



Karura Investment Limited v Magugu & 3 others (Environment & Land Case 329 of 2016) [2024] KEELC 557 (KLR) (8 February 2024) (Ruling)

Neutral citation: [2024] KEELC 557 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 329 OF 2016**

**AA OMOLLO, J
FEBRUARY 8, 2024**

BETWEEN

KARURA INVESTMENT LIMITED PLAINTIFF

AND

MARGARET WAIRIMU MAGUGU 1ST DEFENDANT

CHIEF LAND REGISTRAR 2ND DEFENDANT

DIRECTOR OF SURVEYS 3RD DEFENDANT

NATIONAL LAND COMMISSION 4TH DEFENDANT

RULING

1. The 1st Defendant/Applicant Margaret Wairimu Magugu filed the application dated 11th September, 2023 which is for determination. She sought the following orders;
 1. Spent
 2. Spent
 3. That the Honourable court be pleased to grant leave to the 1st Defendant/Applicant to amend her Statement of Defence dated 18th November, 2016 as shown in the draft amended Defence dated 31st August, 2023.
 4. That the annexed Amended Statement of Defence dated 18th June, 2016 and Amended on 31st August, 2023 be deemed as duly filed upon payment of court fees.
 5. That leave be granted to the Plaintiff/1st Respondent to file any response to the amended statement of defence, and to be at liberty to recall any witness.
 6. That the costs of this Application be provided for.



2. The application is premised on the affidavit of Margaret Wairimu Magugu and on several other grounds listed on its face inter alia;
 - a. That indeed on 12th May, 2022 the 1st Respondent (plaintiff) transferred the suit property all that land known as L.R No. 12422/21 situate in Muthaiga Area, Nairobi City County to the 5th Respondent herein.
 - b. That indeed the said action subsumed the crux of the suit herein, since the subject matter of the suit herein is the ownership of all the land known as L.R No. 12422/21.
 - c. That the actions of the 1st Respondent/Plaintiff of transferring the suit property during the pendency of the suit, gave rise to a new cause of action against the 5th Respondent/Defendant and hence the need to amend the Applicant's Statement of Defence.
 - d. The issuance of the orders sought herein shall occasion no prejudice whatsoever to the 1st and 5th Respondents for they shall be awarded an opportunity to defend the counterclaim.
 - e. That the doctrine of 'equality of arms' in a fair hearing dictate that there be a fair balance between the opportunities afforded the parties involved in litigation.
3. The plaintiff in opposing the application filed a replying affidavit sworn on its behalf by Suresh Chandra Ranchand Shah on 2nd October, 2023. Mr. Shah deposed that the application is mischievous, misconceived and brought in bad faith as it is an attempt by the Applicant to e-open litigation by circumventing this court's ruling of 19th April, 2023. He also deposed that the Applicant entered appearance in the matter and filed a statement of defence on 18th November, 2016. Subsequently the matter was certified ready for hearing.
4. The Plaintiff/Respondent stated that it presented the evidence of 3 witnesses and closed its case on 14th October, 2021. The Respondent accused the Applicant of scuttling the expeditious disposal of this matter by filing of over 4 applications. Mr. Shah averred on behalf of the Plaintiff that the proposed amendments introduced through the counter-claim will be prejudicial to them including significant expenses incurred to secure the attendance of their witnesses and the age of their witnesses. He added that the amendments are also pleading new matter.
5. The plaintiff added that there is nothing contained in the proposed amendments relate to the fact of change of circumstances in light of the 5th defendant's joinder into these proceedings. That the proposed amendments are in essence the rebuttals the Applicant would have preferred in cross-examination of the two witnesses they did not cross-examine. The plaintiff pleaded further that the application has been brought after inordinate delay. It urged the court to dismiss the application with costs.
6. The 1st Defendant/Applicant filed written submissions dated 17th October, 2023 which opened with a narration on the history of prosecution of this matter and added that unknown to the Defendants, and the court, the plaintiff on 12th May, 2022 transferred the suit property to the 5th Defendant. It is the action of transfer which she submits necessitated the need to amend the statement of defence dated 18th June, 2016.
7. The Applicant relied on the provisions of Article 159 (2) (d) of *the Constitution* and Order 8 rule 3(1) of the Civil Procedure Rules which states thus;

“ Administration of justice is to be done without undue regard to procedural technicalities; to probe if and how courts orchestrate undue regard to procedural technicalities in the conduct



of their business and assess the effects of undue regard to procedural technicalities in the civil justice system.”

8. The Applicant also anchored her argument on the case of Priscillah Warui Njagi vs. Joseph Njoka & Another (2015) eKLR where B. N. Olao held that;

“the guiding principal in such applications is that, so long as there is no prejudice or an injustice caused to the other side and unless the applicant is acting male fides, leave to amend should be freely allowed. This is to enable the parties to bring out all the issues that need to be determined and therefore avoid a multiplicity of suits...”

