



**Mungai alias Michael Wanyoike Mungai v Karanja alias Beatrice Nyindumbi
(Sued on her own behalf and as personal Representative of the Estate
of Dr Josphat Njuguna Karanja) & another (Environment & Land Case
190 of 2018) [2023] KEELC 21281 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21281 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE 190 OF 2018**

JG KEMEI, J

NOVEMBER 2, 2023

BETWEEN

WANYOIKE MUNGAI ALIAS MICHAEL WANYOIKE MUNGAI PLAINTIFF

AND

**BEATRICE KARANJA ALIAS BEATRICE NYINDUMBI (SUED ON HER OWN
BEHALF AND AS PERSONAL REPRESENTATIVE OF THE ESTATE OF DR
JOSPHAT NJUGUNA KARANJA) 1ST DEFENDANT**

BROADWAY BAKERY LIMITED 2ND DEFENDANT

RULING

Notice of Motion 8/3/2023

1. On 9/3/2023 the Plaintiff/Applicant moved the Court under Order 8 rule 3 (1), 5, 7 & 8 of the [Civil Procedure Rules](#) together with Section 3A of the [Civil Procedure Act](#) and sought the following orders:-
 - a. Spent
 - b. That the Plaintiff be allowed to amend his Complaint dated 28/6/2018 in line with the draft annexed thereto.
 - c. That the amended Complaint annexed thereto be deemed as having been filed and served upon payment of requisite fees.
 - d. Costs of the application.



2. The application is supported by the grounds annexed to the Affidavit of Charles Mwangi Kangethe, Counsel in conduct with the matter on behalf of the Applicant and duly authorised to swear the Affidavit.
3. The deponent avers that there is new information that has emerged through investigations showing that the 1st Defendant fraudulently transferred the Plaintiff's property through forgery. That there are no documents signed by the Plaintiff in support of a transfer of the suit land in favour of the Defendant. Similarly, that no stamp duty was paid on the alleged transfer. Further, that investigations undertaken confirm that the signature used to obtain Land Control Board consent was fake and did not belong to the Plaintiff.
4. The Applicant avers that it has therefore become necessary to amend the Plaint to reflect the new information arising from the said investigations.
5. The Applicant contends that the proposed amendments are intended to help the Court adjudicate the real matters in dispute between the parties. He is of the view that no prejudice will be visited upon the Defendants.
6. The application is opposed by the 1st Respondent vide an Affidavit of Susan Wagikuyu Karanja sworn on 2/5/2023. She introduced herself as a beneficiary of the Estate of Dr. Josephat Njuguna Karanja with full capacity to swear the Affidavit.
7. She stated that the suit land was acquired on 31/12/1986 by her late father and former Vice President of the Republic of Kenya Dr. Josephat Karanja from the Applicant. That the process was legal and procedurally sound and the suit property was vested in his estate until 2015 when it was sold to the 2nd Respondent in accordance with the deceased's will dated 15/1/1994.
8. That the disposal of the suit property to the 2nd Respondent was pursuant to the orders of the Court issued on Succ. Cause No. 816 of 1994 In the Matter of the Estate of Dr. Josephat Njuguna Karanja. Before the sale of the land the Applicant never raised any objection or alleged fraud with respect to the suit land. That the argument of non-payment of stamp duty is not founded. That the issues of allegations of fraud are being raised 32 years after the acquisition of the property and 29 years after the demise of Dr. Karanja. That the production of the forensic report is an afterthought aimed at changing the substratum of the Applicant's claim. In any event she argues that the application is time barred by the provisions of the Limitation of Actions Act and urged the Court to strike out the application.
9. That the introduction of fresh allegations of fraud in the suit is prejudicial to the 1st Respondent given that Dr. Karanja is now deceased and cannot respond to the claim. She termed the claim frivolous, scandalous and vexatious. Given that the Director of Criminal Investigations had inquired into the allegations and the said allegations were dismissed.
10. The application is vehemently resisted by the 2nd Respondent vide the Replying Affidavit of Bejul Chunilal Shah deponed on 17/4/2023. The deponent introduced himself as a Director of the 2nd Respondent with capacity and authority to swear the Affidavit on behalf of the 2nd Respondent.
11. He challenged the Applicant's Affidavit on the grounds that it was sworn by an Advocate who purported to depone on matters not within his knowledge as they pertain to events that occurred between the Applicant and the deceased Vendor Dr. Josephat Njuguna Karanja. That the act of swearing the Affidavit by Counsel is highly irregular. That arising from the irregular Affidavit together with the supporting annexures the application should be dismissed with costs.



12. That the document marked as MWM1 (forensic report) having been prepared in 2022 in relation to events which occurred more than 30 years prior is inadmissible. *Inter alia*, that the allegations of fraud are statute barred. Further that Dr. Josephat Njuguna Karanja is long deceased and could not be available to corroborate the allegations brought forth by the Applicant.
13. He stated that in any event the allegations of fraud were fully investigated by DCI Thika which investigations did not disclose any *prima facie* complaint against the 1st and 2nd Respondents leading to the closure of the Police file. Evidently, the allegation of fraud is a concluded matter and rehearsing it amounts to an abuse of the Court process.
14. That the application is coming too late in the day when most of the pleadings have been filed by the parties.
15. The deponent further stated that the 2nd Respondent is an innocent purchaser for value having purchased the suit property without notice of any taint and having had no notice of any valid claims to the suit property, it acquired a good title against the Applicant.

