Mutuku v M'Kiama & 2 others (Civil Suit 735 of 2007)
[2023] KEELC 19816 (KLR) (19 September 2023) (Ruling)

Neutral citation: [2023] KEELC 19816 (KLR)

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT NAIROBI

CIVIL SUIT 735 OF 2007

JO MBOYA, J

SEPTEMBER 19, 2023

BETWEEN

ESTHER MUKULU MUTUKU ..... PLAINTIFF

AND

METRA INVESTMENTS LIMITED ..... 1ST DEFENDANT

RAHAB M'KIAMA ..... 2ND DEFENDANT

DIANA RACHEL KAVEDZA ..... 3RD DEFENDANT

RULING

1. The Ruling herein touches on and/or concerns the Application dated the 13th September 2023; and which has been filed by and on behalf of the 3rd Defendant/Applicant. For good measure, the instant Application has sought for various reliefs, whose details are as hereunder;

   i. .....Spent.

   ii. The Honorable to (sic) grant leave to the Plaintiff/Applicant to further amend the amended defense and counterclaim dated the 16th July 2009.

   iii. That the Draft Further Amended Defense and Counterclaim annexed to the Supporting affidavit herein be deemed as duly filed and served upon payment of the requisite court fees.

   iv. Costs of the Application be in the cause.

2. Instructively, the instant Application is premised and/or anchored on various grounds, which have been enumerated in the body of the Application. Furthermore, the Application is supported by the affidavit of the 3rd Defendant/Applicant sworn on even date and to which the deponent has attached a copy of the Draft Further Amended Defense and Counterclaim.

3. Upon being served with the Application under reference, the Plaintiff/Respondent filed Grounds of opposition dated the 15th September 2023; and in respect of which the Plaintiff/Respondent has highlighted various grounds, inter-alia that the current Application has been filed with inordinate and unreasonable delay, which delay has neither been explained nor accounted for, whatsoever.

4. On the other hand, the 1st and 2nd Defendants/Respondents neither filed any Grounds of opposition nor Replying affidavit to the Application beforehand.

5. Be that as it may, it is imperative to underscore that the subject matter was listed and/or scheduled for further hearing of the Defense case on behalf of the 3rd Defendant on the 18th September 2023. However, when the matter was called out for purposes of directions pertaining to and concerning Further Defense hearing, Learned counsel for the 3rd Defendant intimated to the court that same had filed an Application under certificate of urgency; and thereafter sought for directions as pertains to the hearing and disposal of the Application under reference.

6. Arising from the foregoing and with concurrence of the advocates for the adverse Parties, the Honourable court gave directions pertaining to the Application under reference, culminating into the Application being canvassed vide oral submissions on even date.

Submissions by the Parties

a. Applicant's Submissions:

7. Learned counsel for the Applicant adopted the grounds contained at the foot of the subject Application and similarly reiterated the contents of the affidavit sworn by Applicant on even date. Furthermore, Learned counsel thereafter highlighted three pertinent issues for consideration by the Honourable court.

8. Firstly, Learned counsel submitted that the intended amendment of the Statement of Defense and Counterclaim is intended to ventilate a claim pertaining to and/or concerning constructive and/or resulting trust, which the Applicant contends has arisen and/or accrued as a result of the relationship between the Applicant and the Plaintiff/Respondent; as well as the permissible occupation of a portion of the suit property by the Applicant herein.

9. Additionally, Learned counsel for the Applicant further contended that the intended amendment is informed by Section 3 of the *Law of Contract*, Chapter 23, Laws of Kenya; and hence it is appropriate for the court to grant the leave sought and thus allow the Applicant to implead the claim based on Constructive or Resulting trust.

10. Secondly, Learned counsel for the Applicant has submitted that the intended amendment shall not occasion any prejudice and or injustice to the adverse Parties and in particular, the Plaintiff/Respondent herein. In any event, Learned counsel has added that the Plaintiff/Respondent has neither demonstrated nor shown any prejudice that may arise and/or ensue, if the intended amendment is allowed.

