



REPUBLIC OF KENYA



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Postal Corporation of Kenya v Board of Trustees Teleposta Pension Scheme (Environment and Land Case 96 of 2009) [2025] KEELC 5144 (KLR) (10 July 2025) (Ruling)

Neutral citation: [2025] KEELC 5144 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE 96 OF 2009**

**CG MBOGO, J
JULY 10, 2025**

BETWEEN

POSTAL CORPORATION OF KENYA PLAINTIFF

AND

THE BOARD OF TRUSTEES TELEPOSTA PENSION SCHEME DEFENDANT

RULING

1. Before me is the notice of motion dated 5th February, 2025 filed by the plaintiff/applicant, and it is expressed to be brought under Sections 1A, 1B and 3A and 100 of the Civil Procedure Act and Order 8 Rule 3(1), (2) & 5 of the Civil Procedure Rules seeking the following orders:-
 1. This honourable court be pleased to grant leave to the plaintiff to amend the plaint in terms of the annexed draft amended plaint.
 2. The amended plaint be deemed duly filed upon payment of the requisite filing fees.
 3. The costs of this application be provided for.
2. The application is premised on the grounds on its face. The application is supported by the affidavit of Rose Kavinya Musyimi, the facilities manager of the plaintiff/applicant sworn on even date. The plaintiff/applicant deposed that it is the proprietor of LR 209/13957/1, and that it is entitled to sixty-eight basement parking bays constructed and falling within its property. It was deposed that upon establishing that the parking bays fall within its property, it commenced the suit seeking an order of permanent injunction against the defendant/respondent, but that it is also entitled to a refund of all the sums paid for the 68 parking bays and mesne profits for the loss of user of the claim which were not initially pleaded at the point of filing the suit.



3. The plaintiff/applicant further deposed that the proposed amendment arises out of the same facts as between the parties in the present suit, and that the amendment sought will enable the parties to litigate correctly on all the issues and to avoid multiplicity of suits.
4. The application was opposed vide the replying affidavit of Peter K. Rotich, the administrator/trust secretary of the defendant/respondent sworn on 21st February, 2025. The defendant/respondent deposed that the suit was filed almost sixteen years ago i.e. 11th May, 2009 and that the plaintiff/applicant has sought to amend the plaint at the commencement of the hearing. Further, that the plaintiff/applicant has not provided any reasonable justification for the delay, and that it is a tactical maneuver by the plaintiff/ applicant aimed at delaying the hearing and determination of the suit. The defendant/respondent deposed that the plaintiff/applicant has always been aware that Posta House does not have basement parking, and that it was legally entitled to lease it to discharge its pension obligations.
5. The defendant/respondent deposed that the permanent injunction sought by the plaintiff would have been sufficient to compel the surrender of the parking bays if the suit had succeeded and the claims for refund and mesne profits are time barred by virtue of Section 7 of the Limitations of Actions Act.
6. In response thereto, the plaintiff/applicant filed the supplementary affidavit sworn on 4th April, 2025. While reiterating the contents of its supporting affidavit, the plaintiff/applicant deposed that the proposed new prayers are consequential to the main issue in dispute, and that it only recently managed to retrieve all the correspondences and receipts from the historical files. Further, that the delay was occasioned by the difficulty in obtaining past financial records as most of its staff have left employment.
7. The plaintiff/applicant further deposed that a restraining injunction serves a different purpose from a mandatory injunction, and that the proposed claim for mesne profits is not time barred as it is a continuous injury which arises out of the defendant/respondent's encroachment of the parking bays.
8. The application was canvassed by way of written submissions. The plaintiff/applicant filed its written submissions dated 4th April 2025 where it raised one issue for determination which is whether this court should grant the applicant leave to amend the plaint in terms of the annexed amended plaint.
9. On this issue, the plaintiff/applicant submitted that it is undisputed that the amendments are intended to have the real issues determined and avoid the need to file separate proceedings for recovery of mesne profits. Reliance was placed in the cases of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR and *St Patrick's Hill School Limited versus Bank of Africa Kenya Limited*, HCCC Civil Case No. 7 of 2017.
10. The plaintiff/applicant further submitted that while there was delay in filing the application, the delay is not sufficient ground for this court to decline to grant leave to amend the plaint. It was further submitted that the defendant/respondent has failed to demonstrate any delay it will cause or has been caused which cannot be compensated by an award of costs. The plaintiff/applicant submitted that the defendant/respondent has failed to plead any tangible prejudice that would befall it should the amendment be permitted. The plaintiff/applicant relied on the cases of *Central Kenya Ltd v Trust Bank Ltd & 4 others* [*CA No. 222 of 1998*](#), *Eastern Bakery v Castelino* (1958) E.A 461 (U.) at p. 462, and *Tildesley v Harper* (1878), 10 C.D at 296.
11. The plaintiff/applicant further submitted that the defendant/respondent has prematurely explored substantive legal issues that should be heard and determined at the substantive stage. Further, that these arguments are an attempt to circumvent the due process of law and obtain a premature determination



of the merits of the suit. While relying on the cases of James Ochieng' Oduol T/A Ochieng Oduol & Co. Advocates v Richard Kuloba [2008] KECA 53 (KLR) and Barclays Bank D.C.C v Shamsudin [1973] E.A 451, the plaintiff/applicant submitted that the defendant/respondent's opposition to the amendment is not predicated on any procedural defect, save to argue on substantive issues which is contrary to the principles of natural justice and procedural fairness.

