Mr. Obuya for the 9<sup>th</sup> Defendant/Respondent.**

**Mr. Onsembe h/b for Mr. Ongegu for the 10<sup>th</sup> and 11<sup>th</sup> Defendants/Respondents.**

**Ms. Kiprotich for the 12<sup>th</sup> Defendant/Respondent.**

**N/A for the 1<sup>st</sup>, 5<sup>th</sup>, 6<sup>th</sup>, 8<sup>th</sup> and 13<sup>th</sup> Defendants/Respondents.**

