



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT KAJIADO

ELC CASE NO. 641 OF 2017

(Formerly Machakos ELC No. 303 of 2012)

ISAAC GATHUNGU WANJOHI.....1ST PLAINTIFF

ISAIAH KARINDI WAMBUGU MUTONYI.....2ND PLAINTIFF

VERSUS

CATHERINE NYAMBURA.....1ST DEFENDANT

CHIEF LAND REGISTRAR.....2ND DEFENDANT

ZEPHANIA GITAU MBUGUA.....3RD DEFENDANT

SUSAN WANJIRU MBUGUA.....4TH DEFENDANT

LAND REGISTRAR, KAJIADO.....5TH DEFENDANT

THE HON. ATTORNEY GENERAL.....6TH DEFENDANT

RULING

The 2nd, 5th and 6th Defendants filed a Notice of Motion application dated the 7th November 2019 brought pursuant to Article 159 (2) (d) of the Constitution, Section 1A, 1B, 3A of the Civil Procedure Act, Order 8 Rule 3 & 8 and Order 51 Rule 1 of the Civil Procedure Rules where they sought the following orders:

1. That the Honourable Court be pleased to vary the Court Order issued on 18th May, 2017.
2. That this Honourable Court be pleased to grant leave to the 2nd, 5th and 6th Defendants/ Applicants to amend the Defence in terms of the annexed draft amended Defence and adduce the bundle of documents and witness statement annexed herein.
3. That the draft amended Defence and the bundle of documents and witness statements be deemed duly filed.
4. That the costs of the application be in the cause.

The application is premised on the grounds on the face of it and the supporting affidavit of NJOROGE ALLAN KAMAU who is the State Counsel in conduct of this matter where he explains that he took over the conduct of this matter on or about 28th October, 2019 from his colleague Terrel Stephen who left the Attorney General's Chambers. He deposes that upon perusal of the file, he noted that the 2nd, 5th and 6th Defendants filed a holding Defence dated 20th June, 2014 which was not supported by any documents or witness statements. Further, the suit was part heard though the Plaintiffs were yet to close their case and there is a competing claim between the Plaintiffs and 1st Defendant, while the Government as the custodian of records is yet to tender evidence. He claims he wrote to the relevant government departments and obtained relevant materials and documents, the basis of the 2nd, 5th and 6th Defendants amendments. He insists the proposed amendments will occasion no prejudice that cannot be compensated with costs while the 2nd, 5th and 6th Defendants have no claim on the suit land. Further, the documents and witness statements annexed to the draft amended Defence are government documents which have not been availed before court by the custodian and it will be an abdication of responsibility to conceal material facts.

The Plaintiffs did not oppose the application.

The 1st Defendant opposed the application by filing Grounds of Opposition and Replying Affidavit where she averred that the Applicants are guilty of laches; Application is not made in good faith; applicants are acting mala fides; intended amendments will cause injustice to her; intended amendments are inconsistent with the Applicants original pleadings and are against the provisions of the Evidence Act as well as Order 2 Rule 6(1) of the Civil Procedure Rules; no basis has been laid for setting aside the consent and the application lacks merit.

The 3rd and 4th Defendants opposed the application and filed Grounds of Opposition where they contended that the amendments have not been timeously made; information sought to be introduced by the Attorney General was available from 2014; Amendments seek to introduce a wholly new Defence which is prejudicial to them; amendments are in violation of the Court Order of 19th November, 2018; application is not made in good faith; and it lacks merit and should be dismissed.

The application was canvassed by way of written submissions. I note the Plaintiffs' application dated the 11th November, 2019 was conceded to by the 1st Defendant on 16th September, 2020 hence I will not deliver a Ruling to that effect.

Analysis and Determination

Upon consideration of the Notice of Motion dated the 7th November, 2019 including the rivaling affidavits, Grounds of Opposition and respective submissions, the following are the issues for determination:

- Whether the Orders of Court issued on 18th May, 2017 should be varied.
- Whether the 2nd, 5th and 6th Defendants should be granted leave to amend their Statement of Defence dated the 20th June, 2014.