11. On the other hand, Learned counsel for the Applicant has further submitted that the Plaintiff/Respondent has conceded that no prejudice and/or injustice will arise if the amendment was allowed. In this regard, Learned Counsel has invited the attention of the court to ground number 4 of the Grounds of opposition dated the 15th September 2023 and filed by the Plaintiff/Respondent.

12. Thirdly, Learned counsel for the Applicant has submitted that the plea/claim based and/or founded on trust, whether Constructive or Resulting trust is not time bound and hence same cannot be contended to be time barred or otherwise.

13. For good measure, Learned counsel for the Applicant has further submitted that a claim based on trust is not subject to the provisions of Section 7 of the *Limitation of Actions Act*, Chapter 22 Laws of Kenya, either in the manner claimed by the Plaintiff/ Respondent or at all.

14. Finally, Learned counsel for the Applicant has submitted that if there is any prejudice, inconvenience and or injustice that may arise, if the amendment is allowed, then such prejudice can be compensated and/or atoned for by payment of costs, which the Applicant is ready and willing to bear.

15. In support of the forgoing submissions, Learned counsel for the Applicant has cited and relied on *inter-alia* the case of *Central Kenya Ltd v Trust Bank Ltd* (2000)eKLR and *Elijah Kipmg'eno Arap Bii v Kenya Commercial Bank Ltd* (2013)eKLR, respectively.

16. Premised on the foregoing submissions, learned counsel for the Applicant has thus contended that the Application beforehand is meritorious and therefore ought to be allowed as prayed.

b. 1st And 2nd Defendants/respondents Submissions.

17. Learned counsel for the 1st and 2nd Defendants raised, highlighted and canvassed three pertinent issues for consideration by the Honourable court.

18. First and foremost, Learned counsel for the named Respondents has submitted that a Party is entitled to be granted liberty to plead his/her entire case for purposes of determination by the Honourable court. In this regard, Learned Counsel has contended that it behooves the court to afford the 3rd Defendant/Applicant the latitude to bring the entirety of her case before the court.

19. Secondly, Learned counsel has submitted that the question as to whether the pleaded case will succeed and/or be proved by the Applicant, is a different matter which shall only be dealt with and considered by the court during the plenary hearing and in any event; at the tail-end of the case.

20. Consequently and in this regard, Learned counsel has submitted that the merits or otherwise of the claim based on trust, which is intended to be pleaded by the Applicant, cannot be used to defeat the Application for Leave to amend the Statement of Defense and Counterclaim.

21. Thirdly, Learned counsel has submitted that the Plaintiff/Respondent herein shall not suffer any demonstrable prejudice, if the Application for leave to amend is granted. In any event, counsel has contended that if leave to amend is granted to the Applicant, the Plaintiff/Respondent and the 1st and 2nd Defendant/Respondents, where appropriate, shall be at liberty to file amended pleadings to respond to and or answer to any new issues that may be raised by the Applicant.

22. Premised on the fact that the adverse Parties, the Plaintiff/Respondent not excerpted will be entitled to Leave to amend, Learned counsel for the First and Second Defendants/ Respondents has thus submitted that no prejudice shall arise and/or ensue.

23. Lastly, Learned counsel for the 1st and 2nd Defendants has submitted that the issue of inordinate and undue delay does not arise and or ensue in respect of the instant matter. In any event, Counsel has pointed out that the delay in question has been duly explained. Consequently, learned counsel has joined forces with the Applicant in urging the court to allow the application for leave to amend.

c.Plaintiff's/Respondent's Submissions:

24. Learned counsel for the Plaintiff/Respondent has adopted and relied on the Grounds of opposition dated the 15th September 2023; and thereafter highlighted and canvassed five pertinent issues for consideration by the Honourable court.

25. Firstly, Learned counsel for the Plaintiff/Respondent has submitted that the instant Application has been filed with inordinate and unreasonable delay, which delay has neither been explained nor accounted for by the Applicant herein.

