



REPUBLIC OF KENYA



Chepwambok & another v Chepkemboi (Environment & Land Case 6 of 2022) [2022] KEELC 15327 (KLR) (8 December 2022) (Ruling)

Neutral citation: [2022] KEELC 15327 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KAPSABET
ENVIRONMENT & LAND CASE 6 OF 2022
MN MWANYALE, J
DECEMBER 8, 2022
FORMERLY ELDORET E & L CASE NO 231 OF 2020**

BETWEEN

MARY CHEPWAMBOK 1ST PLAINTIFF

RAPHAEL TANUI 2ND PLAINTIFF

AND

PAULINE CHEPKEMBOI DEFENDANT

RULING

1. By a notice of motion dated September 28, 2022 brought under section 1A, 1B, 3, 3A and 63 (e) of the *Civil Procedure Act*, order 8 rules 3 and 5, order 51 rule 1 of the *Civil Procedure Rules*, the defendant/ applicant seeks leave of the court to amend her amended statement of defence dated March 29, 2006 in terms of the annexed draft further amended defence and counterclaim and for the same to be deemed as duly filed.
2. The application is premised on the grounds on its face and supported by affidavit of Pauline Chepkemboi, the defendant /applicant herein.
3. The applicant avers that the intended amendments will assist the court comprehend the origin of the dispute and her claim against the plaintiff for a just and fair determination of the case. That no prejudice will be suffered by the plaintiffs/respondents if the instant application is allowed.
4. The Respondents on their part filed preliminary objection dated November 1, 2022 as well as replying affidavit, sworn by the 1st plaintiff/respondent, in opposition to the application before court. The 1st respondent deponed that the issues raised in the intended defence and counter-claim had already been adjudicated upon by the Court of Appeal *vide* Appeal No CA 83 of 2017. Further that there has been inordinate and inexcusable delay in bringing this application since plaintiffs case is closed.



5. Parties agreed to dispose of the application vide written submissions. The applicant relied on the grounds in the application as well as the contents of the supporting affidavit. The applicant's counsel submitted that the preliminary objection dated November 1, 2022 did not meet the threshold set out in the case of *Mukhisa Biscuit Manufacturing Company Ltd v West End Distributors Ltd* [1969] EA 696 on what a preliminary objection should consist of. Counsel submitted that the preliminary objection raised no point of law rather it contained vague facts which ought to be proved. As regards the replying affidavit deponed by the 1st plaintiff on November 1, 2022, counsel submitted that the exhibits extensively relied upon by the Respondent were not attacked thereby denying the applicant a chance to respond to them.

Analysis And Determination: -

6. Upon careful consideration of the application, replying affidavit as well as submissions in support of the application, it is my view that the sole issue for determination is whether the defendant should be granted leave to amend her amended defence.
7. Amendment of pleadings are governed by section 100 of the *Civil Procedure Act* and order 8 rule 3 and 5 of the *Civil Procedure Rules*.

8. Section 100 of the *Civil Procedure Act* provides that;

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

9. Order 8 rule 3 of the *Civil Procedure Rules* also provides as follows;

“Amendment of pleadings with leave

- i) 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.
- ii) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (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.
- iii)
- iv)
- v) An amendment may be allowed under sub-rule (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 was already been claimed in the suit by the party applying for leave to make the amendment.”

10. Further, order 8 rule 5 of the *Civil Procedure Rules* provide that;

“For the purpose of determining, the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either on its own motion or



an 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.”

11. Based on the provisions of the law cited herein above, it is no doubt that leave to amend pleadings is a discretion of the court which ought to be exercised freely as long as it does not prejudice or cause an injustice to the other party that cannot be compensated by costs.
12. In determining such application for leave to amend pleadings, the Court of Appeal set down some principles courts ought to consider in the case of *Joseph Ochieng and 2 others v First National Bank of Chicago* [1995] eKLR as follows;

“.....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 amendments introduce a new case of 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 Act, but subject however to powers of Court to still allow such an amendment notwithstanding the expiry of current period of limitation.”
13. In the instant case, I wish to first address the issue raised by the applicant on the preliminary objection filed by the 1st plaintiff/respondent in response to the application. A perusal of the same leads me to conclude that in deed it does not meet the threshold set out in the case of *Mukisa Biscuit Manufacturing Ltd v West End Distributors Ltd* [1969] EA 696 at page 700 where the Court of Appeal stated thus;

“A preliminary objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.”
14. The grounds set out in preliminary objection dated November 1, 2022 are clearly not on pure points to law rather, they are facts that ought to be proved through evidence. On this basis, I proceed to dismiss the notice of preliminary objection.
15. The only document opposing the application that is validly before me therefore is the replying affidavit dated November 1, 2022 sworn by the 1st plaintiff/respondent she contends that the issues raised in the intended further amended defence and counter-claim had already been adjudicated upon by the Court of Appeal in CA No 83 of 2017. A perusal of annexure C10 being judgement of the Court of Appeal, this court has established that the same related to a ruling by Hon Justice Odeny for striking out a petition by Joel Kenduiywo (not a party) who was seeking for mesne profits compensation for character assassination, loss of income, pain and physical torture. The Court of Appeal did not in any way determine the issue of ownership of suit property. I therefore disagree that the issues raised in the intended counter claim have been adjudicated upon since the same raises a claim for adverse possession and not mesne profits. Moreover the parties in the Court of Appeal case are dissimilar from the ones herein.



16. Going by the principles set out in the *Joseph Ochieng* case by the Court of Appeal, this court is empowered to allow leave to amend pleadings at any stage of proceedings. Noting that this matter is part heard; it does not affect the court's powers to grant leave at this stage. To buttress this the court places reliance also on section 100 of the *Civil Procedure Act* and order 8 rule 3 (1) of the *Civil Procedure Rules*.
17. It is the court's view that the 1st plaintiff shall not be prejudiced if such leave is granted since first, she had not demonstrated how she will be prejudiced and secondly she is at liberty to recall any witness already testified to address the court on new issues. Furthermore, the 1st plaintiff will be granted corresponding leave to file a reply to defence and defence to counterclaim in any event.
18. It is against this background and in the interest of administering substantive justice that I proceed to allow the application dated September 28, 2022 and order that the draft further amended statement of defence and counter claim is deemed as duly filed. The same be served upon the plaintiff within 14 days from the date of delivery of this ruling. The plaintiff shall reply to the same, if need be within 14 days from date of service of the further amended statement of defence and counter claim. The 1st plaintiff is awarded costs of the application.
19. Orders accordingly.

DATED AT KAPSABET THIS 8TH DAY OF DECEMBER 2022.

HON MN MWANYALE,

JUDGE.

In the presence of;

Mr Gemenet for the applicant

Mary Chepkwombok and Raphael Tanui plaintiffs in person.

