



Bank of Africa Kenya Ltd v Kikambala Housing Estate Limited & another (Environment & Land Case 355 of 2016) [2023] KEELC 20460 (KLR) (5 October 2023) (Ruling)

Neutral citation: [2023] KEELC 20460 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 355 OF 2016
EK MAKORI, J
OCTOBER 5, 2023**

BETWEEN

BANK OF AFRICA KENYA LTD PLAINTIFF

AND

KIKAMBALA HOUSING ESTATE LIMITED 1ST DEFENDANT

THE LAND REGISTRAR KILIFI 2ND DEFENDANT

RULING

1. Notice of motion dated 6th September 2023 seeks to amend the statement of claim – the defence and introduce a counterclaim. The application also seeks leave to introduce additional documents to be allowed in support of the 1st defendant's case. If allowed, the same be duly deemed as filed upon payment of the requisite fees.
2. The reason for the amendment is submitted by the applicant in the motion that the law allows amendment at any stage of the trial. This is so to allow the effective determination of the real issues in question at the trial fully and finally.
3. It is argued by the applicant that there is no new cause of action proposed in the new amendment proposed. That proposed amendment is intertwined with the plaintiff's claim and it all stems from the same dispute and transactions.
4. The amendment also proposes to avoid duplicity and proliferation of suits arising from the same transactions. The original defence sought declarations, which were never captured as, counterclaims. This is what the amendments seek to cure. The respondent can be compensated with costs arising from the intended amendment. The applicant argues that the intended amendment does not amount to the abuse of the court process.



5. The applicant contends that there is no introduction of the two matters pending in Mombasa - Msa. HCC No 2 of 2015 and Msa.HCC No. 58 of 2015. No breach of Section 6 of the [Civil Procedure Act](#) will be occasioned by the amendment. Those suits are not the same as this one. The applicant intends to produce the pleadings in those other cases.
6. The applicant avers that the amendments are not aimed to delay the matter since the matter was referred to Court Annexed Mediation at one point and yielded nothing.
7. The applicant contends that whereas there were directions for the suit to be heard together with ELC No 207 of 2016, a mention date ought to have been granted to await the current one.
8. The respondent in rejoinder states that this matter has come for hearing severally on 26th and 27th June 2023 the applicants vehemently refused to hear this matter together with ELC No 207 of 2016. The court directed the matter to be heard on 9th October 2023 without fail. The current application intends to delay the hearing further.
9. The respondent argues that a look at the history of this claim will reveal that the applicant has been acting in person and at some point; some lawyers were removed by him from the record. The lawyers who should have raised the issues canvassed now drew the pleadings five years ago.
10. The respondent points out that there are two suits, which are pending being introduced in this suit being Msa. HCC No 2 of 2015 and Msa, HCC No 58 of 2015. Paragraph 36 of the intended amended defence is similar to what is being sought in Msa. HCC No 2 of 2018 and Msa. HCC No 58 of 2015. That there be a waiver of interest and Kshs. 5 billion damages, besides there be an inhibition on the suit property until Msa. HCC No. 2 of 2018 and Msa. HCC No. 58 of 2015 are heard and determined. There are also sought costs taxed in Msa. No 2 of 2018 as special damages.
11. The issue for determination is whether an amendment can be allowed at this stage.
12. Both parties submitted orally on the contested issues. I have considered the materials placed before me on the issues that need to be considered before granting an amendment.
13. An amendment can be made at any stage of the trial if it is intended to bring out real issues in the trial and controversy and to have, the matter fully and finally decided. It is not meant to derail a hearing have the court process muddied and abused or take a tangent of getting into issues that can be resolved in another competent forum. This was aptly summed up by Wendoh J. in the case of [Lewar Ventures Limited v Equity Bank \(Kenya\) Limited](#) [2022] eKLR:

“The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as 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.”

The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.”

