



Kenya Anti Corruption Commission v Ndungu & 5 others (Civil Case 179 of 2009) [2025] KEELC 1103 (KLR) (7 March 2025) (Ruling)

Neutral citation: [2025] KEELC 1103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL CASE 179 OF 2009
LL NAIKUNI, J
MARCH 7, 2025**

BETWEEN

KENYA ANTI CORRUPTION COMMISSION PLAINTIFF

AND

BETH NDUTA NDUNGU 1ST DEFENDANT

ABDALLA FARID FADHIL 2ND DEFENDANT

FAHIM YASIN TWAHA 3RD DEFENDANT

TWAHA MBARAK ALI 4TH DEFENDANT

SHAMIN MBARAK ALI 5TH DEFENDANT

SAMMY SILAS KOMEN MWITA 6TH DEFENDANT

RULING

I. Introduction

1. This Honourable Court was called upon to determine the Notice of Motion application dated 6th November, 2023 by Twaha Mbarak Ali and Shamin Mbarak Ali, the 4th and 5th Defendants/Applicants herein. The Application was brought under the dint of the provisions of Sections 1A, 1B and 3A & Section 63 (e) of the *Civil Procedure Act* and Order 8 Rule 3 and Order 51 of the *Civil Procedure Rules* and all other enabling Provisions of the Law.

II. The 4th and 5th Defendants/Applicants Case

2. The 4th & 5th Defendants/.Applicants sought for the following orders:-
 - a. Spent.



- b. That this Honorable Court do grant leave to the Applicants to amend the Plaint as per the copy attached hereto and the amended Plaint be deemed as duly filed upon payment of the requisite Court fees within the time specified by this Honorable Court.
 - c. That the costs of this application be in the cause.
 3. The application was premised on the grounds, testimonial facts and the averments of the 7 Paragraphed Supporting Affidavit of Twaha Mbarak Ali, the 4th Defendant/Applicant herein, sworn and dated the same day. The Deponent averred that:-
 - a. The Deponent instructed his advocate on record to file suit against Respondents to safeguard his interest
 - b. This suit was a claim for recovery of land which was sold to him but was currently being sought by the Plaintiff as recovery of assets belonging to Government of Kenya.
 - c. It was imperative that he recovered his monies paid as purchase price on the purchase of property and other related expenses.
 - d. The Deponent intended to amend the Plaint to include all the relevant to the suit and he intended to demonstrate the importance of having the said parties in the suit. He annexed a draft copy showing the intended amendment marked as “DAA – 1”.
 - e. It was of a profound importance that this Honourable Court do grant the orders sought herein.

III. Submissions

4. On 7th November, 2024 while all the parties were present in court the Honourable Court directed that both the application dated 6th November, 2023 be disposed of by way of written submissions. On 10th December, 2024 the Court having satisfied itself that the submissions had not been filed and parties having complied with the Court’s direction, it proceeded to reserve the delivery of the ruling date on 7th March, 2025.

IV. Analysis and Determination

5. I have keenly assessed and read through the pleadings filed by the Defendants herein, the myriad of cited authorities by the parties, the relevant provisions of the Constitution of Kenya, 2010 and the statutes.
6. For the Honorable Court to arrive at an informed, just, fair and reasonable decision, it has crystallized the subject matter emanating from the filed Application are the following two issues for determination:-
 - a. Whether the Notice of Motion application dated 6th November, 2023 by the 4th and 5th Defendants meets the threshold for the amendment of their pleadings being a Statement of Defence and Counter Claim and should it be granted as per provisions of the law.
 - b. Who will bear the Costs of the Notice of Motion application dated 6th November, 2023.



Issue No. a). Whether the Notice of Motion application dated 6th November, 2023 by the 4th and 5th Defendants meets the threshold for the amendment of their pleadings being a Statement of Defence and Counter Claim and should it be granted as per provisions of the law.

7. Under this Sub heading, the main substratum is on the amendments of pleadings. As already stated above, the legal principles on amendment of pleadings are provided for under the provision of Order 8 Rules 1, 2 and 3 of the Civil Procedure Rules, 2010. Procedurally, before the close of pleadings, the leave of Court is not required as opposed to when there has been closure of pleadings. The principles upon which a Court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases already developed by various Courts with the passage of time.
8. Being a material issue, it is pertinent that the Court reproduces the provision of Order 8 of the Civil Procedure Rules, 2010 herein. Order 8 Rule 3 provides that:
Amendment of pleading with leave [Order 8, Rule 3.]
 - (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 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.
 - (3) An amendment to correct the name of a party may be allowed under sub rule (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 sub rule (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 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 has already been claimed in the suit by the party applying for leave to make the amendment.
9. Amendment should not work injustice to the other side. But an injury that can be compensated by way of costs is not treated as an injustice. Further, the Honorable Court should aim to avoid multiplicity of proceedings and all amendments that should avoid such multiplicity should be allowed. The foregoing precedent confirms that the Honourable court has a wide and unfettered discretion to allow amendment of a claim provided that it is not after an inordinate delay or if it would occasion prejudice to the other side or if it introduces a new or inconsistent cause of action to the proceedings.
10. As stated, there have been a plethora of cases on the issue of amendments of pleadings. Hence, the Court should not be perceived to be re – inventing the wheel. These includes the case of “*Eastern*



Bakery v Castelino (1958) E.A 461 (U) at Page 462 and Civil case No. 7 of 2017, *St. Patrick's Hills School Limited - Versus - Bank of Africa Kenya Limited* (2018) eKLR” where courts held, “*inter alia*’:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs.....”

