



Ethics and Anti Corruption Commission v Baiya & 3 others (Environment & Land Case 256 of 2018) [2024] KEELC 13524 (KLR) (4 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13524 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT & LAND CASE 256 OF 2018
MAO ODENY, J
DECEMBER 4, 2024**

BETWEEN

ETHICS AND ANTI CORRUPTION COMMISSION PLAINTIFF

AND

JACOB BAIYA 1ST DEFENDANT

**NOREEN SHARIFF CHOGE EVA CHEROGONY AND BYRON KIPNGETICH
GAWON CHOGE (SUED AS ADMINISTRATORS OF THE ESTATE OF JIM
CHOGE - DECEASED) 2ND DEFENDANT**

WILSON GACHANJA 3RD DEFENDANT

KAHIGA HOLDINGS LIMITED 4TH DEFENDANT

RULING

1. This ruling is in respect of a Notice of Motion dated 2nd July, 2023 seeking the following orders:
 - a. That this Honourable Court be pleased to grant leave to the 4th Defendant/Applicant to amend the Defence to include Counter-claim in terms of the proposed Amended Defence.
 - b. That Amended Statement of Defence be filed within 14 days of grant of such leave (sic).
 - c. That the costs of this application be provided for.
2. The application was supported by the affidavit of James Muigai, the 4th Defendant/Applicant's director, sworn on 2nd July, 2024 where he deponed that it has become extremely necessary to join the Attorney General as a party through a Counter Claim and that the proposed amendments shall crystallize the issues in controversy and enable the court effectively make full determination of the matters herein.



3. The Plaintiff filed grounds of opposition dated 2nd September, 2024 and stated that the application has been brought with undue delay and introducing the counterclaim at this stage would prejudice the Plaintiff/Respondent as it would hinder its ability to respond effectively.
4. The Plaintiff stated that the Honourable Court lacks the jurisdiction to deal with the issues at hand since it was not a matter concerning land use and occupation in contravention of Article 162 (2) (b) of *the Constitution* and Section 13 (2) of the Environment and *Land Act* and that the application is an abuse of court process as it seeks to introduce a fresh case rather than advancing the existing cause of action.

Applicant's Submissions

5. Counsel for the Applicant filed submissions dated 26th September, 2024 and identified the following issues for determination:
 - a. Whether this Honourable Court should allow the Application?
 - b. Whether the amendment will be prejudicial to the Plaintiff/Respondent?
6. On the first issue counsel submitted, that the Applicant purchased the suit parcel of land for valuable consideration and it is an innocent purchaser for value who conducted due diligence and relied on various documents from the Attorney General and the District Land Registrar who are the 1st and 2nd Defendants in the intended counter-claim.
7. Counsel relied on Order 1, Rule 10 (2), Order 8 Rule 3, Order 8 Rule 5 of the Civil Procedure Rules and the cases of Central Kenya Limited vs Trust Bank Limited [2002] 2 EA 365, Institute for Social Accountability & another vs Parliament of Kenya & 3 others [2014] eKLR and Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited [2013] eKLR and submitted that courts use their discretion to allow applications for amendment of pleadings at any stage if the said amendments aid in determining the real issues arising within the suit.
8. On the second issue, counsel submitted that the intended amendments to include a Counterclaim would not be prejudicial to the Plaintiff whatsoever and relied on the case of General Manager E A R & HA & Thierstein (1968) 1 EA 354 (HCK) C.
9. According to counsel, the Applicant's prayers for a declaration that the proposed Defendants in the Counter Claim are liable to compensate him for the loss of Ksh 16,500,000 falls squarely within the jurisdiction of this Honourable Court as spelled out in Section 13 (2) e and Section 13 (7) (d) and Section 13 (7) h of the *Environment and Land Court Act* and urged the court to allow the application as prayed.

Plaintiff/ Respondent's Submissions

10. Counsel for the Plaintiff/Respondent filed submissions dated 4th October, 2024 and submitted that the application should be dismissed on grounds of undue delay, prejudice, futility and statutory limitations that bar the proposed amendments. It was counsel's submission that this matter is in a series of five related cases where the court delivered judgments for the Plaintiff in two related matters being Nakuru ELC No 242 of 2018 and Nakuru ELC No 266 of 2018 and that all the five cases touch on parcels of land where the Late Jim Choge irregularly acquired parcels of government land.
11. According to counsel, the Defendant's reliance on Order 1 Rule 10 (2) is misplaced as the amendment seeks to introduce new facts inconsistent with the original cause of action, rather than addressing a misjoinder or non-joinder. Counsel relied on the case of Central Kenya Ltd vs Trust Bank Ltd



& 4 Others [2000] eKLR. It was counsel's submission that the counterclaim shifts the focus from the original dispute, which would significantly prejudice the Plaintiff/Respondent contrary to the requirements of Order 8, Rule 3 of the Civil Procedure Rules. Counsel further relied on the cases of Joseph Ochieng & 2 others vs First National Bank of Chicago [1995] eKLR and Social Accountability & Another vs Parliament of Kenya & 3 others [2014] eKLR.

