



REPUBLIC OF KENYA



KENYA LAW
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Makindu Motors Limited v Subati Group Limited & another (Environment & Land Case E032 of 2022) [2023] KEELC 21505 (KLR) (8 November 2023) (Ruling)

Neutral citation: [2023] KEELC 21505 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MAKUENI
ENVIRONMENT & LAND CASE E032 OF 2022
TW MURIGI, J
NOVEMBER 8, 2023

BETWEEN

MAKINDU MOTORS LIMITED PLAINTIFF

AND

SUBATI GROUP LIMITED 1ST DEFENDANT

RELIANCE VENTURES LIMITED 2ND DEFENDANT

RULING

1. By a Notice of Motion dated 22nd March, 2023 brought under Order 1 Rule 3, 6, 7, 9 and 10, Order 8 Rules 3 and 5, Order 51 Rule 1 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the [Civil Procedure Act](#) and all other enabling provisions of the law, the Applicant seeks the following orders:-
 1. Spent.
 2. That the Plaintiff/Applicant be granted leave to amend its Plaint to add the following parties to the suit:-
 - A. Reliance Ventures Limited,
 - B. Harji Sanhani,
 - C. The Land Registrar Makueni County,And upon grant of leave the draft amended Plaint be deemed to be duly filed upon payment of the requisite court fees.
 3. That the costs of the application be provided for.
2. The application is premised on the grounds appearing on its face together with the supporting affidavit of Stephen Ngei Musyoka sworn on even date.



The Plaintiff's Case

3. The Applicant averred that its previous Advocate omitted to include a number of key reliefs and parties in the Plaint herein. He further averred that the amendment is necessary for determining the real question in controversy between the parties herein. The Plaintiff contended that the Defendant will not suffer any prejudice since the hearing has not taken off and that in any event, the Defendant will have corresponding leave to file an amended defence

The Defendants Case

4. The Defendant opposed the application vide the replying affidavit of Ravi Rameshumar Patel sworn on 5th September, 2023.
5. It was averred that the Defendant was not opposed to the joinder of the parties to the suit herein, but was vehemently opposed to the amendment of the Plaint because the amendment is tailored to match with the evidence on record. The deponent further averred that the proposed amendment is inconsistent with the original Plaint as it raises a new cause action that does not arise from the facts already pleaded.
6. The deponent contended that the Plaintiff seeks to introduce fraud as a cause of action which ought to have been pleaded at the inception of the suit. He claimed that the Plaintiff relinquished any cause of action that was not contained in the original Plaint and cannot therefore seek to introduce the same through amendment of the plaint. He urged the court to dismiss the application with costs.
7. In a supplementary affidavit filed on 18/09/2023 the Plaintiff averred that it was strange that the Defendant was opposed to the amendment of the Plaint and not to the joinder of the parties which if allowed will amount to an academic exercise.
8. The application was canvassed by way of written submissions.

The Plaintiff's Submissions

9. The Plaintiff's submissions were filed on 31st May, 2023.
10. On his behalf, Counsel identified the following issues for the court's determination:-
 1. Whether the Plaintiff/Applicant has established sufficient grounds to warrant leave to amend the plaint.
 2. Whether the Plaintiff/Applicant has met the required threshold for granting of orders to enjoin the 2nd, 3rd and 4th Defendants as parties to this suit.
11. On the first issue, Counsel submitted that Order 8 Rule 5 (1) of the Civil Procedure Rules permits the court to order any document to be amended for the purpose of determining any question in controversy between the parties. Counsel further relied on the provisions of Order 8 Rule 5(1) which provides as follows:-

“ Amendments may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if new cause of action unless out of the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”



12. In explaining the purpose of an amendment, Counsel relied on the case of Central Bank of Kenya Vs Trust Bank Limited (200) 2 EA 365 where it was held that:-

“It is also trite law that as far as possible a litigant should plead the whole of his claim which he is entitled to make in respect to his cause of action. Otherwise, the court will not later permit him to re-open the same subject of litigation(see order 11 Rule 1 of the Civil Procedure Rules), only because they have from negligence, inadvertence or accident omitted part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in an application for leave to amend, that all amendments should be freely allowed at any stage of proceedings, provided the amendments or joinder as the case may be will not result in prejudice or injustice to the other party which cannot be properly compensated for in costs.”