As to whether the Orders of Court issued on 18th May, 2017 should be varied.

The 2nd, 5th and 6th Defendants sought for variation of the orders of the Court issued on 18th May, 2017. The Applicants in their submissions contended that they had met the threshold set for variation of the Court Orders. The 1st Defendant in her submissions stated that the AG's application for variation of this Court's Orders dated 19th April, 2018 has not met the threshold set for it. Further, no basis has been made for setting aside the consent. She relied on the decisions of **Inter Countries Importers & Exporters Limited V Teleposta Pension Scheme Registered Trustees & 5 Others (2019) eKLR**; **Pastor Anthony Makena Chege V Nancy Wamaitha Magak & Another (2015) eKLR**; and **Isaac Kinyanjui Njoroge V National Industrial Credit Bank Limited (2018) eKLR**. She further relied on the decision of **Raila Odinga & 5 others V IEBC & 3 Others Petition 5/ 2013 SC (2013) eKLR** and contended that variation of a Court Order is not a procedural technicality. As per the Court records, there were no orders issued on the 18th May, 2017 but on 19th April, 2018, the Court through consent of the parties granted leave for all the parties to file their respective documents within fourteen (14) days from the said date or else the documents would not be considered as part of the record. I believe it is the Orders granted on 19th April, 2018 which the 2nd, 5th and 6th Defendants now seek to vary. After the said directions, the matter was set down for hearing wherein the Plaintiffs have since called all their witnesses and it is only one remaining. Further, I note the Applicants' Counsel had always cross examined all the Plaintiffs' witnesses. The 2nd, 5th and 6th Defendants intimated in their affidavit that they had only filed a withholding Defence with no documents nor witness statements. It is trite that for a party to seek variation of the orders of the court which the parties had consented to, it has to demonstrate that the same were grant through fraud, misrepresentation and mistake. In this instance, the Applicants have not demonstrated whether they were compelled to enter into the said consent. Further, I note they filed the instant application seeking variation of the orders much later after the matter had proceeded severally for hearing where their Counsel actually participated in. The Applicants have relied on Article 159 (2) (d) of the Constitution as well as the Oxygen principles, but to my mind, the directions the parties consented to, were to manage the hearing of this suit to enable the same to be determined expeditiously. Rules are to be adhered and a party cannot consent to the same, abide by it and later seek to vary the same. In associating myself with the principles established in the case of **Flora N. Wasike V Destimon Wamboko (1982 – 88) 1KAR 625** that a consent can only be set aside on the same grounds as would justify setting aside a contract, which include fraud, mistake or misrepresentation and based on the facts before me, I find that the Applicants have not met the said threshold and will hence decline to vary the orders granted on 19th April, 2018.

As to whether the 2nd, 5th and 6th Defendants should be granted leave to amend their Defence. The 2nd, 5th and 6th Defendants have sought for leave to amend their Defence in terms of the annexed draft, which application is supported by the Plaintiffs but opposed by the 1st, 3rd and 4th Defendants. The Applicants in their submissions reiterated their claim and relied on Article 159 of the Constitution as well as the decisions of Andrew **Ouko V Kenya Commercial Bank Limited & 3 Others (2014) eKLR**; and **Moses Wachira Vs Niels Bruel & 2 others (2013) eKLR**. The Plaintiffs in their submissions in support of the Applicants application stated that amendments should be allowed, no matter how late as long as there is no injustice to the other side which cannot be compensated by costs. To buttress their averments, they relied on various decisions including: **JC Patel Vs B. D Joshi (1952) 19 EACA 42**; **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 others (2014)** ; **Victoria Naiyanoi Kiminta V Gladys Kiminta Prinsloo (2019) eKLR**; **Pinnacle Projects Limited V Presbyterian Church of East Africa, Ngong Parish & Another (2019) eKLR**; **Muranga ELC Suit No. 204 of 2017 Thomas Ngarachu & Others Vs John Wilfred Wanyoike & Others; Elizabeth Wambui Githinji & 29 Others V Kenya Urban Roads Authority & 4 Others (2019) eKLR**; **Nabro Properties Ltd V Sky Structures Ltd & 2 Others (2002) 2KLR 299**; **Dr. Sunny Samuel V Simon M. Mbwika & Another (1998) eKLR**. They further submitted that the Court was not bound by the determination of the **Kajiado High Court Petition No. 2 of 2018** which related to the dispute herein as it was merely persuasive. They proceeded to rely on the decision of **Republic Vs Karisa Chengo & 2 Others (2017) eKLR** to support this argument. The Plaintiff further relied on the cases of **Nicholas Kiptoo Arap Salat V Independent Electoral and Boundaries Commissions & 6 others (2013) eKLR**; **Kenya Power & Lighting Company Limited V Benzene Holdings Limited t/a Wyco Paints (2016) eKLR** and **Elijah Kipngeno Arap Bii V Kenya Commercial Bank Limited (2013) eKLR**. The 1st Defendant in her submissions insists the Plaintiffs cannot frame grounds in support of the amendment motion but can only support what the Attorney General has pleaded. She insists the Applicants have not met the threshold for the court to exercise discretion in

