



**Mutiso & another v South Sea Services Limited (Environment & Land
Case 207 of 2021) [2023] KEELC 17359 (KLR) (3 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17359 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 207 OF 2021**

LL NAIKUNI, J

MAY 3, 2023

BETWEEN

BEATRICE SILU MUTISO 1ST PLAINTIFF

SHOUKAT MOHAMED NOORANI 2ND PLAINTIFF

AND

SOUTH SEA SERVICES LIMITED DEFENDANT

RULING

I. Introduction

1. This matter is coming up for ruling of the Notice of Motion Application dated and filed on June 21, 2022, by South Sea Services Limited, the Defendant/Applicant herein. The application was instituted under the provisions of the Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap 21, Order 8 Rule 3 and Order 51 Rule 1 of the *Civil Procedure Rules, 2010* and any other relevant enabling provisions of the Laws of Kenya.

II. The Defendant/Applicant's Case

2. The Defendant/Applicant herein sought for the following orders:
 - a. Spent.
 - b. That this Honorable Court stays proceedings pending hearing and determination of this application.
 - c. That the Defendant/Applicant be granted leave to amend its Defence and Counterclaim as per the draft Amended Plaint annexed hereto;
 - d. That the annexed Draft Amended Defence and Counterclaim be deemed as duly filed upon payment of the requisite fees;



- e. That the Plaintiff/Respondent be at liberty to file their Reply to Defence and Counterclaim to the Amended Defence and Counterclaim, if need be, within 14 days thereafter; and
 - f. That the costs of this application be in the cause.
3. The said application is based on the grounds adduced thereof and the averments contained in eleven (11) Paragraphed Supporting Affidavit of the Defendant/Applicant's Director, Rama Hamisi Bindo (hereinafter known as 'the Deponent'), sworn and filed on June 21, 2022 and the one (1) annexure marked as "RHB – 1" attached thereof.
 4. In the said affidavit, the deponent averred that he was one of the Directors of the Defendant/Applicant and therefore competent to swear the Supporting Affidavit on its behalf. He added that the matter herein was instituted by the Plaintiff/Respondent vide their Originating Summons dated October 6, 2021 and that the same was converted to a Plaint by the Court's own motion.
 5. Based on the evidence provided in the Supporting Affidavit, he averred that the Defendant/Applicant filed its Defence and Counterclaim on December 16, 2021 while the Plaintiffs/Respondents, as per court orders, filed a Plaint on January 28, 2022, by amending their Originating Summons.
 6. Additionally, he deponed that after careful consideration of the amendments filed after the Defendant/Applicant had put in its Defence and Counterclaim, it was necessary for the Defendant/Applicant herein to amend its Defence and Counterclaim as per an annexed copy of the Draft Amended Defence and Counterclaim marked as "RHB – 1" thereof.
 7. In conclusion, the Deponent averred that the matter had been slated for hearing on July 15, 2022 and it would be prejudicial to the Defendant/Applicant if the matter proceeded without the amendment. In any case, the Deponent averred that the amendment would not prejudice the Plaintiffs/Respondents or the cause of action and it is necessary for the fair determination of this matter and in the interest of justice.

III. The Plaintiff/Respondent's responses

8. On July 5, 2022, in response to the Defendant/Applicant's application, the Plaintiffs/Respondents, filed their Grounds of Opposition dated July 4, 2022. The said opposition was based on the following three (3) grounds, that: -
 - a. The application was misplaced and bad in law;
 - b. Until and unless the Plaintiff/Respondent transferred the suit property through transmission to the right beneficiaries, the proposed Counter Claim was premature and an abuse of the process of Court; and
 - c. The application had no merit since the proposed amendments were misplaced. The Defendant/Applicant ought to wait for the transfer to be done through transmission to be registered before laying proprietary claim or otherwise.

IV. The Submissions

9. On July 6, 2022, the matter came up for hearing of the Defendant/Applicant's application. Parties were directed to file Skeletal written Submissions to be highlighted on July 14, 2022. Pursuant to this they all complied accordingly. On July 14, 2022, the Counsels were accorded an opportunity to briefly highlight their submissions orally and the Court reserved time to deliver its ruling on notice.