14. This action was filed in the year 2016. Other matters are pending in this court significantly ELC No. 207 of 2015 which is due for judgment in due course before this Court. I am informed other matters are pending in the Mombasa Commercial Division of the High Court significantly HCC No 58 of 2015 and HCC No 2 of 2018 over the same subject matter.
15. Since 2016 the applicant had all the time to amend given the fact that this matter had been set down for hearing with ELC No 207 of 2015. It cannot then be said that the current application has been brought up timeously.
16. The applicant intends to bring a counterclaim in this case. In the counterclaim, the two Mombasa files have been introduced to form part of this suit see for instance paragraph 36 of the intended amended defence and the counterclaim pleads losses incurred because of the two suits and several other suits (see also paragraph 39 of the intended defence and counterclaim) pending in this court or other courts. All this is attributed to the respondent in the manner it handled the charge transaction subject to this litigation. The applicant intends this court to declare that the losses were attributed to and occasioned by the respondent in this suit. In a nutshell, all those suits should thus be collapsed in this one.
17. There is a plea that this court also issues an inhibition order against the respondent from dealing in any manner with the suit property until the special damages in Msa. HCC 2 of 2018 and Msa.HCC 58 of 2015 have been ascertained and or heard and determined to their logical conclusion. That will mean this court will adopt a supervisory role over those other courts or this court is called upon to superintend those other courts of competent jurisdiction and exercise ‘veto’ powers over their decisions.
18. The court is also being asked to issue compensatory orders as pleaded in paragraph 36 of the intended amended defence and counterclaim which damages directly accrue from the two suits.
19. How the intended amendment is couched will conflict with Section 6 of the *Civil Procedure Act*. We will be having dual case files dealing with similar issues with the resultant effect of parallel decrees arising from equal and coordinate Courts. Section 6 of the *Civil Procedure Act* abhors that manner of proliferation of suits as envisaged in the intended amendment. Wabwoto J. expressed himself in this way when addressing his mind to the doctrine of sub judice as legislated under Section 6 of the *Civil Procedure Act* in *Ephraim Miano Thamaini v Nancy Wanjiru Wangai & 2 others* [2022] eKLR:

“It was submitted that this suit was instituted by the Plaintiff despite the existence of another suit Nairobi ELC Case No. E258 Of 2020 Samson Masaba Munika & Elina Mwayitsi Nakaya V Nancy Wanjiru Wangai and that all these issues ought to have been raised in that suit instead of filing a separate fresh suit.



20. The sub judice principle is captured in Section 6 of the [Civil Procedure Act](#), which provides as follows: -

“6. No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title.”

21. In this regard, section 6 of the [Civil Procedure Act](#) expressly provides that no court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.

22. With a large number of pending cases, the judiciary is overburdened and faces a stark lack of resources. When two suits arising out of the same issues between the same parties are brought before the courts, there is bound to be wastage of resources and frivolous litigation.

23. The basic purpose and the underlying object of sub judice is to prevent the courts of concurrent jurisdiction from simultaneously entertaining and adjudicating upon two parallel litigations in respect of same cause of action, same subject matter, and the same relief. This is to pin down the parties to one litigation to avoid the possibility of contradictory verdicts by two courts in respect of the same relief and is aimed at preventing a multiplicity of proceedings.

24. The Supreme Court of Kenya in [Kenya National Commission on Human Rights v Attorney General; Independent Electoral & Boundaries Commission & 16 others \(Interested Parties\)](#) [2020] eKLR, had occasion to pronounce itself on the subject of sub judice. It aptly stated -

“The term ‘sub-judice’ is defined in Black’s Law Dictionary 9th Edition as: “Before the Court or Judge for determination.” The purpose of the sub-judice rule is to stop the filing of a multiplicity of suits between the same parties or those claiming under them over the same subject matter so as to avoid abuse of the Court process and diminish the chances of courts, with competent jurisdiction, issuing conflicting decisions over the same subject matter. This means that when two or more cases are filed between the same parties on the same subject matter before courts with jurisdiction, the matter that is filed later ought to be stayed in order to await the determination to be made in the earlier suit. A party that seeks to invoke the doctrine of res sub-judice must therefore establish that; there is more than one suit over the same subject matter; that one suit was instituted before the other; that both suits are pending before courts of competent jurisdiction and lastly; that the suits are between the same parties or their representatives”

25. In the case of [David Ndi & others v Attorney General & Others](#) 2021 eKLR, a bench of five Judges inter alia stated;

“The rationale behind this provision (Section 6 of the [Civil Procedure Act](#)) is that it is vexatious and oppressive for a claimant to sue concurrently in two courts. Where there are



two courts faced with substantially the same question or issue, that question or issue should be determined in only one of those courts, and the court will....”

20. By introducing the very issues that are actively being litigated in other courts and claiming reliefs arising out of them, the sub judice rule comes into play. It will mean introducing new and inconsistent causes of action or issues that will be in direct conflict with this matter and the other pending suits elsewhere. The result will also be convoluting the issues for determination and eclipsing the real issues for trial. I am seeing new causes of action building up as this matter pends before our Courts. We are dealing with a 2012 transaction that has now mutated into another mongrel very dissimilar from the original one. The intended amendment will also prejudice the respondent.
21. Issues pending in those other Courts should be handled more effectively there. There is an attempt to bring this matter together with the other suits by taking an offside position. I believe it will fall short of the tenets of justice and an orderly way of conducting court business.
22. The upshot is that the application dated 6th September 2023 is hereby dismissed with costs. The matter is to proceed as scheduled.

DATED, SIGNED, AND DELIVERED AT MALINDI VIRTUALLY ON THIS 5TH OCTOBER, 2023.

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E. K. MAKORI

In the Presence of

Mr. Muttisya for the Applicant

Ms. Otieno for the Respondent

Court Clerk: Happy

