



Ternic Enterprises Limited v Waterfront Outlets Limited (Environment and Land Case Civil Suit 200 of 2019) [2023] KEELC 18376 (KLR) (5 June 2023) (Ruling)

Neutral citation: [2023] KEELC 18376 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 200 OF 2019**

JO MBOYA, J

JUNE 5, 2023

BETWEEN

TERNIC ENTERPRISES LIMITED PLAINTIFF

AND

WATERFRONT OUTLETS LIMITED DEFENDANT

RULING

Background And Introduction

1. Vide notice of motion application dated the April 26, 2023; the defendant/applicant has approached the Honorable court seeking for the following reliefs;
 - i. That, the application be heard in the first instance *ex-parte* and service be dispensed with.
 - ii. That, the application be certified urgent.
 - iii. That, the honourable court be pleased to grant leave to the defendant/applicant to amend his defence and counter-claim filed herein.
 - iv. That, the costs of the Application be in the cause
2. The instant Application is premised and/or anchored on the grounds alluded to and enumerated at the foot thereof. Further, the Application is supported by the affidavit of one Christopher Onuong'a Owanda sworn on the April 26, 2023; and in respect of which the Deponent has annexed a copy of the Statement of Defense and Counterclaim which was filed vide ELC Suit No 1569 of 2016.
3. On the other hand, upon being served with the instant Application, the Plaintiff/Respondent filed a Replying affidavit sworn by one Nicolas Owino; and which affidavit is sworn on the March 19, 2023.



For good measure, the Plaintiff/Respondent has opposed the current Application contending, inter alia, that same has been filed and mounted with unreasonable and inordinate delay.

4. It is instructive to note that the instant Application came up for hearing on the 22nd of May 2023 and whereupon the advocates for the respective Parties agreed to canvass and dispose of the Application by way of oral submissions.
5. Pursuant to and in line with the agreement of the respective counsel for the Parties, the instant Application was indeed canvassed and ventilated vide oral submissions.

Submissions By The Parties

a. Applicant's Submissions:

6. The Learned counsel for the Applicant herein adopted and reiterated the contents of the Grounds at the foot of the Application and similarly adopted the contents of the Supporting affidavit attached thereto.
7. Furthermore, Learned counsel for the Applicant thereafter proceeded to and highlighted Four (4) pertinent issues for due consideration and determination by the Honourable court.
8. Firstly, Learned counsel for the Applicant has submitted that the Applicant herein duly entered appearance and filed a Statement of Defense and Counterclaim. However, counsel added that despite filing the Statement of Defense and Counterclaim, the Applicant herein omitted to include and/or to refer to the existence of a previous suit, wherein both the Plaintiff/Respondent and the Defendant/Applicant herein, have been sued together by M/s Salford Investment Ltd.
9. Additionally, Learned counsel submitted that upon being sued by the said Salford Investment Ltd, in terms of the preceding paragraph, the Plaintiff/Respondent and the Defendant/Applicant herein filed a Joint Statement of Defense and wherein it was stated and acknowledged that the Defendant/Applicant was a bona fide purchaser for value of the suit property.
10. Premised on the position taken by both the Plaintiff and the Defendant herein, Learned counsel has submitted that the existence of the said suit and the contents of the documents thereof, shall be critical and important to enable this Honourable court to arrive at a fair and just determination of the dispute before the court.
11. Secondly, Learned counsel submitted that the failure to include and in any event, to refer to the existence of the previous suit, namely, ELC No 1569 of 2016, was an inadvertent mistake and/or lapse on the part of the Learned counsel for the Defendant/Applicant.
12. Be that as it may, counsel has contended that the mistake and/or lapse on the part of the counsel for the Defendant/Applicant ought not to be visited upon the Defendant/Applicant, with a view to depriving same of a Right to Fair Hearing, as prescribed by dint of Article 50(1) of the *Constitution, 2010*.
13. Thirdly, Learned counsel for the Applicant has submitted that the Honorable court is conferred and/or bestowed with a unfettered discretion to entertain and adjudicate upon an Application for amendment, with a view to enabling the court to deal with all the issues in controversy/ Dispute; once and for all.
14. In this respect, Learned counsel has implored the Honourable court to find and hold that it would be prudent to grant Leave to the Applicant herein so as to bring on board the pleading and documents which were filed by the respective Parties in their case, where both have been sued as the Defendants.