A. The Written and Oral Submissions by the Defendant/ Applicant.

10. On 21st July, 2022, the Learned Counsel for the Defendant/Applicant herein, the Law firm of Messrs Marende Necheza & Company Advocates filed their written Submissions dated July 13, 2022. Mr Ondieki Advocates orally submitted that the law on granting leave to amend pleadings is provided for under the provision of Order 8 of the Civil Procedure Rules, 2010 and the principles that should guide the court on applications for amendments are elaborated in “Mulla, the Code of Civil Procedure, 18th Edition, Volume 2, Pages 1751-1752, which have been cited in various cases including the case of “Coffee Board of Kenya – Versus - Thika Coffee Mills Limited & 2 Others (2014) eKLR: -

“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.”

11. On the issue of amendment of pleadings, the Counsel also referred to the case of: “*Suleiman – Versus -Karasha* (1989) eKLR in which the Court of Appeal stated: -

“Under the Civil Procedure Rules, the parties can amend their pleadings with the leave of the court at any time before judgment. Such amendment would clearly set out the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the Court has to consider the application for amendment and give effect to it as it may deem just.”

12. Additionally, the Counsel further submitted that the Plaintiffs/Respondent’s Grounds for Opposition raised one major issue of lifting the caution for transfer of the property to the beneficiaries first through transmission before the said amendment is allowed, an act which was opposed by the



Defendant/Applicant from the original Originating Summons, in which the main cause of action was the lifting of the Caution.

13. He argued that the Plaintiffs/Respondents had sold the suit property and wished to have the caution lifted for the purposes of completing a sale transaction and a transfer to a third party known as Farid Mohamed Almaary. They were only frustrated due to the registered Caution. In support of this argument Counsel relied on the Plaintiffs/Respondents' averments in their Supporting Affidavit sworn on October 6, 2021, under the contents of Paragraphs 10 and 11 and their annexed copy of a Sale Agreement marked as "AKM – 7" on the same affidavit.
14. Furthermore, his contention was that the Plaintiffs/Respondents' Grounds of Opposition were baseless. That the Defendant/Applicant's amendments were warranted as it was evident that the Plaintiffs/Respondents have sold and were going to transfer the suit property directly to the third party were it not for the caution.
15. In conclusion, the Counsel for the Defendant/Applicant submitted that all criteria and/or requirements for the court to exercise its discretion and grant leave for the amendment of the Defence and Counterclaim as per the annexed draft had been met by the Defendant/Applicant's application dated June 21, 2022.

B. The Written and Oral Submissions by the Plaintiff/Respondent

16. On July 13, 2022, the Counsel for the Plaintiff/Respondent, the Law firm of Messrs Munythyia, Mutugi, Umara & Muzna Advocates filed their written submissions dated July 12, 2022, in opposition to the Defendant/Applicants application. Mr Munythyia Advocate submitted on the issue of whether the Plaintiffs/Respondents' Grounds of Opposition dated July 4, 2022 were merited. He submitted that the Defendant/Applicant's application dated June 21, 2022 was misplaced, bad in law and that no defence is available to the Defendant/Applicant in relation to the registration of forms LRA No 39 and LRA No 42.
17. In support of his argument, he relied on the cases of "[*Satnam Sing Chana & Another – Versus - Jutendra Trikamdas Swualy & Another*](#) (2021) eKLR and [*In Re Estate of Sibanu Ramba Odera \(Deceased\)*](#) (2020) eKLR in which the Courts articulately deliberated on at length the effect of Sections 28, 61, and 62 of the [*Land Registration Act*](#), No 3 of 2012 on the aspects of the Transmission of property upon death. In the *Satnam* Case (Supra), the court held that: -