their favour. Further, the amendment should not be allowed since it advances a new ground of Defence. She contended that the Applicants failed to disclose to the court that the witnesses' statements they intend to rely on were authored on 14th August, 2015; and were unsuccessfully used in mounting a Criminal Prosecution against her vide **Kajiado SPMCC No. 343 of 2018, Republic V Catherine Nyambura Muraria** which charges were quashed. Further, the Plaintiffs were complainants in the said criminal case and participated in the High Court Petition as Interested Parties. She reiterates that the documents sought to be produced were unsuccessfully brought into these proceedings by the Plaintiffs who filed what they purported to be their supplementary bundle of documents dated the 24th September, 2018. To buttress her averments, she relied on the following decisions: **Eastern Bakery Vs Castelino (1958) EA 461**; **Nurdin Bandari V Lombank Tanganyika Ltd (1963) EA 304**; **John Gakuo & Another V County Government of Nairobi & Another (2017) eKLR**; **Patel V Amin (1988) KLR**; **Hunker Trading Company Limited V Elf Oil Kenya Limited (2010) eKLR**; **Frederick S. Mburunga Vs George Murea M'itibua & Another (2018) eKLR**; and **Richard Omari Nyamatura V Daniel Ombachi Mogeni (2015) eKLR**.

In the current scenario, the 2nd, 5th and 6th Defendants have sought to amend their Defence claiming they had initially filed a holding Defence in 2014. They have not explained why they did not seek the same sooner before the matter was set down for hearing. From a perusal of the said proposed amendments, I note the Applicants have totally altered their original Defence and actually substituted a fresh cause of action. They now seek for the court to admit the Plaintiffs' claim which they had been denying from the time this suit was filed upto 2019 after **Kajiado SPMCC No. 343 of 2018, Republic V Catherine Nyambura Muraria** alluded to above was quashed vide the **Kajiado High Court Petition No. 2 of 2018**.

Order 8 rule (3) (2) stipulates that **'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.**

Further Order 8 rule (3) (5) stipulates that **'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.**

From the parties' submissions, they furnished Court with several authorities which are all relevant but at this juncture I will proceed to only cite a few.

In the case of **Eastern Bakery v. Castelino (1958) EA 461, O'Connor P.** at letter C on page 462 stated thus:

"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 vs. Maung Po Hnaung* (4) (1921), 48 I.A. 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".

