



**Ethics and Anti-Corruption Commission v Midlands Limited & another; Mureithi (Interested Party) (Environment & Land Case 381 of 2017) [2023] KEELC 16044 (KLR) (9 March 2023) (Ruling)**

Neutral citation: [2023] KEELC 16044 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYAHURURU  
ENVIRONMENT & LAND CASE 381 OF 2017  
YM ANGIMA, J  
MARCH 9, 2023**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**MIDLANDS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LILIAN WANGIRI NJENGA ..... 2<sup>ND</sup> DEFENDANT**

**AND**

**NAPHTALI MUNGAI MUREITHI ..... INTERESTED PARTY**

**RULING**

**A. Introduction**

1. By a plaint dated 04.02.2013 the Plaintiff sought, inter alia, recovery of various land parcels comprised in Title Nos. Nyadarua/Njabini/6087, 6088, 6089, 6090, 6091 & 6092 which were said to have been irregularly, fraudulently and illegally excised from the original parcel No. Nyandarua/Njabini/530 which was said to be public property then vested in Settlement Fund Trustees (SFT) in trust for Njabini Agricultural Training Centre (the Centre), a public institution which was in occupation of the said land at all material times.
2. It was pleaded that the 2<sup>nd</sup> Defendant who was then the Director of Land Adjudication & Settlement had illegally, fraudulently and in abuse of her office as a public officer allocated the land in issue to the 1<sup>st</sup> Defendant without the consent of the Minister responsible for Agriculture as stipulated under the Agriculture Act (Cap. 318) whereas the said land was not available for allocation in any event.



## **B. The Plaintiff's Instant Application**

3. Whilst the suit was pending and part heard before 2 different Judges the Plaintiff filed a notice of motion dated 15.09.2022 grounded upon Sections 1A, 1B & 3A of the Civil Procedure Act (Cap. 21), Order 8 Rules 3, 5 & 8 and Order 51 rule 1 of the Civil Procedure Rules, 2010 (the Rules), and all other enabling provisions of the law seeking the following orders:
  - a. That the Plaintiff/applicant be granted leave to amend its pleadings in the manner set out in the amended pleadings annexed to this application and marked BWK-4.
  - b. That subject to the outcome of prayer (1) above, the amended pleadings annexed to this application and marked BWK-4 be deemed to be duly filed and served on the 1<sup>st</sup> and the 2<sup>nd</sup> Defendants/respondents and the interested party.
  - c. That subject to the outcome of prayer (1) above, this honourable court be pleased to order that the amended pleadings be served upon the institutions the Plaintiff seeks to join to this suit through this application namely, Land Settlement Fund Board of Trustees and Equity Bank, within fifteen (15) days or such time as the court may deem fit in the circumstances of this case.
  - d. That subject to the outcome of prayer (1) and (3) above, this honourable court be pleased to order that the institution intended to be joined in this suit through this application namely Land Settlement Fund Board of Trustees and Equity Bank do enter appearance and file their respective statements of defence to the Plaintiff/applicant's amended pleadings within fifteen (15) days of service or such time as the court may deem fit in the circumstances of this case.
  - e. That this honourable court be pleased to give such other orders or directions as may be fit and just in the circumstances of this case.
4. The application was based upon the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by Benson Wambua Kyeli on 15.09.2022 and the exhibits thereto. The Plaintiff asserted that the Land Settlement Fund Board of Trustees (LSFBT) was the successor of the SFT which was the registered proprietor of the suit properties prior to their alienation to the 1<sup>st</sup> Defendant. It was contended that the SFT was not holding the suit properties as absolute owner but in trust for the Centre.
5. The Plaintiff further contended that the suit properties were charged to Equity Bank Ltd hence the bank was a necessary party to the proceedings as it has an interest in the properties. The Plaintiff was thus of the view that the joinder of the said parties would assist the court to effectually and completely adjudicate all the issues raised in the suit.

## **C. The Defendants' Response**

6. The Defendants did not file any replying affidavit to dispute the factual foundation of the Plaintiff's application. However, the 2<sup>nd</sup> Defendant filed grounds of opposition dated 28.09.2022 raising the following grounds.
  - a. The application has been filed outside 60 days within which it was to be filed following directions of the court given on 15<sup>th</sup> June, 2022 without an explanation being offered.
  - b. The annexed amended pleadings do not disclose any cause of action that is not already addressed and/or pleaded in the pleadings.