26. Additionally, Learned counsel for the Plaintiff has submitted that the Applicant herein last sought for and obtained Leave to file an amended statement of defense and counterclaim in the year 2009; and that the current Application has been mounted more than 14 years from the date of the last amendment.

27. In any event, Learned counsel has also submitted that the lapse of 14 years from the date of last amendment constitute an unreasonable lapse of time and or delay, which thus disentitles the Applicant to the Equitable discretion of the court.

28. Secondly, Learned counsel for the Plaintiff has also submitted that even though the provisions of Order 8 of the *Civil Procedure Rules*, 2010; allows an Applicant liberty to file an Application for leave to amend at any time of the proceedings, such liberty does not afford an Applicant a blank cheque to file an application for amendment at the tail- end of the proceedings and in particular, long after the Plaintiff and the 1st and 2nd Defendants' have closed their respective cases.

29. Thirdly, Learned counsel for the Plaintiff/Respondent has submitted that the current Application by the Applicant is informed by and in any event reeks of mala fides. In this regard, Learned Counsel has contended that the Applicant herein is now using the current application with a view to circumvent the testimony of the Plaintiff herein and the evidence that has since been tendered.

30. Fourthly, Learned counsel for the Plaintiff has submitted that the Plaintiff/Respondent shall be exposed to suffer extreme prejudice and grave injustice if the current Application for Leave to amend is granted in the manner sought. Instructively, Learned counsel has pointed out that the intended amendment if granted shall destabilize the entire proceedings and thereafter force the Plaintiff/ Applicant to go back to the drawing board with a view to crafting Further pleadings; so as to defend the new cause of action, which is sought to be introduced by the Applicant herein.

31. To this end, Learned counsel for the Plaintiff/Respondent has thus contended that the instant Application is calculated to draw-back on the totality of the proceedings that have been taken and thereby defeat the Constitutional imperative to hear and determine matters expeditiously.

32. Finally, Learned counsel for the Plaintiff has submitted that the issues which inform the current amendment, were well within the knowledge of the Applicant and her counsel from the onset and hence same ought to have been introduced timeously and without waiting for substantial proceedings to be taken before such an application is mounted and/ or filed.

33. In the premises, Learned counsel for the Plaintiff has contended that the Applicant herein is not entitled to the Leave sought and in any event, the Applicant has not justified why the Honourable court ought to exercise discretion in her favor at this late stage of the proceedings.

34. In support of the foregoing submissions, Learned counsel for the Plaintiff has cited and relied on various cases on *inter-alia* *Raphael Mkare & 515 Others v ADC* [2015] eKLR, *Julius Njiraini Nyamu v Henry Mburu Marungo* [2021)] eKLR and *Joseph Tireiti v Jacob Kipsongot Arap Ligate & another* [2013] eKLR, respectively.

35. In a nutshell, Learned counsel for the Plaintiff has invited the Honourable court to find and hold that the Application beforehand is devoid of merits and thus ought to be dismissed with Costs.

Issues for Determination

36. Having reviewed the Application dated the 13th September 2023; and the Response thereto and having similarly taken into account the submissions by and on behalf of the respective Parties, the following issues do arise and are thus worthy of determination.

    i. Whether the Application herein has been made and/or mounted without inordinate delay and if not; whether the delay has been accounted for or otherwise.

    ii. Whether the intended amendment is disposed to introduce a new and distinct cause of action and if so; what is the likely consequence of such introduction of a new cause of action to the entire proceedings.

    iii. Whether the Plaintiff/Respondent shall be disposed to suffer any prejudice, inconvenience and or grave injustice and whether such prejudice/injustice is remediable by way of costs.

    iv. Whether the current Application is defeated by the Doctrine of Latches.

Analysis and Determination

Issue Number 1

Whether the Application herein has been made and/or mounted without inordinate delay and if not; whether the delay has been accounted for or otherwise.