13. Counsel further submitted that the principles that guides court in an application for amendment were set out in Eastern Bakery Vs Castelino (1958) EA 461 where it was held that:-

“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be compensated by costs.”

14. To buttress this point, Counsel further relied on the case Budding Vs Murdoch (1875) ICL.D AT P42 and Simonian Vs Johari (1962) EA 336(K). Counsel submitted that the joinder of the parties to the suit herein is necessary so that the matters in controversy can be determined conclusively. Counsel submitted that the Defendants will not suffer any prejudiced if the orders sought are granted since the hearing of the suit is yet to take off. In addition, Counsel submitted that the Defendants will have corresponding leave to file an amended defence.

15. Counsel maintains that the proposed amendment is necessary as it introduces the issue of fraud which if established will invalidate the Defendant’s title. .

16. On the second issue, Counsel relied on the provisions of Order 1 Rule 1, Order 1 Rule 3 and Order 1 Rule 10(2) of the Civil Procedure Rules and on the case of Kingori Vs Chege and 3 Others (2002) eKLR which set out the principles to be considered in enjoining a party to the suit as follows:-

- a. He must be a necessary party.
- b. He must be a proper party.
- c. His presence is necessary to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit.

17. Counsel submitted that the Defendant’s interest is derived from an agreement of sale with the 2nd Intended Defendant while the 2nd Intended Defendant’s interest is derived from a sale agreement between the 2nd Intended Defendant and the 3rd intended Defendant. It was submitted that the sale agreement between the 2nd and 3rd Intended Defendants was based on forged documents and that once it is established, the sale agreement and the title deed issued to the 2nd Defendant will be rendered void which will in turn vitiate the agreement of sale between the 1st and 2nd Defendant herein. It was further submitted that the Intended Defendants perpetrated the fraud, which was abated by the 4th defendant whose servants caused fraudulent alterations and entries in the land register to cover up the fraudulent acts of the other Defendants. Counsel asserted that the issues are inter connected and cannot be determined unless all the Defendants are joined to the suit herein.



18. To buttress his submissions Counsel relied on the bundle of authorities annexed to his written submissions.

The Defendant's Submissions

19. The Defendants submissions were filed on 8th September, 2023.
20. Counsel submitted that the only issue for determination is whether the application for joinder of parties and amendment of the Plaint is merited.
21. It was submitted that the Defendant was not opposed to the joinder of the parties to the suit herein. However, the Defendant insisted that it was opposed to the proposed amendment of the Plaint because it would significantly alter and expand the Plaintiff's original cause of action from trespass contained in the original Plaint to fraud and conversion. To buttress this point Counsel referred the court to the pleadings in the original Plaint and the proposed amended plaint. Counsel further relied on the case of *Kakamega Paper Converters Ltd Vs Mohanial Arora & 4 Others (2015)* where the court held that:-
- “.....2) the amendment do not introduce new or inconsistent cause of action or abrogate or affect vested interest or accrued legal right or defence.....”
22. It was submitted that the plaintiff has failed to establish how the proposed amendments are necessary to determine the dispute at hand or why they cannot be introduced by way of evidence.
23. Counsel submitted that the Plaintiff has not established what prejudice it would suffer if the amendment sought is not granted. To buttress this point Counsel relied on the case of *Kassam Vs Bank of Baroda (Kenya) Ltd (2002) eKLR* where it was held that:-
- “I find that to allow the requested amendment would be to facilitate abuse of the process of the court. The power of amendment is to be most carefully and jealously exercised in all the circumstances of the case of each individual case so that a party may not turn his suit or defence into a gamble at the opponent expense.....”
24. Counsel further submitted that the proposed amendment raises contradictory facts to the original Plaint as follows;
- “In the original Plaint the Plaintiff was the original allottee of the property while in the amended Plaint introduces a third party who the Plaintiff claims was the original allottee.”
25. Counsel asserted that the proposed amendment will prejudice the Defendant as it will have to restructure and review its defence to the Plaintiff's fabricated case which will in turn delay the hearing and determination of this case. It was submitted that the facts as pleaded in the draft amended plaint are not supported by any evidence hence the Defendant is unable to ascertain with certainty the case which he has to meet at the trial.
26. Counsel contended that the application is intended to delay the determination of the Plaintiffs application dated 12th October, 2022 since it was filed weeks to the date reserved for taking a ruling date on the same.
27. It was further submitted that the facts and the cause of action which the Plaintiff proposes to introduce in the amended plaint are not new to the Plaintiff as they accrued prior to the commencement of these proceedings.