- c. The annexed amended plaint does not disclose any specific relief sought against the proposed 3<sup>rd</sup> Defendant.
- d. Allowing the application will further convolute the issues in the matter and delay the determination of the suit that is already part-heard.
- e. The application is frivolous and an abuse of the court process as it has been filed in bad faith so as to bridge gaps which were formed during cross examination of witnesses who have testified.

#### **D. Directions on Submissions**

- 7. When the application was listed for inter partes hearing it was directed that the same shall be canvassed through written submissions. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that the Plaintiff's submissions were filed on 03.10.2022 whereas the 2<sup>nd</sup> Defendant's submissions were filed on 24.10.2022. The 1<sup>st</sup> Defendant and the Interested Party did not file any submissions to the application.

#### **E. The Issues for Determination**

- 8. The court has perused the Plaintiff's notice of motion dated 15.09.2022, the 2<sup>nd</sup> Defendant's grounds of opposition as well as the material on record. The court is of the opinion that the main question for determination is whether the Plaintiff has made out a case for leave to amend the plaint and join the proposed Defendants in the suit.

#### **F. Analysis and Determination**

- 9. Order 8 rule 3(1) of the Rules on amendment of pleadings stipulates as follows:

“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.”

- 10. On the other hand, Order 8 of the Rules provides that:

“(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 may be just.

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

- 11. The principles to be considered in granting or refusing an application for leave to amend pleadings were re-stated in the case of *Eastern Bakery –vs- Castellino* [1958] EA 461 at 462 as follows:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs *Tildesley v. Harper* (10 (1878), 10 Ch. D. 393; *Clarapede v. Commercial Union Association* (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: *Budding v. Murdoch* (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means



of amendment, the subject matter of the suit: *Ma Shwe Mya vs. Maung Po Hnaung* (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: *Raleigh v. Goschen* (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: *Weldon v. Neal* (6) (1887), 19 Q.B.D. 394; *Hilton v. Sutton Steam Laundry* (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

12. Similarly, in the case of [Central Kenya Ltd –vs- Trust Bank Ltd & 5 Others](#) [2000] eKLR the Court of Appeal considered the principles as follows:

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

13. The Court of Appeal considered the issue of joinder of parties in the case of [JMK –vs- MWM and Another](#) [2015] eKLR as follows:

“Commenting on this provision, the learned authors of Sakars Code of Civil Procedure (11<sup>th</sup> Ed. Reprint, 2011. Vol.1 p. 887), state that:

“This section should be interpreted liberally and widely and should not be restricted merely to the parties involved in the suit, but all persons necessary for a complete adjudication should be made parties.

...

We would however agree with the respondent that Order 1 Rule (10)(2) contemplates an application for amendment or joinder of parties where proceedings are still pending before the court. Sarkar’s Code, (supra) quoting as authority, decision of Indian Courts on the provision, expresses the view that an application for joinder of parties can be filed only in pending proceedings. In the same vein, the Court of Appeal of Tanzania, while considering the equivalent of Order 1 Rule 10(2) of our [Civil Procedure Rules](#), in [Tang Gas Distributors Ltd –vs- Said & Others](#) [2014] EA 448, stated that the power of the court to add a party to proceedings can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceedings has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage.”

14. The issue of who is a necessary party was considered in the case of [Pizza Harvest Ltd. –vs- Felix Midigo](#) [2013] eKLR where the court held that:

“...I have also taken cognizance of the case of *Amon –vs- Raphael Tuck and Sons Limited* (1956) 1 All ER 273 in which Devlin J held at page 286 – 287:

“What makes a person a necessary party? It is not, of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary



witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ...the court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.” (Emphasis added)

15. Similarly, in the case of *Civicon Limited –vs- Kivuwatt Limited & 2 Others* [2015] eKLR it was held, inter alia, that:

“Having carefully considered the respective positions of the parties to this dispute, this is our view of the appeal. Under Order 1 of the *Civil Procedure Rules*, the trial court has wide discretionary powers to make necessary amendments as to the parties to a suit by adding, substituting or striking them out and make all such changes in respect of the parties as may be necessary to enable an effectual adjudication to be made concerning all matters in dispute between them. The court has a separate, independent duty from the parties themselves to ensure that all necessary and proper parties, and no others, are before it so that it may effectually and completely determine and adjudicate upon all matter in dispute...”