9. It is submitted by the Applicant that the present application has been filed timeously. In support of this argument, she relied on the case of Fiveways Medical Diagnostic (K) Ltd Vs. Northern Water Services Board & 3 Others (2020) eKLR where E. C Cherono J. had this to say;

“though the application is strenuously opposed, I find the application for amendment by the 1st Respondent made in good faith and will enable this Honourable Court to determine the real issues in controversy. The court takes Judicial Notice that the Plaintiff has called two witnesses but she has not closed her case. Should the application be allowed and the plaintiff wishes to amend their defence and even to recall the two witnesses who have already testified, the costs of recalling the witnesses shall be borne by the Applicant/1st Defendant...”

10. There is no submission filed by the Plaintiff/Respondent.

11. The provisions of order 8 rule 3(1) of the Civil Procedure Rules allows for amendment of pleadings at any stage of the proceedings subject to terms as may be just. The plaintiff has deposed to three things in opposing the grant of the leave sought. First, that it will be prejudiced as it has already closed its case. Second, the amendment is intended at circumventing the orders of this court given on 19th April, 2023. Thirdly, the application has been brought after undue delay.

12. The plaintiff has not denied the allegation of effecting a transfer to the 5th Defendant – Deka Plantations Ltd on 12th May, 2022 during the pendency of this suit. A copy of the title confirms the transfer at entry No. 4. On the title. The 1st Defendant who moved this court to join Deka Plantations Ltd to these proceedings after learning of their (Deka Plaintations) intention to sell the suit property to members of the public on 5th November, 2022.

13. I have perused the statement by defence of the 1st Defendant dated 18th November, 2016 and noted that it had sought prayers as against the plaintiff including an order for cancellation of the “irregular and fraudulent title L.R No. 12422/21 (IR 39545).” The plaintiff/Respondent deposed that the proposed amendment is attempting to introduce a new cause of action under prayer (IV) where the proposed amendment is seeking cancellation of L.R 12422/21 and the registration of 5th Defendant.

14. Thus, a prayer for cancellation already existed save for the cancellation of transfer and registration of Deka Plantations; which could not be included in earlier defence. The body of the proposed counter-claims give background of why the order of cancellation sought should be granted. I am thus not persuaded that there is a new cause of action being introduced.

15. Another argument fronted why the orders sought should not be granted is that it amendment is aimed at circumventing the outcome of the ruling of 19th April, 2023. I have had the opportunity to read the ruling of my brother S. Okong’o J. which denied the 1st Defendant/Applicant’s request for leave to recall a witness for cross-examination and file witnesses’ statements. The Applicant/1st Defendant



has explained that it is the action of transferring the suit title to the 5th Defendant in May, 2022 which had necessitated the amendment.

16. As correctly pointed out by the Plaintiff, the complaints pleaded in paragraphs 6 – 32 of the proposed counter-claim speaks of actions done between 1976 to 5th April, 2016. This is way before 12th May, 2022 when the property passed on to the 5th Defendant and before the Applicant filed her statement of defence on 18th November, 2016. The Applicant ought to have been candid with the court to explain the delay instead of submitting that the application was filed timeously.
17. In exercise of my discretion, i have to balance the prejudice that the plaintiff and the Applicant is likely to suffer if the orders are granted (not granted). The consequence of transfer of the suit land to the 5th defendant during the pendency of this suit will be determined automatically by the outcome of this suit. The 5th Defendant's title is dependent on being sustained or cancelled once the dispute between the plaintiff and the 1st defendant is determined. On the question of being granted an opportunity to present its case, the Applicant/1st Defendant already has a prayer for cancellation of the plaintiff's title in the original defence.
18. In the case of *Kasam Vs. Bank of Baroda (Kenya) Ltd (2002) eKLR*, Kuloba J. stated thus;

“the power to allow amendment is intended to do justice, for all amendments ought to be allowed which (a) do not work injustice on the other side, and (b) are necessary for determining the real question in controversy between the parties.”

“Looking at everything on this file, it is to be noticed that this application has come after a delay of nearly three years after the defence was filed; and it seems to have been a reaction to the plaintiff's application for an order to strike out the defence. It was filed in a manner which give a legitimate impression that if the plaintiff had not moved in this manner the defendant would simply have stayed put and done nothing about its defence. Such a reactionary conduct of a party points to a bad view of that party unless he explains his waiting for the other side to move before he also moves. There is no explanation given in the instant matter for that conduct. It may be true that sometimes an amendment is sought after the party seeks it has seen the next line of action by his opponent; but in the absence of an explanation as to why voluntary amendment was not sought without it being prompted by the other party's move, the bona fides of the desire to amend it put in question.”
19. However, granting the orders of amendment will result in re-opening and re-starting the case. For this to be done, the 1st Defendant ought to have demonstrated why the power under section 3 and 3A of the [Civil Procedure Act](#) ought to be exercised in their favour but which duty they have not discharged. They ought to have seriously taken the cue from the finding by S.Okong'o J that she was guilty of laches for failing to file documents and witness statements vide the ruling of 19th April, 2023. It is my finding that the change of title to the 5th Defendant was overtaken by events as soon as Deka Plantations Ltd was made party to these proceedings. The actions of the 5th Defendant to sell the suit property can be cured by seeking orders of temporary injunctions and not seeking to amend the defence.
20. Consequently, I find that the application dated 11th September, 2023 is without merit and proceed to dismiss it with costs to the plaintiff.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 8TH DAY OF FEBRUARY 2024

A. OMOLLO



JUDGE