28. Counsel asserted that the Applicant has not given any justification as to why the proposed new issues were not included in the original plaint since the facts and the cause of action are not new to the Plaintiff. It was submitted that Order 3 Rule 4 of the Civil Procedure Rules requires a Plaintiff to bring their whole claim in respect of a cause of action. That failure by the Plaintiff to plead their whole claim would amount to relinquishing the omitted claim. It was submitted that the Plaintiff having relinquished its claim cannot purport to introduce the same by amending the Plaint as it will amount to an abuse of the court process.
29. Counsel contended that the proposed amendment is a reaction to the evidence adduced by the Defendant so far. Counsel maintains that the draft amended plaint is an attempt by the Plaintiff to re-plead its case.
30. Counsel submitted that the original plaint and the application was a fishing expedition and urged the court to dismiss the application with costs.
31. To buttress his submissions, Counsel relied on the authorities annexed to his submissions.

Analysis And Determination

32. Having considered the application, the affidavits and the rival submissions, the only issue for determination is whether the orders for amendment and joinder are merited.
33. The Plaintiff is seeking leave to amend its plaint as per the draft amended plaint. The Plaintiff contended that its previous Advocate erroneously omitted to join some parties and to plead key reliefs in the plaint. Order 8. Rule 3 provides as follows:
 - (1) Subject to Order 1, Rules 9 and 10, Order 24, rules 3, 4, 5, and 6 and the following provisions of this rule, the court may at any state of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
 - (2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3)(4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
 - (5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.



34. Order 8 Rule 5 (1) of the Civil Procedure Rules provides that: -

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the Court may either on 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.”

35. It is evident from the above provisions that an amendment of pleadings may be permitted at any stage for purposes of determining the real question in controversy between the parties.

36. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously.

37. In the case of Central Kenya Limited Vs Trust Bank Limited & 5 Others [200]eKLR the Court of Appeal (Gicheru, Bosire & Owuor, JJA) whilst referring to commentaries on the Indian Civil Procedure Code by Chittaley and Rao stated as follows with regards to the settled rule to amendment of pleadings:

“... that a party is allowed to make such amendments as may be 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.”

38. Their Lordships went on to state that;

“It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, Beoco Ltd v. Alfa Laval Co. Ltd [1994]4 ALL ER. 464).”

39. In the case of Ochieng and Others vs First National Bank of Chicago Civil Appeal Number 149 of 1991 [1995] eKLR cited with approval in St. Patrick’s Hill School Vs Bank of Africa LTD [2018]e KLR the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. They were enunciated as follows:

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case:
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings;
- d) 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:



- e) 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
40. The factors to be taken into account in the exercise of the court's discretion were summarized in the case of *Kassam Vs Bank of Baroda (Kenya) Limited* (2002) 1 KLR 294. They are:-
- a. The party applying is not acting mala fides;
 - b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
 - c. The amendment is not a device to abuse the court process;
 - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
 - e. And that the amendment will not alter the character of the suit.
41. Similarly in the case of *Daniel Ngetich & Another Vs K-Rep Bank Limited* 2013 KLR it was held that:-
- “Normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of Court” Amendment ought to be allowed when:
- (a) They do not work injustice to the other side.
 - (b) They are necessary for the purposes of determining the real questions in controversy between the parties.”
42. It is trite law that an amendment should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs.
43. It will be seen from the above, that the court may be inclined to reject amendments which seek to fundamentally alter the character or subject matter of the suit.
44. The Plaintiff contends that the proposed amendment is necessary because its previous Advocate erroneously omitted to join some parties and to plead key reliefs in the Plaint. Vide the Plaint dated 12th October, 2022 and filed in court on even date, the Plaintiff seeks the following orders:-
- i) A declaration that Makueni/Kitengei 159 “B” Squatters Settlement Scheme belongs to the Plaintiff herein.
 - ii) An order of permanent injunction restraining the Defendant either by itself or through its directors, servants, agents, employees and/or anyone claiming through it from selling, transferring, alienating, subdividing, entering, trespassing or carrying out any wanton acts or interfering with the Plaintiff's quiet possession and enjoyment of Makueni/Kitngei 159 “B” Squatters Settlement Scheme.
 - iii) Cancellation of any documents to title or title issued to the Defendant.
 - iv) General damages for trespass and mesne profits.



- v) Costs and interest of the suit.
- vi) Any other relief that this Honourable court may deem fit and just to grant.
45. In the draft amended Plaintiff, the Plaintiff in addition to the above reliefs is seeking the following orders:-
- iii)
- (a) Orders directing the 1st and 2nd Defendants to deliver up the original title deeds dated/ issued on 8th September 2021 and 3rd November 2014 respectively to the 4th Defendant.
 - (b) Orders directing the 4th Defendant to effect cancellation of title deeds aforesaid and issue title to the suit property to the Plaintiff herein.
 - (c) Orders directing the 4th Respondent to regularize the parcel file and entries in the relevant land register to reflect the Plaintiff as the registered proprietor of the suit property and to eliminate the fraudulent entries therein.
 - (d) Orders directing the 1st Defendant to remove all unlawful fencing, piping, trenches and all unlawful infrastructures set up in the suit property and deliver up the suit property to the Plaintiff in its initial condition.
 - (e) Orders directing the OCS Mtitio Andei and/or Kibwezi to ensure full compliance with the orders of this court.
46. In the proposed amended Plaintiff, the Plaintiff pleaded particulars of fraud and illegalities committed by the 2nd, 3rd and 4th Intended Defendants. It is crystal clear that the Plaintiff wants to add a new cause of action. In the original Plaintiff, there are no allegations of fraud or particulars thereof were pleaded. The issues that the Plaintiff seeks to introduce through amendment were within its knowledge all along. The deponent admitted as much in his supporting affidavit. The proposed amendment is inconsistent with the previous pleadings as it is not in tandem with the original cause of action. The effect of the proposed amendment would introduce a new cause of action. From the foregoing, it is crystal clear that the Plaintiff wants to overhaul its original Plaintiff by introducing a new case with completely different legal principles.
47. The Plaintiff, who was represented by an Advocate from the inception of the case, has not explained to this Honourable Court why the alleged key reliefs and parties were not included in its original plaintiff. Failure to include the alleged key reliefs and parties at the time of filing this suit was deliberate and not done by mistake and thus the same is not a genuine mistake requiring the invoking of the discretion of this Honourable Court.
48. From the foregoing I am of the view that allowing this application will prejudice the Defendant as was held in the case of Harrison C. Kariuki Vs Blue Shield Insurance Co. Ltd 2006 eKLR whereby the learned Judge held:-

“I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. It will occasion injustice to the Defendant who will have to extensively amend its defence. The Defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expanded case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal



of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted. Having considered all matters placed before me, and in exercise of my discretion I will refuse the application. It is hereby dismissed with costs to the Defendant.”

49. In end, I find that the application dated 22nd March 2023, is devoid of merit and the same is hereby dismissed with costs.

RULING DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS THIS 8TH DAY OF NOVEMBER, 2023.

.....

HON. T. MURIGI

JUDGE

In The Presence Of:-

Mwangi appearing together with Ms Kimani for the Respondent.