12. The defendant/respondent filed their written submissions dated 22nd April, 2025 where it raised one issue for determination which is whether the court should grant leave to the plaintiff to amend the plaint. On this issue, the defendant/ respondent submitted that the claims for refund of rent and mesne profits are statute barred by dint of Section 4 (1)(a) and 7 of the *Limitation of Actions Act*. Further, that the plaintiff/ applicant has failed to move this court to enlarge time for filing statute barred amendments. To buttress on this submission, the defendant/ respondent relied on the cases of Edward Moonge Lengusuranga v James Lanaiyara & another [2019] KEHC 6758(KLR) and Pius Kimaiyo Langat v Cooperative Bank of Kenya Limited [2017] KECA 152 (KLR). In conclusion, the defendant/respondent submitted that the application should be dismissed with costs.
13. I have analysed and considered the application, the responses and the written submissions filed by the parties and in my view the issue for determination is whether the prayer seeking the amendment of the plaint is merited.
14. Section 100 of the *Civil Procedure Act*, provides as follows:-

“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.”
15. Order 8, Rules 3 and 5 of the Civil Procedure Rules, provides as follows:-
 - “(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 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.
 - (3) ...
 - (4) ...
 - (5) 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.”



16. Further, Order 8, Rule 5 of the Civil Procedure Rules provides:-

“(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 are just.

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

17. My reading of the above provisions shows that indeed an amendment may be allowed at any time of the suit. The court however has discretion to either allow or deny the amendment hence the need to seek leave. In making this decision, the court needs to look at all circumstances of the matter. If the amendment will greatly prejudice the other party so as to lead to an injustice, then the amendment may be disallowed. But if no injustice is going to be caused to the other party, the court may allow the amendment with necessary directions. Having said that, it is preferable that applications to amend come early in the proceedings. Late amendments are more likely to cause injustice as compared to an amendment coming before the hearing of the suit commences.

18. The Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR stated as follows:-

“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 vs. 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.”

19. The plaintiff/applicant filed this application just before the hearing of the suit, a fact which is not denied. The delay was attributed to the fact that they had now managed to obtain all the correspondences and receipts as most of the staff were retired. While I agree that amendments can be made at any stage of the proceedings, it is preferred that amendments are sought early as I have stated in paragraph 17 above. On the other hand, the defendant/respondent besides expressing the delay, contended that the claim for mesne profits are statute barred by virtue of Sections 4 (1) (a) and 7 of the *Limitation of Actions Act*. It appears that the defendant/respondent was in agreement that the proposed amendments do not seek to alter the original suit and that they are in tandem with the



original plaintiff. Also, it is apparent that in allowing the proposed amendments, the parties are agreeable to having all the issues determined once and for all.

20. From the above, it is my finding that the proposed amendments, however late as they have been brought would assist the court in determining all the issues and avoid multiplicity of suits. There is no prejudice that has been shown that will be suffered by the defendant/respondent. In any case, the defendant/respondent will have a chance to amend its defence accordingly. The limitation of time to seek the orders of mesne profits and rent are issues that can be dealt with substantively in the hearing. It is also my view that costs will be adequate compensation in the circumstance.
21. The notice of motion dated 5th February, 2025 is hereby allowed in the following terms: -
- i. The plaintiff/applicant is hereby granted leave to amend the plaintiff in terms of the annexed draft amended plaintiff.
 - ii. The amended plaintiff will be deemed duly filed upon payment of the requisite filing fees which should be made within 7 days from the date hereof.
 - iii. Immediately upon payment of the requisite fees, service of the amended plaintiff should be effected upon the defendant/respondent forthwith.
 - iv. The defendant/respondent to file and serve its amended defence, if need be, within 21 days from the date of service.
 - v. Costs of this application is hereby awarded to the defendant/ respondent and same are assessed at Kshs. 150,000/- payable within 30 days from the date hereof.

Orders accordingly.

DATED, SIGNED & DELIVERED VIRTUALLY THIS 10TH DAY OF JULY, 2025.

HON. MBOGO C.G.

JUDGE

10/07/2025.

In the presence of:

Mr. Benson Agunga - Court assistant

Mr. Muthee for the Plaintiff/Applicant

Mr. Ongwen alongside Ms. Kimona for the Defendant/Respondent