37. Before venturing to address and/or ventilate the issue beforehand, it is important to state and point out at the onset that the instant suit was filed and/or mounted way back in the year 2007 and hence at this juncture, the suit beforehand has graced the corridors of the court for a duration in excess of 16 years. In this regard, there is no gainsaying that the suit has taken a considerable duration of time prior to and before same could be brought to hearing.

38. Whereas various reasons may be responsible for the duration and or length of time that the suit has taken before being brought to hearing, it is imperative that the exercise of discretion one way or the other as pertains to any interlocutory Application, the one beforehand not excerpted, be considered vis a vis the extent of delay.

39. Having pointed out the foregoing, it is now appropriate to consider the pertinent facts relating to whether the current Application has been made timeously and with due promptitude. In this regard, it is not lost on the court that the 3rd Defendant/Applicant herein initially filed a Statement of Defense and Counterclaim on the 7th April 2008; and thereafter same was amended on the 16th June 2009.

40. Subsequently, the instant suit was listed for hearing and same has substantially been heard . For good measure, it is imperative to underscore and reiterate that the Plaintiff's case was heard and closed on the 30th January 2023; and thereafter the 1st and 2nd Defendants case was taken and closed on even date.

41. Notably, the Applicant herein thereafter sought for and obtained an adjournment with a view to commencing her case. In this respect, the Applicant's case was ultimately commenced on the 22nd May 2023.

42. Be that as it may, during the entire duration when the Plaintiff's case was being heard and thereafter the case for the 1st and 2nd Defendants, the Applicant herein was privy to and/or aware of all the facts and circumstances which are now being alluded to at the foot of the current Application.

43. Consequently and in view of the foregoing, the question that does arise is why was the current application not filed and/or mounted either prior to the commencement of the hearing or at any appropriate time, to enable same to be dealt with and/or interrogated by the court and with a view to facilitate timely disposal.

44. To my mind, the Application beforehand has been mounted after lapse of inordinate and unreasonable amount of time. Nevertheless, it is important to point out that whenever an Applicant approaches the court for purposes of exercise of equitable discretion and more particularly where there is a scintilla of delay, like the one beforehand, then it behooves the Applicant to place before the Honorable court some cogent, plausible and reasonable explanation to explain why there has been that delay.

45. Most importantly, where an Applicant is able to account for and/or explain the delay attendant to the filing of the particular application, then a court of law and of equity is disposed to look at the application favorably. For good measure, it is worth remembering that Equity aids the vigilant and not the indolent.

46. Moving forward, I am therefore called upon to interrogate whether the Applicant herein has supplied and/or availed any reason for the delay to file and/or mount the application beforehand timeously. In this respect, the contents of Paragraphs 3 and 4 of the Supporting affidavit by the Applicant are pertinent.

47. Consequently, it is imperative to reproduce same verbatim;

> **Paragraph 3**
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> That I subsequently instructed the firm of M/s Musyoka Murambi & Associates to come on record in place of M/s Havi & Company Advocates who had replaced the firm of M/s Majanja Luseno & Company Advocates.
>
> **Paragraph 4**
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> That I am advised by my advocates currently on record, which advise I verily believe to be true that the said documents does not bring out with clarity the issue of creation of constructive trust.

48. From the foregoing reproduction, what comes out clear is that the advise to amend the pleadings herein arises out of information by the Applicant's current advocates, after reviewing the amended statement of defense and counterclaim on record. In this respect, the question that does arise is why the review which is now anchoring the advise, was not taken earlier, insofar as the current advocates for the Applicant have indeed been on record for the Applicant right from the commencement of the hearing of the proceedings and in particular, since the 30th of November 2021.

49. For coherence, the contents of the supporting affidavit, which ought to have accounted for the reason for the delay has indeed not availed any such reasons. Consequently and in the absence of any such cogent and/or plausible reasons, the only inference to be drawn is that the delay in filing the application was informed by inaction, negligence or want of diligence, on the part of the Applicant and by extension her counsel on record.