15. Lastly, Learned counsel has submitted that the existence of ELC No 1569 of 2016; and the facts contained therein are well known to both Parties and hence neither of the Parties herein shall suffer any prejudice, if at all, if the amendment sought is granted.
16. To the contrary, Learned counsel has contended that the amendment beforehand and which is limited in scope, shall enable the Honourable court to entertain and adjudicate upon the issues in dispute.
17. In support of the various submissions, whose details have been reproduced herein before, the Applicant has cited and relied on the decision in the case of *Kampala Coach Ltd versus Community Bank Ltd* (2016)eKLR and *Coffee Board of Kenya Ltd versus Thika Coffee Mills Ltd* (2014)eKLR, respectively.

b. Respondent's Submission:

18. Learned counsel for the Respondent intimated to the Honourable Court that the Respondent had filed a Replying affidavit sworn on the 19th May 2023; and same sought to adopt and rely thereon, in opposition to the Application beforehand.
19. Having adopted and reiterated the contents of the Replying affidavit, Learned counsel for the Respondent has thereafter highlighted/ amplified two (2) issues for consideration and determination by the Honourable court.
20. First and foremost, Learned counsel for the Respondent has submitted that the issues pertaining to the existence of the previous suit, namely, ELC No 1569 of 2016, wherein the Plaintiff and the Defendant herein, have been jointly sued as Defendants, was duly known to and within the knowledge of the Applicant by the time same entered appearance and filed the Statement of Defense in respect of the subject matter.
21. Owing to the fact that the previous suit was well known to and within the knowledge of the Applicant herein, Learned counsel for the Respondent has therefore contended that the issues being raised for purposes of attracting Leave to amend, is one that was well within the knowledge of the Applicant and thus ought to have been placed before the Honorable court in the first instance.
22. Secondly, Learned counsel has submitted that the instant Application has been made and mounted with undue delay and inordinate delay, which delay has neither been accounted for nor explained by the Applicant herein.
23. While urging the ground of inordinate delay, Learned counsel for the Applicant has submitted that the statement of defense which is sought to be amended was indeed filed in court on or about the June 28, 2016; and hence an Application for Leave to amend, if any, ought to have been filed timeously and with due promptitude.
24. Insofar as the current Application has been filed with inordinate and unreasonable delay, Learned counsel for the Respondent has therefor implored the Honourable court to find and hold that the Applicant is not deserving of the equitable discretion of the court or at all.
25. Premised on the foregoing submissions, Learned counsel for the Plaintiff/Respondent has thus contended that the entire Application seeking for Leave to amend the Statement of Defense and counterclaim is thus devoid of merits and ought to be dismissed.



Issues For Determination

26. Having reviewed the Application dated the April 26, 2023; and the Response thereto and upon taking into account the oral submissions which were ventilated on behalf of the respective Parties, the following issues do arise and are thus pertinent for determination.
- i. Whether the existence of ELC No 1569 of 2016; and the issues raised thereunder are critical and relevant to the effective and effectual determination of the instant matter.
 - ii. Whether the intended amendment shall enable the Honourable court to fully appreciate and comprehend the character of the issues in dispute.
 - iii. Whether the instant Application has been made and mounted with unreasonable/ Inordinate delay and whether such delay, if any; ought to vitiate the exercise of Judicial Discretion.

Analysis And Determination

Issue Number 1; Whether the existence of ELC No 1569 of 2016 and the issues raised thereunder are critical and relevant to the effective and effectual determination of the instant matter.

27. It is common ground that the Plaintiff/Respondent and the Defendant/Applicant herein had previously entered into and executed a sale agreement pertaining to and concerning *inter-alia* LR No's 209/16716 and 209/16717, respectively.
28. Subsequently, the properties known as LR No's 209/16716 and 209/16717 were transferred and registered in the name of the Defendant herein. For clarity, the Defendant/Applicant appears to have been duly issued with certificate of titles.
29. Be that as it may, it is imperative to state and underscore that a dispute pertaining to ownership and validity of the title documents relating to the suit properties arose culminating into a suit being filed by M/s Salford Investment Ltd as against the Plaintiff and the Defendants herein. For good measure, the Plaintiff herein was sued as the 5th Defendant, whereas the Defendant herein was the 1st Defendant.
30. Notably and in a bid to vindicate their Interests, upon being impleaded vide ELC No 1569 of 2016; the Plaintiff and the Defendant herein instructed and retained M/s Ogola Okello and Company Advocates; to enter appearance and thereafter filed a statement of defense on their behalf.
31. Furthermore, it is instructive to observe that the statement of defense which was filed by and on behalf of the Plaintiff and the Defendant herein, respectively, contained various averments. In particular, paragraph 14 of the said Statement of Defense stated as hereunder;
- “The 1st Defendant in response to paragraph 24 will contend that occupation of land by it has a lawful and bona fide purchaser for value cannot be curtailed by this honorable court as the Plaintiff has no proprietary rights/interests in LR No's 209/16716 and 209/16717 and the grant of orders sought will greatly prejudice the 1st Defendant”.
32. It is important to note that the 1st Defendant in ELC No 1569 of 2016, who was being touted and confirmed as a Bona fide purchaser for value in respect of the two properties herein, is the current Defendant in the instant case.



