



REPUBLIC OF KENYA



**KENYA LAW**  
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**Tina Holdings Limited v Housing Finance Company of Kenya (HFCK) &  
4 others; Hotel Connections Limited (Interested Party) (Environment &  
Land Case 113 of 2017) [2023] KEELC 18016 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEELC 18016 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 113 OF 2017  
CA OCHIENG, J  
JUNE 5, 2023**

**BETWEEN**

**TINA HOLDINGS LIMITED ..... PLAINTIFF**

**AND**

**HOUSING FINANCE COMPANY OF KENYA (HFCK) ..... 1<sup>ST</sup> DEFENDANT**

**CREDIT REFERENCE BUREAU LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**STEPHEN ROBI MAINA ..... 3<sup>RD</sup> DEFENDANT**

**STELLA WANGUI NJOROGE ..... 4<sup>TH</sup> DEFENDANT**

**KIMISITU CO-OPERATIVE SAVINGS AND CREDIT SOCIETY**

**LIMITED ..... 5<sup>TH</sup> DEFENDANT**

**AND**

**HOTEL CONNECTIONS LIMITED ..... INTERESTED PARTY**

**RULING**

1. What is before Court for determination is the Plaintiff's Notice of Motion Applications dated the September 6, 2022 and February 23, 2023 respectively.
2. In the Notice of Motion dated the September 6, 2022, the Plaintiff seeks the following orders:
  1. That leave be granted to the Plaintiff to re-amend its Plaintiff and remove the names of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup> Defendants and the Interested Party from this suit in accordance with the draft Amended Plaintiff annexed herein.
  2. That the draft Amended Plaintiff be deemed duly filed upon payment of requisite filing fees.



3. That costs of the Application be in the cause.
3. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Titus Kitonga. The Applicant claims the previous amendment of the Plaint to include the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Respondents including Interested Party was not necessary and is diversionary to the main cause of the suit which is a loan agreement. Further, none of the enjoined Respondents have so far filed Defence or Replying Affidavits. It argues that in the event that any of the 2<sup>nd</sup>, 3<sup>rd</sup>, 4<sup>th</sup> and 5<sup>th</sup> Defendants including Interested Party were to be enjoined in this suit, they would be at liberty to apply to the Court for inclusion. Further, the Defendants and Interested Party shall not be prejudiced at all if the orders sought are granted.
4. The Interested Party opposed the Application by filing a Replying Affidavit sworn by its Managing Director Patrick K. Makau, where he deposes that the said Application lacks merit and an abuse of the court process. He proceeded to highlight that there were various suits initiated by the Plaintiff in respect to the dispute herein being ELC No 113 of 2017, ELC No 115 of 2017 and 206 of 2017 which were consolidated by Justice Angote on 22<sup>nd</sup> March, 2017. It contends that it remains an Interested Party in this suit having purchased land title number Athi River/Athi River Block 1/87 through a Public Auction in 2016. It argues that the amendments sought to be introduced in the suit purportedly to remove it, as a party to this suit is farfetched, frivolous and vexatious. Further, that the Applicant is trying to mislead the Court on material facts and wrongfully prejudice its interest as the indefeasible owner of land parcel number Athi River/Athi River Block 1/87.
5. The Applicant filed a Supplementary Affidavit sworn by Titus Kitonga reiterating its averments and insisting that the Plaintiff has not made any specific claim against the Interested Party.
6. In the Notice of Motion dated the February 23, 2023, the Plaintiff seeks the following orders:
  1. Spent.
  2. That the court strikes out the Interested Party's Further Affidavit dated January 30, 2023 as the same has been filed without leave of court and after the duration of pleadings was closed.
  3. That the Court strikes the Interested Party's submissions dated January 30, 2023 as long as submissions include matters raised in its Further Affidavit of January 30, 2023.
  4. That costs of the Application be in the cause.
7. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Titus Kitonga. It contends that the Interested Party filed its Further Affidavit and written submissions on January 30, 2023 in response to the Applicant's Supplementary Affidavit dated the December 21, 2022 as well as submissions dated the 28<sup>th</sup> December, 2022. Further, that the Supplementary Affidavit was filed without leave of court and amounts to an illegality as well as an abuse of the court process. It avers that the Interested Party's filing of the Further Affidavit beyond the stipulated period is prejudicing the Applicant's rights.
8. The 1<sup>st</sup> to 5<sup>th</sup> Defendants did not oppose the two Applications.
9. The Interested Party opposed the Application by filing a Replying Affidavit sworn by Patrick M. Makau, its Managing Director where he deposes that it was served with the Plaintiff's Application seeking to strike out its Further Affidavit which was filed in response to the Applicant's Application dated the September 6, 2022 on February 28, 2023. Further, on March 1, 2023, it informed court that they had not been served with the Plaintiff's Application seeking to strike out their Further Affidavit. It insists that it was served with the said Application on March 6, 2023. It explains that when the Plaintiff



on December 29, 2022 filed his Supplementary Affidavit sworn on December 21, 2022 alongside its submissions on the said Application dated September 6, 2022, it raised new matters in response to the Interested Party's Replying Affidavit necessitating it to file a further response. It sought for leave for the Further Affidavit to be admitted. It reiterates that it filed its submissions within time.