50. However, it is important to underscore that the Equitable discretion of the court can only be invoked upon dissemination and/or disclosure of cogent and plausible reasons and where no such reasons

are granted, the court must be reluctant to exercise equitable discretion. Simply put, the exercise of Discretion of the Court can only be unlocked by and upon full dissemination of all the facts attendant to and underpinning the delay.

51. In this respect, it is imperative to take cognizance of the ratio decidendi in the case of *Kamondo v Maina* (Civil Application E110 of 2022) [2023] KECA 947 (KLR) (28 July 2023) (Ruling), where the court stated and held thus;

> 5. Needless to state the principles that guide the court in applications such as this one are well settled. In *Vishva Stone Supplies Company Limited v RSR Stone* Civil Application No 55 of 2020, Nambuye, J stated:
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> > " The principles distilled from the above case law may be enumerated inter alia as follows:
> >
> > i. The mandate under Rule 4 is discretionary, unfettered and does not require establishment of "sufficient reasons". Neither are the factors for exercise of the courts unfettered discretion under the said Rule limited to, the period for the delay, the reason for the delay (possibly) the chances of the appeal succeeding and the degree of prejudice to the respondent if the application is granted; the effect of the delay on public administration and the importance of compliance with time limits; the resources of the parties and also whether the matter raises issues of public importance.
> >
> > ii. Orders under Rule 4 of the *Court of Appeal Rules* should not only be granted liberally but also on terms that are just unless the applicant is guilty of unexplained and inordinate delay in seeking the Courts indulgence or that the Court is otherwise satisfied beyond para adventure, that the intended appeal is not an arguable one.
> >
> > iii. The discretion under Rule 4 of the *Court of Appeal Rules* must be exercised judicially considering that it is wide and unfettered meaning on sound reasoning and not on whim or caprice see Githere v Ndiriri.
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> > iv. As the jurisdiction is unfettered, there is no limit to the number of factors the Court would consider a long as they are relevant to the issues falling for consideration before the Court.
> >
> > v. The degree of prejudice to the respondent entails balancing the competing interests of the parties that is the injustice to the applicant in denying him/her an extension, against the prejudice to the respondent in granting an extension.

vi. The conduct of the parties, the need to balance the interests of a party who has a decision in his or her favour against the interest of a party who has constitutionally underpinned right of appeal, the need to protect a party's opportunity to fully agitate its dispute against the need to ensure timely resolution of disputes, the public interest issues implicated in the appeal or intended appeal and whether prima facie, the intended appeal has chances of success or is a mere frivolity.

vii. Whether the intended appeal has merit or not is not an issue determined with finality by a single judge hence the use of the word "possibly".

viii. The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the Court's #ow of discretionary power with the only caveat being that there has to be valid and clear reason upon which discretion can be favourably exercised.

ix. Failure to attach a draft memorandum of appeal is not fatal to an application under rule 4 of the Rules of the Court so long as there is demonstration through other processes relied upon by such an applicant that the intended appeal is arguable.

x. An arguable appeal is not one that must necessarily succeed but is one which ought to be argued fully before court;

xi. The right to a hearing is not only constitutionally entrenched, it is also the cornerstone of the rule of law."

52. Additionally, the importance of accounting for and/or availing reasons for any delay attendant to the filing of an application that seeks to invoke the discretion of the court was also underscored by the Court of Appeal in the case of *Habo Agencies Limited v Wilfred Odhiambo Musingo* [2015] eKLR, where the court stated thus;

> "In the circumstances of this case, I find and hold that the basis for the exercise of my discretion has not been laid properly or at all. Reliance is merely made on alleged inaction by counsel on record, but that does not avail the applicant. I further find that the applicant was not candid in explaining the delay and this deprives it of equitable relief."