12. Ms. Maina stated that the Defendant/Applicant seeks an amendment more than eleven years after the filing of the initial pleadings without any reasonable explanation for the delay and relied on the cases of Central Kenya Ltd vs Trust Bank Ltd & 4 others [2000] eKLR and Peter Muchira Karugumi vs Kirinyaga County Government & Governor, Kirinyaga County Government [2020] KEELRC 65 (KLR).
13. It was further counsel's submission that the Defendant/Applicant's counterclaim is barred by law and cannot be introduced at this stage through an amendment and such amendments should not be allowed where the claims would be time barred if filed separately. Counsel relied on Section 3 (2) of the Public Authorities Limitation of Action Act and Section 4 (1) (d) and 35 of the Limitation of Actions Act and the cases of Iga vs Makerere University [1972] EA 65 and Hilton vs Sutton Steam Laundry [1946] KB 65.
14. According to counsel, the timing of the amendment points to bad faith as the Plaintiff/Respondent or the intended Defendants in the counterclaim are not privy to the original land sale contract between the 5th Defendant and the 2nd Defendant thus the proposed amendment cannot be sustained and relied on the case of Kenya Airports Authority vs Mitu-Bell Welfare Society & 2 others [2016] eKLR. Finally, counsel submitted that the application is an abuse of court process and relied on the case of Muchanga Investments Ltd vs Safaris Unlimited (Africa) Ltd & 2 others [2009] eKLR and urged the court to dismiss the application.
15. The other Parties were not opposed to the application and hence did not file any submissions.

Analysis And Determination

16. The issue for determination is whether the 4th Defendant/Applicant should be granted leave to amend the Defence to include Counter-claim in terms of the proposed Amended Defence.
17. The court is guided by the case of Ochieng and Others -v- First National Bank of Chicago, Civil Appeal Number 147 of 1991 set out as follows the principles under which Courts may grant leave to amend the pleadings:
 - a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b) the amendments should be timeously applied for;
 - c) power to amend can be exercised by the court at any stage of the proceedings;
 - d) 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;
 - e) 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 Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”



18. The application is brought under the provisions of Order 1, Rule 10 (2) of the Civil Procedure Rules which provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

19. The provisions of Order 1, Rule 10 (2) of the Civil Procedure Rules deal with parties who are improperly joined. The 4th Defendant/Applicant seeks to amend the defence to include a counterclaim. The Application has also been brought under Order 8 Rule 3 and 5 of the Civil Procedure Rules. Order 8 Rule 3 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. An amendment to correct the name of a party may be allowed under subrule (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 subrule (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 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.

20. Order 8 Rule 5 of the Civil Procedure Rules provides 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 are just.
2. This rule shall not have effect in relation to a judgment or order.

21. The court record shows that the Plaintiff's five witnesses have already testified and the Applicant submitted that it is of utmost importance that the Attorney General be joined as a Defendant and that the witnesses who have testified so far are government officials whom the Attorney General would be



obliged to act for if sued for acts done in execution of their duties hence no prejudice is likely to be suffered if the counterclaim is introduced at this stage.

22. The court record also shows that this suit was instituted on 13th July, 2018 and later amended on 3rd March, 2021. Further, that on 25th February, 2021, the Applicant herein filed a Statement of Defence and the hearing of this case commenced on 15th November, 2021. The court is cognizant of the fact that amendments should be freely allowed at any stage of the case before Judgment so long as it is brought timeously and in good faith.
23. The Respondent has questioned the jurisdiction of this court to hear and determine the case if the amendment is allowed and that the counterclaim for compensation would be time barred. With due respect to counsel, I find this line of argument intriguing why the court would suddenly not have the requisite jurisdiction to hear this matter. The Court's mandate is provided for under section 13 of the Land and Environment Act, which enumerates the cases that the court can adjudicate upon.
24. On the issue of Limitation of Actions, the court will be able to deal with whether the reliefs sought in the counterclaim is time barred or not. Amendments should be allowed to avoid multiplicity of suits but the same must be filed without undue delay. Further we should also take into consideration that the proposed amendment should not be inconsistent with the cause of action and that the cause of action arises out of the same facts or substantially from the same cause of action.
25. The Applicant seeks to amend the defence to include a counterclaim for compensation arising from the same facts and same transaction. This is a court of justice, which should not lock out a litigant from the seat of justice to ventilate his/her grievances. The amendment will not prejudice the plaintiff as the court will still hear and determine the case on merit and being an adversarial system, the outcome will go either way.
26. In Mulla, The Code of Civil Procedure, 18th Ed, Vol.2 at pages 1751-1752:- sets the following on 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.”

27. I have considered the application, the submissions by counsel and the relevant judicial authorities and find that the application has merit. The Applicant to file and serve an amended defence and counterclaim within 7 days, Respondents to file amended pleadings within 14 days upon service if need be. Costs in the cause.

DATED, SIGNED AND DELIVERED AT NAKURU THIS 4TH DAY OF DECEMBER 2024.

M. A. ODENY

JUDGE

