



**Laikipia University v Registered Trustees of Child Welfare Society of Kenya (Environment & Land Case 5 of 2017) [2022] KEELC 15189 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEELC 15189 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 5 OF 2017  
YM ANGIMA, J  
DECEMBER 8, 2022**

**BETWEEN**

**LAIKIPIA UNIVERSITY ..... PLAINTIFF**

**AND**

**REGISTERED TRUSTEES OF CHILD WELFARE SOCIETY OF  
KENYA ..... DEFENDANT**

**RULING**

**A. The Defendant's Application**

1. By a notice of motion dated September 25, 2022 brought under the provisions of sections 3A and 100 of the *Civil Procedure Act* (cap 21), Order 8 rule 3 and Order 51 rules 1 of the *Civil Procedure Rules, 2010* (the Rules), and all other enabling provisions of the law, the Defendant sought leave of court to amend its defence and counterclaim. The Defendant also applied for costs of the application to be provided for.
2. The application was based upon the grounds set out on the face of the application and the contents of the supporting affidavit sworn by Lawrence M Mbabu on February 23, 2022 and the exhibits thereto. It was contended that the purpose of the amendment was to bring out all the issues in controversy so that the court may conclusively deal with and determine all the issues in controversy once for all. It was contended that circumstances had changed since the filing of the suit in that the Defendant had obtained a certificate of lease for the suit property hence it was necessary to plead that fact.

**B. The Plaintiff's Response**

3. The Plaintiff filed a replying affidavit sworn by its legal officer, one I N Wanjau on August 3, 2022 in opposition to the application. It was contended that the application was an afterthought and an abuse of the court process. It was contended that the pleadings in the matter had closed and that the application had been overtaken by events since the hearing of the suit had already commenced.



4. It was further contended that the Defendant's title was irregularly issued and that the amendment sought to be introduced was a new ground of defence which shall prejudice the Plaintiff. The Plaintiff contended that there was inordinate delay in filing the instant application and that the same would not assist the court in resolving the real issues in controversy. The court was consequently urged to dismiss the application with costs.

### C. Directions on Submissions

5. When the application was listed for inter partes hearing, it was directed that the same shall be canvassed through written submissions. The parties were consequently given timelines within which to file and exchange their respective written submissions. The record shows that the Defendant's submissions were filed on or about September 26, 2022 whereas the Plaintiff's submissions were not on record by the time of preparation of the ruling.

### D. The Issue for Determination

6. The court has considered the Defendant's notice of motion dated February 25, 2022, the Plaintiff's replying affidavit in opposition thereto as well as the material on record. The court is of the opinion that the main question for determination is whether the Defendant has made out a case for the grant of leave to amend its pleadings.

### E. Analysis and Determination

7. Order 8 rule 3(1) of the [Rules](#) on amendment of pleadings stipulates as follows:

“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. On the other hand, Order 8 rule 5 of the [Rules](#) stipulates as follows:

“(1) 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 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 may be just.

(2) This rule shall not have effect in relation to a judgment or order.”

9. The principles to be considered in granting or refusing an application for leave to amend pleadings were re-stated in the case of *Eastern Bakery v Castellino* [1958] EA 461 at 462 as follows:

“It will be sufficient, for 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 *Tildesley v Harper* (10 (1878), 10 Ch D 393; *Clarapede v Commercial Union Association* (2) [1883], 32 W R 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v Murdoch* (3) [1875], 1 Ch D 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: *Ma Shwe Mya v Maung Po Hnaung* (4)



[1921], 48 IA 214; 48 Cal 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v Goschen* (5), [1898] 1 Ch 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v Neal* (6) 1887], 19 Q B D 394; *Hilton v Sutton Steam Laundry* (7), [1946] K B 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

10. Similarly, in the case of [Central Kenya Ltd v Trust Bank Ltd & 5 Others \[2000\] eKLR](#) the Court of Appeal considered the principles as follows:

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

11. The court has considered the application for leave in light of the above principles. There is no allegation or demonstration that the proposed amendment seeks to introduce an entirely new ground of defence or attack. There is no evidence to demonstrate that the proposed amendment seeks to introduce matters which would be statute-barred under the [Limitation of Actions Act](#) (cap 22). The court is not satisfied that the proposed amendment shall completely alter the character of the action or counterclaim. The nature of the dispute remains very much the same. Both the Plaintiff and the Defendants are seeking to assert competing claims over the suit property. The means of proving one’s ownership over the suit property cannot alter the nature or character of the suit or counterclaim.
12. The mere fact that the suit is already part heard cannot be a legitimate ground for refusing to grant leave. The Rules allow the court to grant such leave at any stage of the proceedings as long as it is before judgment. As indicated above, mere delay in seeking leave to amend cannot be a good justification for refusing leave. The Plaintiff has not demonstrated any prejudice it shall suffer by allowing the application which cannot be compensated by costs. The Plaintiff may still be granted an opportunity to amend its pleadings and to adduce additional evidence, if need be. The Plaintiff had not yet closed its case by the time the instant application was filed.
13. The court is satisfied on the basis of the material on record that the amendment sought shall assist the court in determining the real issues in controversy between the parties once for all. There is no evidence on record to demonstrate that the application was an afterthought or that it was brought in bad faith. There is nothing on record to demonstrate that it is an abuse of the court process or that it is intended to delay expeditious trial of the suit and counterclaim.

## **F. Conclusion and Disposal Order**

14. The upshot of the foregoing is that the court is satisfied that the Defendant has made out a case for the grant of the orders sought. Accordingly, the Defendant’s notice of motion dated February 25, 2022 is hereby allowed in the following terms:
- a. The Defendant’s notice of motion dated February 25, 2022 be and is hereby allowed in terms of order Nos 1 & 2 thereof.
- b. The Plaintiff shall be at liberty to amend any of its pleadings including the plaint, reply to defence and defence to counterclaim within 14 days from the date hereof.



- c. The parties shall be at liberty to file and exchange supplementary lists of documents and additional witness statements within 30 days upon the lapse of the period specified in order (b) above.
- d. The Plaintiff shall be at liberty to recall any of its witness who had previously testified, if need be.
- e. The Defendant shall bear the costs of the application in any event.
- f. The suit shall be mentioned on February 8, 2023 to fix a date for further hearing of the suit.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU THIS 8<sup>TH</sup> DAY OF DECEMBER, 2022 AND DELIVERED VIA MICROSOFT TEAMS PLATFORM.**

**In the presence of:**

**N/A for the Plaintiff**

**Ms. Ndinda holding brief for Mr. Mbaabu for the Defendant**

**C/A - Carol**

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**Y M ANGIMA**

**JUDGE**