53. Before departing from the subject issue, it is also important to recall, reiterate and emphasize the succinct exposition of the law and holding in the case of *Andrew Kariuki Njoroge v Paul John Kimani*, Civil Application, Nai E049 of 2022 (2022) KCEA, 1188 (KLR) (20th October 2022), where it was observed as hereunder:-

12. In order to exercise its discretion whether or not to grant condonation, the court must be appraised of all the facts and circumstances relating to the delay. The applicant for condonation must therefore provide a satisfactory explanation for each period of delay. An unsatisfactory explanation for any period of delay will normally be fatal to an application, irrespective of the applicant's prospects of success. Condonation cannot be had for the mere asking.

    An applicant is required to make out a case entitling him to the court's indulgence by showing sufficient cause, and giving a full, detailed and accurate account of the causes of the delay. In the end, the explanation must be reasonable enough to excuse the default.

13. Equally important is that an application for condonation must be filed without delay and/or as soon as an applicant becomes aware of the need to do so. Thus, where the applicant delays filing the application for condonation despite being aware of the need to do so, or despite being put on terms, the court may take a dim view, absent a proper and satisfactory explanation for the further delays.

54. Arising from the foregoing, my answer to issue number one is two-fold. Firstly, the current Application has been mounted with inordinate and unreasonable delay. Secondly, the inordinate delay under reference has neither been accounted for nor explained, whatsoever.

ISSUE NUMBER 2

Whether the intended amendment is disposed to introduce a new and distinct cause of action and if so; what is the likely consequence of such introduction of a new cause of action to the entire proceedings.

55. Upon being served with the Plaint filed by and on behalf of the Plaintiff/Respondent herein, the 3rd Defendant/Applicant herein duly entered appearance and thereafter filed an initial Statement of Defense which was subsequently amended on the 16th June 2009.

56. Instructively, at the foot of the amended Statement of Defense and Counterclaim dated the 16th June 2009, the Applicant herein adverted to a position that same had legally acquired title to and in respect of the disputed portions of the suit property and furthermore, sought for an order of specific performance. For good measure, the crux of the Applicant's defense and the amended counterclaim was that there was a contract therefore underpinning the prayer for specific performance.

57. Instructively, at the foot of the amended counterclaim, the Applicant herein did not advert to and/or contend that same was entitled to the disputed plots arising out of the suit property on the basis of (sic) constructive or resulting trust at all.

58. Most importantly, it is not lost on the court that the entire body of the amended counterclaim, which indeed anchored and informed the Applicant's case, including her testimony before the Honourable court did not refer to and/or espouse a claim for constructive and/or resultant trust.

59. Invariably, it has been important to point out the foregoing facts so as to demonstrate that the plea/claim for constructive and/or resulting trust, which are now sought to be brought on board are completely new and distinct causes of actions, which had hitherto not been ventilated at all.

60. Moreover, it can also not be gainsaid that if the amendment beforehand is allowed then the Parties herein including the Plaintiff/Respondent would be called upon to file further pleadings and in particular, amendments. Quite clearly, the introduction of a new and separate cause of action, which

is at variance with what had hitherto been impleaded, ought not to be allowed and in any event; at such a late stage in the proceedings.

61. To this end, it is pertinent to adopt and reiterate the ratio decidendi in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, where the Court of Appeal stated and held thus;

> " 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:-
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> > " 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."

62. Most recently, the Court of Appeal had occasion to consider the question of an amendment which was intended to introduce a new and distinct cause of action in the case of *Catherine Koriko & 3 Others v Evaline Rosa* (2020)eKLR.

63. For coherence, the Honorable Court of Appeal observed as hereunder;

> " In the instant matter, in dismissing the appellants' application, I note that the learned judge aptly stated that if the amendment were to be allowed, it would change the character of the suit and the respondent would be prejudiced as she had battled claims in the Succession Cause and now in the instant suit. In this context, I am inclined to adopt the dicta by this Court in *Rubina Ahmed & 3 others v Guardian Bank Ltd, (Sued in its capacity as a successor in Title to First National Finance Bank Ltd)* [2019] eKLR where the Court declined to interfere with the discretion of the trial judge to refuse amendment of pleadings. This Court observed:
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> > In our view, in considering the various factors he did, the learned Judge was simply balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.