19. The two Applications were canvassed by way of written submissions.

### **Analysis and Determination**

11. I have considered the two Notice of Motion Applications, respective affidavits, annexures and rivalling submissions, the following issues are for determination: Whether the Plaintiff should be granted leave to re-amend the Plaint. Whether the Interested Party's Supplementary Affidavit and submissions filed on January 30, 2023 should be struck off for having been filed out of time and without leave.
12. As to whether the Plaintiff should be granted leave to re amend the Plaint.
13. The Plaintiff has sought to re-amend its Plaint to remove all the parties except the 1<sup>st</sup> Defendant which is opposed by the Interested Party whose main contention is that it is the current registered proprietor of the suit land and is in possession thereof. I note the Plaintiff had initially amended its Plaint to bring in all the parties that it now seeks to remove.
14. In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the Court of Appeal in dealing with issues of amendment held a follows:

“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 v 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.”

15. I have had a chance to peruse the draft re-amended Plaint and note that the issues the Plaintiff is raising against the 1<sup>st</sup> Defendant are matters of evidence and need not be pleaded. Further, it had emerged that the Interested Party is the current registered proprietor of the suit land and even though the Plaintiff contends that it is not a necessary party, I note the fulcrum of the suit herein revolves around the said suit land and at this juncture I beg to disagree. It is my considered view that since the Interested Party is in possession of the suit land and is its registered proprietor, it is indeed a necessary party. Further, from the averments in the instant Application, I find that the removal sought for the Interested Party is not made in good faith. In the circumstances, I will only allow the amendment to the extent of



removing the 2<sup>nd</sup> to 5<sup>th</sup> Defendants but retain the Interested Party. I will further award costs to the 3<sup>rd</sup> to 4<sup>th</sup> Defendants who filed their Defence.

16. As to whether the Interested Party's Supplementary Affidavit and submissions filed on January 30, 2023 should be struck off for having been filed out of time and without leave.
17. The Plaintiff has sought for the striking out of the Interested Party's Supplementary Affidavit and Submissions filed on January 30, 2023. The Interested Party insists the Plaintiff raised new issues in its Further Affidavit and served it late, culminating in its filing the Supplementary Affidavit and submissions on January 30, 2023.
18. Order 50 Rule 4 of the [Civil Procedure Rules](#) provide that:

“Except where otherwise directed by a judge for reasons to be recorded in writing, the period between the twenty-first day of December in any year and the thirteenth day of January in the year next following, both days included, shall be omitted from any computation of time (whether under these Rules or any order of the court) for the amending, delivering or filing of any pleading or the doing of any other act: Provided that this rule shall not apply to any application in respect of a temporary injunction.”

19. From a perusal of the respective Affidavits and submissions. I note the Plaintiff filed his Supplementary Affidavit and submissions on the 29<sup>th</sup> December and it is clear from the legal provisions I have quoted that time stops running until the 14<sup>th</sup> day of January. Further, the Plaintiff has also not denied that it also served its Supplementary Affidavit and submissions late but the Interested Party did not challenge it. I note the Plaintiff has also not denied that it raised fresh issues in its Further Affidavit which required the Interested Party to rebut. In [Republic v District Land Registrar, Uasin Gishu & Anor](#) [2014] eKLR Justice Ochieng held that:

“To my mind, Justice is not dependent on Rules of Technical procedures. Justice is about doing the right thing. Pursuant to article 159 (2) (d) .....in exercising Judicial Authority, the courts ' in exercising judicial authority, the courts and tribunals shall be guided by the following principles ....(d) justice shall be administered without undue regard to procedural technicalities.”

20. Based on the facts as presented while associating myself with the cited decisions, I will decline to strike out the Further Affidavit and submissions as sought on the ground of late filing and being filed without leave. I opine that this is indeed a procedural technicality which the Plaintiff seeks to rely on. I opine that this matter should be set down for hearing on its merits instead of parties dealing with interlocutory applications.
21. It is against the foregoing I find the Notice of Motion Application dated the September 6, 2022 partially successful and will proceed to remove the 2<sup>nd</sup> to 5<sup>th</sup> Defendants from the suit herein. I will further award costs to the 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they had filed their Defence.
22. I direct the Plaintiff to file and serve the re-amended Plaintiff within twenty one (21) days from the date hereof.
23. As for the Notice of Motion dated the February 23, 2023, I will dismiss the same as it is not meritorious.
24. I so order.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 5TH DAY OF JUNE, 2023**



**CHRISTINE OCHIENG**  
**JUDGE**