“In the premises, I find and hold that the caveat that was lodged and/or registered by the Defendants herein, against the Title of the suit property, was meant to fetter and/or otherwise interfere with the Plaintiffs rights and/or entitlement to the suit property. Consequently, the registration of the caveat was illegal and thus unlawful. In the premises the Chief Land Registrar be and is hereby ordered to discharge, rescind and/or vacate the same forthwith.”
18. The Counsel further argued that any document registered against the title of the deceased person before transmission is null and void. In support of his argument he referred to the case of:- "[*Joseph Ondu Nyangiri – Versus - Monicah Auma Odeny & Another*](#) (2021) eKLR in which the court ordered for cancellation of entries unprocedurally recorded as per Section 80 (1) of the [*Land Registration Act*](#) on rectification of the land register on satisfaction that an error, mistake or fraud occurred.
19. In conclusion, the Counsel for the Plaintiffs/Respondent stating that no amendment would be raised apart from an objection, urged the court to dismiss the Defendant/Applicant's application dated June 21, 2022 with costs.



V. Analysis and Determination

20. I have keenly assessed all the filed pleading, the written submissions and the cited authorities by the parties pertaining to the application dated June 21, 2022 by the Defendant/Applicant herein and the relevant provisions of the statutes. In order to reach a just and fair decision on the matter, the Court has sought to be guided by the following three (3) issues. These are:-
- a. Whether the Notice of Motion application dated June 21, 2022 by instituted by the Defendant/Applicant herein seeking for leave to amend its Defence and Counter Claim has any merit.
 - b. Whether the parties herein are entitled to the orders sought from the filed application.
 - c. Who will bear the Costs of the application.

Issue No. a). Whether the Notice of Motion application dated June 21, 2022 by instituted by the Defendant/Applicant herein seeking leave to amend its Defence and Counter Claim has any merit.

21. The legal principles governing amendment of pleadings are provided for under Order 8 Rules 1,2 and 3 of the [Civil Procedure Rules, 2010](#). Rules 3 on amendment with leave provides that: -
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.”
22. Additionally, these principles upon which a Court acts in an application to amend pleadings before/ during trial are well settled and stated in a myriad of cases. For instance, Bramwell, LJ in the case of: - [Tildesley – Versus – Harper](#)” (1878), 10 Ch D at Page 296 stated as under:
- “My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”
23. Further to this in the case of: - [St Patrick’s Hills School Limited - Versus - Bank of Africa Kenya Limited](#)” eKLR (2018) where courts held, *inter alia*:
- “The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is



no injustice if the other party can be compensated by costs. (See *Eastern Bakery – Versus - Castelino* (1958) EA 461). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitaley, P BB”). On the same subject, in the case of *Abdul Karim Khan – Versus - Mohamed Roshan* (1965) EA289 (CA), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint. The principles upon which a court acts in an application to amend a pleading before/during trial are also well settled and succinctly stated in *Eastern Bakery – Versus - Castelino*, (1958) EA 461 (U) at p 462:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.”

24. Also, in the case of “*Joseph Ochieng & 2 others Trading as Aquiline Agencies – Versus - First National Bank of Chicago* [1995] eKLR the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is as follows:-
- 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.
25. Applying the principles laid down above to the circumstances of the instant case, it will be noted that on October 28, 2021, direction on the Originating summons dated October 6, 2021 by the Plaintiff were taken pursuant to the provision of Order 37 Rules 16, 17 and 18 of the *Civil Procedure Rules, 2010* whereby the Originating Summons was converted to a Plaint, the Defendant’s Replying Affidavit to be converted to a Defence and Counterclaim and the matter to proceed by way of adducing evidence by way of “Viva Voce” means. Pursuant to that, the Plaintiff complied with the Court’s orders on January 28, 2022 and the Defendant filed the current application on June 21, 2022.
26. The Plaintiff/Respondent have basically opposed the application on the grounds that transmission of the property had not taken place. Hence, the Defendant could not therefore amend its Defence and Counterclaim as was immature and an abuse of court process. The Court is not persuaded by this argument by the Plaintiff/Respondent. In saying so, it is my humble opinion that the essential principles that this court should consider for an application of amendment have been brought out clearly by the Defendant/Applicant in the above-referenced precedence. For this reason, the Court holds that the application meets the threshold for the relief sought.