64. Similarly, I hold the humble view that the intended amendment would alter and/or change the character of the Applicant's case, which in any event, formed the substratum of the Applicant's own testimony before the Honorable court. Consequently and in this regard, the intended amendment ought not to be granted.

ISSUE NUMBER 3

Whether the Plaintiff/Respondent shall be disposed to suffer any prejudice, inconvenience and or grave injustice and whether such prejudice/injustice is remediable by way of costs.

65. Other than the fact that the intended amendment would no doubt alter and change the character of the Applicant's claim before the court, which has been addressed in terms of the preceding paragraphs, there is also the question of prejudice and injustice, that may arise if the intended amendment is allowed.

66. To start with, the intended amendment if allowed, would then cause a draw-back in the proceedings insofar as the Plaintiff/Respondent and the rest of the adverse Parties, would be called upon to file further and/or amended pleadings, in response and/or answer to the intended amendments.

67. Subsequently, there is no gainsaying that both the Applicant and the rest of the Parties, would thereafter be called upon to file inter-alia further documentation and most importantly, additional witness statements, to reflect the new and distinct issues that are sought to be impleaded.

68. Furthermore, it is also worth noting that the Parties would thereafter be entitled to come back to court and tender additional evidence relative to the new issues being introduced. Instructively and there is every likelihood, that the Plaintiff/Respondent would have to take the witness stand yet again and where appropriate, be at liberty to call further witnesses. In this regard, the net effect is that the court will be called upon to recommence the trial de-novo.

69. On the other hand, it is also imperative to underscore that the Applicant herein had hitherto not captured the issues of constructive trust and resulting trust in her witness statement and effectively, same shall therefore be constrained to file additional witness statement.

70. From the foregoing, it is not lost on this court that the bottom line of the current application would negate the totality of the proceedings that had hitherto been undertaken by the court and in my humble view, such kind of an action would not only be counter-productive, but will also be antithetical to the constitutional imperatives underscored vide Article 159 (2) (b) of the *Constitution* 2010.

71. In any event and before departing from this issue, it is worthy to point out that where an intended amendment is likely to bring on board a new dimension to the case and/or a new factor, including additional witnesses, then the justice of the case, coupled with the Over-riding Objectives of the Court; militates against the grant for an Application for amendment.

72. To buttress and emphasize the position, I beg to revisit the holding of the Court of Appeal in the case of Catherine *Catherine Koriko & 3 others v Evaline Rosa* (2020)eKLR, where the court of appeal stated and held thus

> "Comparatively, in the South African case of Robinson –v- Randfontein Estates Gold Mining Company Limited, 1925 AD 173 Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court's refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called."

73. Consequently and without belaboring the point, I would still have been constrained to refuse the application for amendment of the counterclaim by the Applicant herein, on account of prejudice and grave injustice, that would arise and/or ensue, if same were granted.

74. Furthermore, it is my humble view that the ripple effect, that is likely to arise if the subject application were granted; would defeat the overriding objectives in terms of Section 1A and 1B of the *Civil Procedure Act*, Chapter 21 Laws of Kenya. Consequently, the extent of prejudice and injustice discernable herein, cannot be atoned for by way of costs.

ISSUE NUMBER 4

Whether the current application is defeated by the Doctrine of Latches.

75. Whilst dealing with issue Number one hereinbefore, this court has had occasion to consider the amount of time that had lapsed, prior to and before the filing of the current Application for Leave to amend. Furthermore, it is also important to recall that the application for leave to amend was actually filed on the face of a scheduled hearing date for defense case.

76. Other than the foregoing, it is also pertinent to observe and state that the issues which are now being relied upon to anchor the application for amendment, are indeed Issus that were well within the knowledge of the applicant and her legal counsel, right from the onset.

77. Notwithstanding the foregoing and taking into account the totality of the facts; the current Application which is contended to be intended to enable the Applicant to implead the entirety of her case before the court, was never made and/or mounted timeously.