11. The same was later on buttressed by the case of: “Bramwell, LJ in “*Tildesley v Harper*” (1878), 10 Ch. D. at Page 296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”

12. It is clear that from the above principles which I endeavor to import to this case that an amendment of pleadings in general should be allowed before the final Judgement is delivered. Pursuant to the above position, in application of the said legal principles to the instant case, this Court agrees with the Applicants the Deponent intended to amend the defence to include all the relevant to the suit and he intended to demonstrate the importance of having the said parties in the suit. According to the Applicants the suit was a claim for recovery of land which was sold to him but was currently being sought by the Plaintiff as recovery of assets belonging to Government of Kenya. It was imperative that he recovered his monies paid as purchase price on the purchase of property and other related expenses.

13. Additionally, the case of “*Molo and Another v Kenya Railways and Another* (2002) 2 KLR 551 decided by Onyango Otieno J as he then was (now JA) on an application for amendment. The Learned Judge held “*inter alia*” that:-

- i. It is a well settled principle in law, that applications for amendments to pleadings before hearing are normally to be granted without much a do if they can be made without injustice to the opposing party.
- ii. The reason why amendments to pleadings are generally granted without much fuss particularly before hearing is because such amendments help to have all matters between the parties availed to court, so that the court, may be in a better position to have an informed view of the entire case. That ensures justice.
- iii. No time limit can be spelt out for an application for amendments as it is an application that can be made at any time even after these is heard but before Judgment.

14. Thus, this Honorable Court notes that the instant suit is still at its hearing stage and the pleadings had not closed hence the application was bona fide, timeously brought and meritorious as the amendment will not be introducing a new cause of action which is substantially different from the already existing one not offending Order 8 Rule 3 of the *Civil Procedure Rules*, 2010. Besides, in order to balance the scale of Justice as it were, the Court will allow the other parties corresponding leave and the opportunity to respond to the amendment if they so wished to do. Therefore, for these reasons, under this sub – heading the application for the 4th and 5th Defendants/Applicants herein succeeds.

Issue No. c). Who will meet the costs of the Notice of Motion Application dated 6th November, 2023

15. The Issue of Costs is at the discretion of the Costs. Costs mean the award that is granted upon a party upon the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1)



of the Civil Procedure Act, Cap. 21 holds that costs follow the events. By the event it means the result of the said legal action and/or proceedings.

16. In this case, as Honorable Court finds that the Plaintiff/ Applicant has succeeded in prosecuting its application and fulfilling the conditions set down for the amendment of the Plaintiff herein. Hence, it follows that there shall be no orders as to costs.

V. Conclusion and Disposition

17. Consequently, upon conducting an elaborate analysis of the issues set out herein, this Honorable Court is satisfied that the 4th and 5th Defendants have established a case from the reliefs sought from the application. Thus, specifically, the Honorable Court proceeds to grant the following orders:-
- a. That the Notice of Motion application dated 6th November, 2023 by the 4th and 5th Defendants be and is hereby allowed with costs.
 - b. That the 4th and 5th Defendants herein are granted leave to amend their pleadings being a statement of defence and Counter Claim as per the copy attached hereto and the amended statement of defence and counter claim be deemed as duly filed upon payment of the requisite Court fees within the time specified by this Honorable Court within the next Twenty-One (21) days from the date of delivery of this Ruling.
 - c. That upon service, the 1st, 2nd, 3rd and 6th Defendants in the suit are at liberty to file their responses within Fourteen (14) days of service thereof.
 - d. That the Plaintiff herein is granted 14 days leave to fully adhere with the case management requirements under Order 11 of the Civil Procedure Rules 2010 and to file and serve reply to the Amended Defence and Defence to the Counter Claim pursuant to the provision of Order 7 Rules 1, 2,3 & 11 of the Civil Procedure Rules, 2010.
 - e. That for expediency sake this matter to have been fixed and/or disposed of within the next One Hundred and Eighty (180) days from the date of this Ruling there be a mention on 25th March, 2025 before Justice Hon. Olola for conducting Pre - Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010 being that it is a fairly old matter having been filed in the year 2009.
 - f. That there shall be no orders as to costs.

It is so ordererd accordingly

RULING DELIVERED THROUGH MICROSOFT TEAM VIRTUAL MEANS, SIGNED IN OPEN COURT AND DATED THIS 7TH DAY OF MARCH 2025.

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HON. MR. JUSTICE L.L. NAIKUNI
ENVIRONMENT & LAND COURT AT
MOMBASA

Ruling delivered in the presence of:-

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. M/s. Abdurahmin Advocate for the Plaintiff/Respondent.
- c. No appearance for the 4th and 5th Defendants/Applicants.



HON. JUSTICE L.L. NAIKUNI (ELC JUDGE)

