



**Egoli Estates Limited v Bluebill Enterprises Limited (Environment & Land
Case E395 of 2021) [2023] KEELC 790 (KLR) (7 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 790 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E395 OF 2021**

**JA MOGENI, J
FEBRUARY 7, 2023**

BETWEEN

EGOLI ESTATES LIMITED PLAINTIFF

AND

BLUEBILL ENTERPRISES LIMITED DEFENDANT

RULING

1. The application before me is one dated August 29, 2022 filed by the defendant. The application is brought under the provisions of order 8 rule 3 and 5 of the *Civil Procedure*, sections 1A, 1B, 3A and Section 100 of the *Civil Procedure Act* and all other enabling laws. The applicant seeks the following orders :-
 - 1) That the honorable court be pleased to grant leave to the defendant/applicant to amend its amended defence and counter-claim dated January 21, 2022 as shown in the draft further amended defence and counter-claim.
 - 2) That the annexed further amended defence and counter-claim be deemed as duly filed upon payment of court fees.
 - 3) That costs be in the cause
2. Among the grounds cited for the application are that this suit cannot be fairly adjudicated without the proposed amendments to the defence and counter-claim. That the Defence and the Counter-claim omitted crucial facts, to wit: that the defence and counter claim needs to provide full and particulars on special and general damages and that the amendments sought are necessary for the purpose of helping the court to determine the real questions in issue between the parties.
3. The application is opposed but before I go to the gist of the objection, I think it is important to outline a brief background to this suit.



4. The suit was commenced by way of plaint dated November 17, 2021. Briefly, the case of the plaintiff is that the defendant's wall and its base has extended to the plaintiff's land parcel by 0.3 meters and by 0.5 meters of the column base of the apartments.
5. That the plaintiff claims to have used a lot of expense in abating and correcting the encroachment by excavation, cutting and under pinning of the boundary wall.
6. Both the plaintiff and the defendant own parcels of land that are adjacent to each other the one for the plaintiff is title Number Dagoretti/Riruta/3095 and the defendant's is Dagoretti/Riruta/3096 and they share a common boundary.
7. The plaintiff while excavating to commence construction works on its land parcel in August 2019 conducted a survey and it is through the survey that he discovered that the defendant's boundary walls and apartments had encroached into the plaintiff's land parcel.
8. The defendant filed defence dated December 20, 2021 and denied all claims in the plaint. He stated that the plaintiff never involved them in the process of abating and making good the alleged encroachment and therefore any costs being claimed are denied.
9. The plaintiff avers that the application to amend the defence and counter-claim is *res judicata* since this court vide its ruling of June 27, 2022 dealt conclusively with the issue of the amended defence and counter-claim which was the subject of the application dated April 7, 2022 therefore the issues being raised in the instant application are *res judicata*. They urged the court to find the application as lacking in merit and dismiss it.
10. The application raises only one issue to be determined that is whether or not the application is *res judicata* by dint of the fact that the applicant had filed an amended defence and counter-claim without seeking leave of the court which was dismissed on June 27, 2022.
11. Both parties filed written submissions which I have read and considered. Courts are usually liberal when it comes to allowing a party to amend his pleadings, unless, it is demonstrated that great prejudice will be caused to the other party, which prejudice cannot be remedied by an award of costs. In the case of *Eastern Bakery v Castelino* [1959] EA 461, the court held that :-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs”.
12. In the case of *Caneland Ltd & Others v Delphis Bank Ltd* C A No 20 of 2000, the court held that for *res judicata* to apply, the issues must be heard and decided on merits otherwise the pleas cannot be sustained.
13. Similarly, in the case of *The Tee Gee Electrical & Plastic Co v Kenya Industrial Estates Ltd* C A no 333 of 2001 the Court took the view that *res judicata* only applies where the matter has been heard and determined on the merits.
14. *Black's Law Dictionary* 10th Edition defines the terms “heard and determined” as follows: - “of a case, having been presented to a court that rendered judgment.”



15. The term “hearing” is defined in the same dictionary as follows: -

“A judicial session is open to the public held for the purpose of deciding issues of fact or of law sometimes with witnesses testifying.”
16. *Res judicata* is also defined in the same dictionary as follows: -

“An issue that has been definitively settled by judicial decision.”
17. Article 50(1) of the Constitution provides for fair hearing. The court must also be alive to the requirements of both article 159(2)(d) of the Constitution and section 19(1) of the Environment and Land Court Act which eschew the determination of disputes on procedural technicalities. See *Wensley Barasa v Immaculate Awino Abongo & another* [2020] eKLR.
18. I have considered the assertion by the plaintiff’s advocate that the application is *res judicata*, but with tremendous respect, I will differ with this position. This court rejected the filing without leave of the court the amended defence and counter-claim. This means that the application was not heard on merit. The current application is seeking leave to allow filing of the amended defence and counter-claim.
19. I am also aware that the hearing is yet to commence as directions have not been given in terms of order 11 of the Civil Procedure Rules. If any injustice is to be occasioned to the plaintiffs, the same can be cured by granting them corresponding leave to amend their plaint and or file a reply to the counter – claim together with an award of costs if need be.
20. Since the defendant has not brought this application too late in the day, I find no reason to refuse them the orders. For the reasoning contained in the body of this ruling and the right given by the rules, I find merit in the application and allow it by making the following orders
 - a. Leave be and is hereby granted to the defendant/applicant to amend its amended defence and counter-claim dated January 21, 2022 as shown in the draft further amended defence and counter-claim.
 - b. That the annexed further amended defence and counter-claim be deemed as duly filed upon payment of court fees.
 - c. The costs of the application are ordered in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 7TH DAY OF FEBRUARY 2023.

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MOGENI J

JUDGE

Judgment read in virtual court in the presence of:

..... **For the plaintiff**

..... **For the defendant**

Ms Caroline Sagina.....Court

.....

MOGENI J



JUDGE