78. In my humble view, the totality of the circumstances surrounding the subject matter and coupled with lack of any cogent or plausible explanation at the foot of any supportive affidavit, brings to the fore the application of the Doctrine of Latches.

79. As concerns the relevance and importance of the Doctrine of Latches, it is appropriate to adopt the position enunciated in the case of *Edward Akong'o Oyugi & 2 others v Attorney General* [2019] eKLR in which the learned Judge stated as follows:

> 80. The next question is whether the delay of 5 years after the 2010 Constitution is unreasonable and whether it has been explained. In my view, the common law delay rule involves a two-stage inquiry: first, whether the proceedings were instituted after a reasonable time has passed, and, second, if so, whether the court should exercise its judicial discretion to overlook the unreasonable delay taking the relevant circumstances into consideration.
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> 81. The Respondents counsel's contention is that this suit is barred by the doctrine of latches. The doctrine of laches is a legal defense that may be claimed in a civil matter, which asserts that there has been an unreasonable delay in pursuing the claim (filing the lawsuit), which has prejudiced the defendant, or prevents him from putting on a defense. The doctrine of laches is an equitable defense that seeks to prevent a party from ambushing someone else by failing to make a legal claim in a timely manner. Because it is an equitable remedy, laches is a form of estoppel.
>
> 82. Laches ("latches") refers to a lack of diligence and activity in making a legal claim, or moving forward with legal enforcement of a right, particularly in

> regard to equity; hence, it is an unreasonable delay that can be viewed as prejudicing the opposing [defending] party. When asserted in litigation, it is an equity defense, that is, a defense to a claim for an equitable remedy. The person invoking laches is asserting that an opposing party has "slept on its rights", and that, as a result of this delay, circumstances have changed, witnesses or evidence may have been lost or no longer available, etc., such that it is no longer a just resolution to grant the plaintiff's claim. Laches is associated with the maxim of equity, "Equity aids the vigilant, not the sleeping ones [that is, those who sleep on their rights]." Put another way, failure to assert one's rights in a timely manner can result in a claim being barred by laches.
>
> 83. To invoke laches the delay by the opposing party in initiating the lawsuit must be unreasonable and the unreasonable delay must prejudice the defendant. Examples of such prejudice include: evidence favorable to the defendant becoming lost or degraded, witnesses favorable to the defendant dying or losing their memories, the defendant making economic decisions that it would not have done, had the lawsuit been filed earlier.

80. Additionally, the import and tenor of the Doctrine of Latches was also underscored in the case of *Chief Land Registrar & Another v Nathan Tirop* (2018)eKLR, where the court observed as hereunder;

> 55. Laches means the failure or neglect, for an unreasonable length of time, to do that which by exercising due diligence could or should have been done earlier; it is negligence or omission to assert a right within a reasonable time, warranting a presumption that the party entitled to assert it either has abandoned it or declined to assert it. This equitable defense is based upon grounds of public policy, which requires the discouragement of stale claims for the peace of society. (See Republic of *Phillipines v Court of Appeals*, GR No 116111, January 21, 1999, 301 SCRA 366, 378-379).

81. Invariably, the amount of time that has lapsed ever since the filing of the instant suit, coupled with the stage in which the matter has since reached and in particular; the fact that the Plaintiff has already closed her case, makes the Doctrine of Latches relevant.

82. Simply put, I come to the conclusion that the application beforehand is also defeated and negated by the Doctrine of Latches.

Final Disposition:

84. Having reviewed, evaluated and analyzed the pertinent issues which were isolated for determination herein before, I form the humble view that the current Application which ex-facie has been mounted with inordinate and unreasonable delay; and which delay, has in any event, not been explained, is devoid of merits.

85. Consequently and in the premises, the Application dated the 13th of September 2023; be and is hereby dismissed with costs to the Plaintiff/Respondent only, insofar as the 1st and 2nd Defendants, joined forces with the Applicant.

86. It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 19TH DAY OF SEPTEMBER 2023.

OGUTTU MBOYA,

JUDGE.