16. The court is satisfied on the basis of the pleadings and the material on record that the Plaintiff has made out a case for the grant of leave to amend the plaint as sought in the application. The 2<sup>nd</sup> Defendant did not file any affidavit to demonstrate that it shall suffer any prejudice which cannot be adequately compensated by an award of costs. It has not been demonstrated that the application was brought in bad faith. The mere fact that there was delay in filing the instant application cannot be sufficient reason to refuse an amendment. The fact that the suit is part-heard cannot, by itself, preclude a party from seeking amendment of pleadings or joinder of additional parties. See *General Manager East African Railways and Harbours Corporation –vs- Thierstein* [1968] EA 354. The court has noted that the Plaintiff is yet to close its case and Defendants are yet to testify.
17. The court is equally satisfied that the Plaintiff has made out a case for joinder of the proposed 3<sup>rd</sup> and 4<sup>th</sup> Defendants to the suit. There is no doubt from the material on record that the SFT was the registered proprietor of the properties the subject of the suit prior to allocation of the same to the 1<sup>st</sup> Defendant. The capacity in which it was holding the suit properties is one of the issues for determination in the suit. The legality of the allocation is also one of the issues for determination in this suit. The court is thus of the opinion that successor of the SFT is a necessary party to the proceedings.
18. The court is further of the opinion that it is necessary to join Equity Bank Ltd as a party because it appears to be holder of a charge with respect to the suit properties or some of them. A charge is a legal interest intended to secure the payment of money or money’s worth. It is, therefore, evident that if the suit were to proceed to conclusion in the absence of the chargee, its legal interest may be adversely affected in violation of the rules of natural justice. There is also a risk that the chargee may not be bound by the outcome of the suit. The court is thus satisfied that Equity Bank Ltd is a necessary party to the proceedings.
19. The court has considered the 2<sup>nd</sup> Defendant’s objection to the application on the basis that it was filed outside the 60 days granted by the court on 15.06.2020. The court is of the opinion that the same is merely a technical objection which is curable under Article 159(2)(d) of *the Constitution* of Kenya,



2010 and Section 19(1) of the *ELC Act*, 2011. It does not require further consideration. However, for the avoidance of doubt on the competence of the application the period of 60 days is hereby extended by a further 30 days.

### **G. Conclusion and Disposal Orders**

20. The upshot of the foregoing is that the court finds merit in the Plaintiff's application dated 15.09.2022. Consequently, the same is hereby allowed in the following terms:
- a. Leave be and is hereby granted to the Plaintiff to amend the plaint and to join the Land Settlement Fund Board of Trustees and Equity Bank Ltd as Defendants.
  - b. The draft amended plaint annexed to the Plaintiff's application is deemed as duly filed and served upon the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the Interested Party.
  - c. The Plaintiff shall serve the amended plaint upon the 3<sup>rd</sup> and 4<sup>th</sup> Defendants within 10 days from the date hereof.
  - d. The 3<sup>rd</sup> and 4<sup>th</sup> Defendants shall enter appearance to the suit within 14 days upon service of the amended plaint and thereafter file their pleadings within 14 days upon entry of appearance.
  - e. The Plaintiff shall be at liberty to file a reply to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' pleadings within 7 days upon service by them.
  - f. The 2<sup>nd</sup> Defendant is hereby awarded costs of the application.
  - g. Mention on 11.05.2023 for directions on the hearing of the suit.

Orders accordingly.

**RULING DATED AND SIGNED AT NYAHURURU AND DELIVERED VIA MICROSOFT TEAMS PLATFORM THIS 9<sup>TH</sup> DAY OF MARCH, 2023.**

In the presence of:

N/A for the Plaintiff

Ms. Muchiri for the 1<sup>st</sup> Defendant

Mr. Solomon Opole holding brief for Mr. Musyoka for the 2<sup>nd</sup> Defendant

N/A for the Interested Party

C/A - Carol

**Y. M. ANGIMA**

**JUDGE**

