



Kenya Wildlife Service Staff Superannuation Scheme Registered Trustees & another v Dykoe Enterprise Limited & 4 others (Environment & Land Case E010 of 2020) [2023] KEELC 21441 (KLR) (9 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21441 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E010 OF 2020
J OMANGE, J
NOVEMBER 9, 2023**

BETWEEN

**KENYA WILDLIFE SERVICE STAFF SUPERANNUATION SCHEME
REGISTERED TRUSTEES 1ST PLAINTIFF
KENYA WILDLIFE STAFF RETIREMENT BENEFITS SCHEME 2006
REGISTERED TRUSTEES 2ND PLAINTIFF**

AND

**DYKOE ENTERPRISE LIMITED 1ST DEFENDANT
NEPHETS INTERLINK SERVICES LIMITED 2ND DEFENDANT
THE CHIEF LAND REGISTRAR 3RD DEFENDANT
HON. ATTORNEY GENERAL 4TH DEFENDANT
COUNTY GOVERNMENT OF NAIROBI 5TH DEFENDANT**

RULING

1. In the Notice of Motion application dated the May 24, 2023 the applicants sought the following orders:
 - a. That the honourable court be pleased to grant the plaintiffs leave to amend their plaint and issuance of summons against the intended defendants.
 - b. Costs of the application.
2. The application was supported by an affidavit sworn by the 1st plaintiff's chairperson Edwin Wanyonyi who deponed that at all materials times the 1st and 2nd plaintiffs were the registered owners of LR No 1/287 lenana road Kilimani Nairobi having purchased the same from Utramod Holding Limited



vide a sale agreement dated April 26, 2016 and transfer of title effected on the December 6, 2016 at a consideration of Ksh 520,000,000.

3. He deponed that prior to purchase they had performed due diligence on the said property and confirmed Utramod Holding Limited as the legitimate owner who could transfer proprietary rights. This position was supported by search documents issued by the 3rd defendant.
4. He avers that in the original defence by the 3rd and 4th defendants, the issue of ownership was always attributed to the plaintiffs and that at no one point was there a contention as to ownership and it comes as a surprise that the 3rd and 4th defendants through their amended defence dated April 3, 2023 attribute ownership to the 1st defendants.
5. He deponed it is on the basis of this amended defence that they wish to amend their plaint to include the sellers that is Utramod Holding for a claim of misrepresentation.
6. The 5th respondent filed grounds of opposition dated September 22, 2023 which grounds were as follows:-
 - i. That the application is an abuse of the court process, scandalous, frivolous, vexatious and intended to embarrass the court.
 - ii. The proposed amendments introduce new and inconsistent cause of action and issue which changes the action into one of a substantially different character.
 - iii. The applicants propose to amend the plaint to enjoin the sellers of the subject matter and admit that they have realize that the sellers misrepresented the true ownership of the suit property at the time the applicant bought the suit property from them.
 - iv. The effect of the proposed amendment would be to introduce a new cause of action against the sellers and could be more conveniently be made subject of a fresh action.
 - v. The court should not allow the plaintiffs to reframe their case or claims by an amendment of their plaint.
 - vi. The amendment would be prejudicial to the rest of he parties in the suit and thus not in the best interest of equity and justice and fairness of the court to allow it.
 - vii. Application is not legally tenable and devoid of merit.
7. The plaintiff in their submissions highlighted the fact that the 5th respondent had brought forth a different application to have the plaintiffs advocate cease to act on the basis of conflict of interest instead of responding to the application for amendment. Counsel submitted that the court should disregard this and instead consider whether the application is merited to warrant orders sought.
8. The plaintiff highlighted the principles courts have considered in failing to grant leave to amend. Counsel relied on the following cases among others *St Patrick hill school limited vs Bank of Africa Kenya limited* 2018(eKLR), *Ochieng and others vs First National bank of Chicago* Civil Appeal No 147 of 1991 where in the former the court stated that amendments to pleadings should be allowed as long as they do not cause an injustice to the other side which injustice cannot be compensated by way of monetary compensation. The latter laid down principles as set out in the Court of Appeal for allowing amendment to pleadings which power is discretionary to courts at any stage of the pleadings.
9. In their submissions, the 5th respondent raised two issues for determination that is whether the court should allow the application seeking leave to amend the plaint and who should bear the costs.



10. It was the 5th respondent's submission that the application did not meet the conditions to amend as stipulated in the case of *Institute for social accountability and another vs parliament of Kenya and 3 others* (2014)eKLR as it brought forth new and inconsistent cause of action which would change the action into a different character, and to be precise they highlighted that the claim for misrepresentation would turn the suit from one seeking declaration of ownership and trespass to a tortious liability one. They also submitted that they stand to suffer irreparable loss that cannot be compensated by award of damages, that no prejudice will be occasioned to the applicants if the application is not allowed as they can file a separate action against the intended proposed parties.
11. Having considered the pleadings and the submissions herein, the issue that the court has to determine is whether the notice of motion application dated May 24, 2023 warrants grant of the orders sought.
12. Whether the notice of motion application dated May 24, 2023 warrants grant of orders sought order 8, rule 5 gives the court the general power to amend thus;
 5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.
13. In the case of *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”
14. The applicant's case is that after it had filed its plaint and the supporting documents, the 3rd and 4th defendants amended their defence to attribute ownership of the suit property to the 1st defendant and not the plaintiffs as stated in their original defence. The applicants stated that this necessitated amending the suit to bring in the sellers who sold the property to them. This they said was necessary in view of the amended defence filed by the 3rd and 4th Defendants. This would enable the court to determine all the issues in the suit at once.
15. Based on the highlighted case law the principles that ought to guide a court in considering an application for amendment include;
 - i. the amendment should not introduce new or inconsistent cause of actions or issues;
 - ii. the amendment should be made timeously;
 - iii. it should not affect any vested interest or accrued legal right and
 - iv. it should not prejudice or cause injustice to the other party.



16. Having considered the proposed amendments, I note that the land in dispute is the same. The parties involved are the same. Even if a new suit were to be filed it would be the same parties litigating. More important this matter has not been heard or determined. The situation would have been different if the case had been heard and judgement had been delivered. The issue of enjoining the 6th 7th 8th and 9th defendants is one that I find not contentious as it involves the same subject matter and it would save the court time to have the same matter adjudicated upon than have a new suit.
17. On the issue of time, the amended defence was filed on the 14th April 2023 and this application brought forth on the May 24, 2023. As such there was no delay by the plaintiffs.
18. An issue was raised by the 5th respondent regarding the application they have filed on conflict of interest. This is a totally separate application to the application to amend and will be dealt with separately.
19. The upshot of the foregoing is that I find the application has merit and is allowed as follows;
 - a. Leave is hereby granted to the applicants/plaintiffs to- amend the plaint. The amended plaint be filed and served upon the intended defendants within 30 days.
 - b. The amended plaint be served upon the 1st to 5th defendants within 14 days. Leave is granted to the said defendants to file an amended defence within 14 days if necessary.
 - c. The costs of this application be borne by the plaintiffs/applicant.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 9TH DAY OF NOVEMBER 2023.

Judy Omenge

JUDGE

In the presence of: -

Mr. Kajuma with Mr. Midya for the Plaintiff

Mr. Mutua for 1st and 2nd Defendants

Mr. Allan Kamau for 4th and 5th Defendants

Steve - Court Assistant

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