33. Moreover, it is not lost on the court that the statement of defense alluded to was a Joint Statement of defense and thus the current Plaintiff was indeed vindicating and confirming that the Defendant herein was/is a bona fide purchaser for value in respect of the suit property.
34. In addition, it is important to recall that the said Joint statement of defense which was filed vide ELC No 1569 of 2016, has not been impeached and/or impugned by the Plaintiff herein.
35. Notwithstanding the foregoing and during the existence of the Joint statement of Defense, the current Plaintiff herein has now contended that the transfer and registration of the suit property, namely, LR No 209/16717, in favor of the Defendant was undertaken albeit without the payment of the requisite consideration/purchase price.
36. In my humble understanding, what I hear the Plaintiff to be stating is that the Defendant herein is now not a Bona fide purchaser for value over and in respect of the suit property, (sic) on account of want of consideration.
37. Clearly, there is an inherent, nay, apparent contradiction in the position taken by the Plaintiff in respect of the instant matter as contrasted with the position taken and espoused in the Joint statement of defense filed in ELC No 1569 of 2016.
38. Based on the foregoing, there is no gainsaying that the Pleadings and documents filed in ELC No 1569 of 2016; and by extension the named suit, have a serious impact and implication on the instant matter. Simply put, the averments and Factual Statements therein shall be of great assistance to this Honourable Court, in arriving at a just and expedient determination in respect of the Instant matter.
39. Without belaboring the point, it will be incumbent upon this Honourable court to interrogate and ascertain whether or not the Defendant herein is a bona fide purchaser of the suit property, in the manner espoused in the Joint statement of defense filed or otherwise.
40. Consequently and in the premises, I surmise that the intended amendment, whose purpose and import is to implead and bring to the attention of this Honourable court the existence of a related suit, namely, ELC No 1569 of 2016, would not only be appropriate and expedient; but in the interests of justice, so as to enable the court to understand the bona fides of the claims being ventilated by the Plaintiff beforehand.

Issue Number 2; Whether the intended amendment shall enable the Honourable court to fully appreciate and comprehend the character of the issues in Dispute.

41. Whilst discussing the nature and import of the Joint statement of defense filed by both the Plaintiff and the Defendant herein in respect of ELC No 1569 of 2016; the court has indeed found and established that elsewhere the Plaintiff herein appears to have conceded that the Defendant was a Bona fide purchaser of the suit Property herein.
42. However, in respect of the instant matter, the Plaintiff has taken a diametrically opposed and contradictory position and in particular, same is challenging the Defendant's Title to and ownership of the suit property.
43. Suffice to point out and to state that the court process is intended to be used and utilized for purposes of determining actual disputes between Parties and not for purposes of massaging the egos of the Parties or otherwise.



44. Nevertheless, juxtaposing the pleadings and the averments in respect of the instant matter as against the pleadings which were filed by the Parties herein jointly in ELC No 1569 of 2016; there does arise an issue which appears to be puzzling and interesting, in the same vein.
45. Furthermore, there is no gainsaying that one of the suit properties which is being disputed in ELC No 1569 of 2016, is the same as the property beforehand. Consequently and in this regard, there is no doubt that there is a resemblance in the issues beforehand.
46. Taking the foregoing position into account, it is therefore instructive to note that the intended amendment, would thus assist and enable the Honourable court to fully appreciate and comprehend the true state of facts and affairs concerning and relative to the relationship between the Parties herein and their dealings over the suit property.
47. In a nutshell, it is therefore my humble view that the intended amendment would clearly enable the Honourable court to discharge its statutory and constitutional mandate of resolving Dispute between the Parties who approach the seat of Justice.
48. To underscore the reasons and circumstances where an amendment would issue and/or be granted, it is important to take cognizance of the holding of the Court of Appeal in the case of *Central Bank of Kenya versus Trust Bank Ltd* (1996)eKLR, where the Court of Appeal stated and held thus;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

“that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

49. In addition, the circumstances and factors to be considered prior to and before granting Leave to amend were also highlighted and elaborated upon by the Court of Appeal in the case of *Elijah Kipng'eno Arap Bii versus Kenya Commercial Bank Ltd* (2013)eKLR, where the court stated as hereunder;

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the



subject of a fresh action; that 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 Limitation Acts.”