Issue No. b). Whether the parties herein are entitled to the orders sought from the filed application.

27. Under this sub – heading, there are certain pertinent issues for the Court to critically ponder here for its consideration. These are whether the application was timeously, in good faith and if the Plaintiffs would suffer any prejudice if this application was allowed. The issue posed under this sub – heading is fully supported by the arguments and the legal reasoning elaborately set out above. The Court discerns that from the filed grounds of opposition, the written and oral submissions none has attempted to demonstrate what prejudice and how the Plaintiff/Respondent would suffer should the application be allowed. Also, I have not been convinced that the application and the relief sought by the Defendant/ Applicant lacks merit as per the laid down principles established by law and precedence.
28. Moreover, the Court strongly feels the opposition by the Plaintiff is not only pre mature but its being too apprehensive. The Court states so based on two reasons. Firstly, the issues on the process and outcome of the transmission of the property belonging to the Estate of the deceased, perhaps are relevant issues to be adjudicated and determined during the main trial. Thus, the issues raised are at the wrong stage of the proceedings. Secondly, nothing in the given circumstances that precludes the Plaintiff/Respondent herein once they would have regularize their house pursuant to the relevant provisions of the law to wit the *Laws of Succession* Cap 160 and Sections 28, 49, 50, 51 55, 56, 57, 58, 61 and 62 of the *Land Registration Act*, No 3 of 2012 to move Court for further amendment of its pleadings under the provision of Order 8 of the *Civil Procedure Rules, 2010*.
29. Hence, in a nutshell, the application has merit and needs to be allowed. Furthermore, in order to balance the scale of Justice and in all fairness, the Plaintiff/Respondent will also be accorded an opportunity to file amendment to its pleadings thereof.

Issue No. c). Who will bear the costs of the application.

30. It is now well established that the issue of Costs is at the discretion of the Court. Costs mean the award that is granted at the conclusion of any legal action, process and proceedings in any litigation. The proviso of the provision of Section 27 (1) of the *Civil Procedure Act*, Cap 21 holds that costs follow the event. By event here, it means the results emanating from the legal action, process and proceedings.
31. In the instant case, although the Defendant/Applicant has succeeded in prosecuting their application dated June 21, 2022, taking that the matter still to go through the entire motion of hearing and final determination, its just, fair and reasonable that each party bear their own costs.

VI. Conclusion & Disposition

32. In the long run, the Honorable Court is fully satisfied that the leave and proposed amendment sought by the Defendant/Applicant to amend its Defence and Counter Claim is justifiable, Hence, the Court proceeds to grant the following Orders:-
 - a. That the Notice of Motion Application dated June 21, 2022 and the amendment of the Defence and Counterclaim be and is hereby allowed.
 - b. That an order be and is hereby made for the Defendant to file and serve the Amended Defence and Counterclaim in terms of the attached Draft annexed Amended Defence and Counter Claim upon payment of requisite court fees within the next Seven (7) days from the date of the delivery of this Ruling.
 - c. That upon service, corresponding leave be and is hereby granted to the Plaintiff to file and serve an Amended Plaintiff and a Reply to the Amended Defence and Counterclaim within 14 days.



d. That for expediency sake, this matter to be heard within the next One Hundred and Eighty days from the date of this Ruling commencing from October 30, 2023. There should be a mention on June 8, 2023 for Pre – Trial Conference as provided for under the provisions of Order 11 of the *Civil Procedure Rules, 2010*

e. That each party to bear their own costs

It is ordered accordingly

RULING DELIVERED THROUGH MICROSOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 3RD DAY OF MAY 2023.

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**HON. JUSTICE L. L. NAIKUNI (JUDGE)
ENVIRONMENT AND LAND COURT AT
MOMBASA**

In the presence of:-

- a. M/s. Gillian, the Court Assistant.
- b. Mr. Mkomba Advocate holding brief for Mr. Munyithia Advocate for the Plaintiff/Respondent.
- c. Mr. Ondieki Advocate for the Defendant/Applicant.