While in the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 others (2014)** the Court of Appeal while dealing with an appeal on issues of amendment, observed that: 'The above text was cited with approval by this Court in **Wareham t/a AF Wareham & 2 others –vs- Kenya Post Office Savings Bank- Civil Appeal Nos. 5 & 48 of 2002.** Mulla, *The Code of Civil Procedure, 18th Ed, Vol.2* at pages 1751-1752: - has also set out the following which are also a useful guide when dealing with amendments of pleadings: -

"On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. **All amendments should be allowed which are necessary for determination of the real controversies in the suit;**
- ii. **The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;**
- iii. **Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;**
- iv. **Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;**
- v. **Amendment of a claim or relief barred by time should not be allowed;**
- vi. **No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;**
- vii. **No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;**

viii. *The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;*

ix. *Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.*”

[23] **Another factor that is also taken into consideration is that the court should not consider the merits of the proposed amendment in allowing or rejecting an amendment. This is because the merits are to be determined at the hearing of the suit’**

Further, in the case of **Hunker Trading Company Limited V Elf Oil Kenya Limited (2010) eKLR**, the Court of Appeal observed that: ‘**In conclusion, we wish to observe that “O₂ principle” which must of necessity turn on the facts of each case is a double faced and for litigants to thrive under its shadow they must place themselves on the “right side”. In the circumstances of this matter, the applicant is clearly on the “wrong side” and for this reason the principle must work against it. The advent of the “O₂ principle” in our opinion, ushers in a new management culture of cases and appeals in a manner aimed at achieving the just determination of the proceedings; ensures the efficient use of the available judicial and administrative resources of the courts; and results in the timely disposal of the proceeding at a cost affordable by the respective parties. That culture must include where appropriate the use of suitable technology. It follows therefore that all provisions and rules in the relevant Acts must be “O₂” compliant because they exist for no other purpose. The “O₂ principle” poses a great challenge to the courts in both the exercise of the powers conferred on them by the two Acts and rules and in interpreting them in a manner that best promotes good management practices in all the processes of the delivery of justice. In our view this challenge may involve the use of an appropriate summary procedure where it was not previously provided for in the rules but the circumstances of the case call for it so that the ends of justice are met. It may also entail our redesigning approaches to the management of the court processes so that finality and justice are attained and decisions that ought to be made today are not postponed to another day. The “O₂ principle” is certainly not going to be a magic potion capable of solving all our problems in the civil justice system. Instead it is a challenge to every court in every matter that comes up before it.”**

While Order 2, rule 6 (1) of the Civil Procedure Rules stipulates thus: ‘**No party may in any pleading make an allegation of fact, or raise any new ground of claim, inconsistent with a previous pleading of his in the same suit.**’

Based on the facts before me, while relying on the cited legal provisions and associating myself with the principles enshrined in the decisions I have quoted, I find that the amendment sought has come too late in time. I note that the Applicants failed to explain to Court that the documents they now seek to rely on and the proposed amendments touched on issues which were already dealt with in the **Kajiado SPMCC No. 343 of 2018, Republic V Catherine Nyambura Muraria** which was quashed vide the **Kajiado High Court Petition No. 2 of 2018**. It is hence my considered view that the Applicants have not fully demonstrated the reason for their delay in filing the said documents from August 2014. Further, the fact that they participated in the pre-trial directions as well as the hearings indicate an element of laches and bad faith. To my mind, even failure to inform Court that the said amendments are sought after the criminal case in the lower court was quashed vide a High Court Petition is an indicator that the amendments are being sought as a last resort. It emerged that the Plaintiffs had even earlier on attempted to produce the said documents they seek to rely on, but this was unsuccessful. Even though, the law allows the Court to grant amendments at any time, I opine that the proposed amendments at this time might be prejudicial to the rest of the Defendants. Further, I note the Applicants relied on Article 159 of the Constitution but as established in the case of **Raila Odinga & 5 others V IEBC & 3 Others Petition 5/ 2013 SC (2013) eKLR** that these constitutional provision should not be a solution for all ills, which position this Court relies on. The Applicants have further sought to rely on the oxygen principles but at this juncture, it is my view that this cannot do as it will delay the expeditious disposal of this case which has been pending for almost 10 years as it will result in its reopening. In the circumstance, I find that the amendments sought have totally altered the Applicants’ Defence; have not been brought timeously; will prejudice the rest of the Defendants and will decline to allow the same at this point.

It is against the foregoing that I find the application dated the 7th November, 2019 unmerited and will dismiss it. Costs will be in the cause.

Dated signed and delivered virtually at Kajiado this 18th day of January, 2021.

CHRISTINE OCHIENG

JUDGE