50. Clearly and for good measure, where the intended amendment is calculated to bring forth material before the Honourable court so as to enable the court to discern and comprehend the various perspectives/ nuances of the Dispute beforehand, then it behooves the court to accede to and grant the Application for amendment.

Issue Number 3; Whether the instant Application has been made and mounted with unreasonable/ Inordinate delay and whether such delay, if any; ought to vitiate the exercise of Judicial Discretion.

51. One of the reason upon which Learned counsel for the Plaintiff/Respondent opposed the instant Application for amendment was because the Application has been made and/or mounted with unreasonable and inordinate delay.
52. While ventilating the grounds of unreasonable delay, Learned counsel for the Plaintiff/Respondent submitted that the suit which is now sought to be impleaded was filed in the year 2016; and thereafter a Statement of defense was filed on the 11th April 2017. In this regard, Learned counsel contended that the Defendant was thus knowledgeable of the existence of the said pleadings and averments.
53. In addition, Learned counsel submitted that insofar as the issues now sought to be impleaded on the basis of the intended amendment, were within the knowledge of the Defendant/Applicant; same ought to have mounted the current Application earlier and with due promptitude.
54. Granted that the existence of ELC No 1569 of 2016 was known to both the Applicant and the Plaintiff/Respondent, respectively, but the fact that neither of them sought to bring same to the attention of the court casts a blemish on both the Parties beforehand, whose conduct smacks of want of diligence.
55. To my mind, it was equally incumbent upon the Plaintiff/Respondent to bring to the attention of the Honourable court the existence of ELC No 1569 of 2016 and in particular, the fact that therein (in ELC no 1569 of 2016); same had acknowledged that the Defendant is a bona fide purchaser.
56. Nevertheless and despite the fact that the Plaintiff knew of the relevance and the implications of the averments of the other suit, same chose to conceal, nay withhold the said information, for reasons best known unto her.
57. Nevertheless and in my humble view, both the Defendant/Applicant and the Plaintiff/Respondent are culpable for withholding critical information from the Honourable court, in equal measure.
58. Be that as it may and whereas I do agree that the instant Application ought to have been made much earlier, with the exercise of due diligence, it would be remiss and foolhardy of me to decline the Application for amendment and thereby to shut out critical information that would help the Honourable court to unravel the dispute herein.
59. Further and in addition, I com to the conclusion that despite the delay in mounting the current Application, the delay in question is neither inordinate or grossly unreasonable. If anything, the impugned delay is attributed to both Parties, who appear not to have been candid with the court from the onset.



60. Premised on the discourse contained in the preceding paragraphs, this is not a matter where the impugned delay, (which I have held is attributed to both parties), ought to deprive the Applicant of the right to bring forth the intended information.

Final Disposition

61. From the forgoing deliberations, it is imperative to underscore and state that the purpose of an amendment is to enable the Honourable court to entertain and adjudicate upon all the issues in controversy between the Parties once and for all.

62. Consequently, where a Party seeks to bring forth critical information that would be helpful in assisting the Honourable court to discharge her statutory mandate, then such an information must not, (unless there exists good reason), be foreclosed.

63. In view of the foregoing, I come to the conclusion that the Application dated the April 26, 2023; is meritorious and thus deserving to be granted.

64. In this regard, the said Application be and is hereby allowed in the following terms;

- i. The Defendant/Applicant be and is hereby granted Leave to file and serve the amended Statement of Defense and Counterclaim; and same to be filed and served within 7 days from the date herein.
- ii. The Plaintiff be and is hereby granted Leave to file and serve a Reply to Defense and defense to the counterclaim, if any, and same to be filed and served within 14 days from the date hereof.
- iii. The Parties herein be and are hereby granted liberty to file and serve Further Bist and bundle of documents; Further List of witnesses and additional witness statement, if any; and same to be filed and exchanged within 14 days from the close of pleadings.
- iv. The Parties shall thereafter avail hard copies of the pleadings to court once filed in the usual manner.
- v. Costs of the Application shall abide the outcome of the suit.

65. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 5TH DAY OF JUNE, 2023.

OGUTTU MBOYA

JUDGE

In the presence of:

Benson – court assistant

Mr. Manyara h/b for Mr. Oyugi for the Defendant/Applicant..

Ms. Kagoye h/b for Mr. Waudo for the Plaintiff/Respondent