Written Submissions

16. The Applicant's submissions dated 29/5/2023 and the Supplementary submissions filed on 30/5/2023 by the law firm of Ayieko Kang'ethe & Co. Advocates.
17. The submissions of the 1st Respondent were filed on 23/5/2023 by the firm of Kamau Lando & Associates LLP.
18. The Submissions of the 2nd Respondent were filed on 24/5/2023 by the law firm of Macharia - Mwangi & Njeru Co. Advocates.
19. The Court has read and considered all the written Submissions on record in arriving at its final decision in this Ruling.
20. The key issue of determination is whether the Applicant is entitled to leave to amend Plaintiff dated 14/6/2018 in line with the draft annexed to the application; secondly whether the Affidavit sworn by the Applicant's Counsel is irregular and thirdly who meets the cost of the application.

Sworn Affidavit

21. Order 19 rule 3 (1) and (2) of the [Civil Procedure Rules](#) provides as follows;
 - “(1) Affidavits shall be confined to such facts as the deponent is able of his own knowledge to prove:

Provided that in interlocutory proceedings, or by leave of the Court, an Affidavit may contain statements of information and belief showing the sources and grounds thereof.
 - (2) The costs of every Affidavit which shall unnecessarily set forth matters of hearsay or argumentative matter of copies of or extracts from documents, shall (unless the Court otherwise directs) be paid by the party filing the same.”
22. It is trite that an Affidavit must be confined only to facts which the deponent is able to prove by his own knowledge and where it is based on information, the source and grounds should be disclosed. It is also trite that an Advocate is not allowed to depone on behalf of his client on contentious matters of



which he has no personal knowledge. The role of an Advocate in law does not include being a witness in a suit where he is representing a litigant

23. The Respondents have challenged the Affidavit sworn on the 8/3/2023 by Charles Mwangi Kangethe on the grounds that the matters he has deponed to are not matters within his knowledge as Counsel for the Applicant. It was submitted that by electing to swear the said Affidavit on behalf of his client the said Advocate had descended to the arena of conflict with the attendant risks of being called as a witness in the very matter that he is acting for his client.
24. The Court has considered the objection. The deponent avers that he swore the Affidavit with the authority of the Applicant and therefore the source of the new information with respect to the investigation is from the Applicant. That may be so. It is the view of the Court that an Advocate must steer away from contentious matters involving his client otherwise he will have descended into the arena of conflict as a witness instead of representing his client. The two positions are untenable and seemingly portend difficulty to Counsel in the discharge of his duties to the client.
25. In response the Applicant has raised an objection on the replying Affidavit sworn by Susan Wagikuyu Karanja in response to the application on the basis that she is a beneficiary of the estate of the 1st Defendant. From the record the deponent has disclosed that she is the beneficiary of the estate of the 1st Defendant and secondly that she is conversant with the facts and has sworn the Affidavit with the authority of the Applicant.
26. In both scenarios the Court finds that the Affidavit by Mr. Kangethe relate to interlocutory proceedings in form of amendment of a pleading where the parties shall have the chance to test the evidence at the trial. The Court finds no prejudice that the Respondents shall suffer. Equally no prejudice shall be suffered by the Applicant in Ms Karanja swearing the Affidavit on behalf of the 1st Defendant.

Amendment of pleadings

27. Section 100 of [Civil Procedure Act](#) provides as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

28. Order 8 rule 3 of the [Civil Procedure Rules](#) 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 stage 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 subrule if it thinks just so to do.
3. An amendment to correct the name of a party may be allowed under subrule (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 subrule (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 subrule (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.”
29. Order 8 Rule 3 gives the Court discretion to allow the amendments of pleadings at any stage of the proceedings on such terms as to costs or otherwise as may be just and in such manner as it may direct.
30. Similarly, the Court could on its own motion or on application of a party order any document to be amended in such manner as to such terms as to costs or otherwise as are just. This may be done for purposes of determining the real question in controversy between the parties.
31. In the case of *Eastern Bakery vs Castellino* 1958 EA 461 the Court held;
- “Amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated by costs. But there is no power to enable one distinct cause of action to be substituted for another”
32. Further the Court of Appeal in *Central Kenya Ltd. vs. Trust Bank Ltd* (2000) 2 EA 365 said;
- “A party would be allowed to make such amendments of pleadings as was necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (1) there has been no undue delay, (2) no new inconsistent cause of action was introduced, (3) no vested interest or accrued legal right was affected and (4) the amendment could be allowed without injustice to the other side.”
33. In this case the Applicant has sought the amendments to allow the real issues to be placed before the Court for determination. The Applicants case is premised on fraud. The Respondents have challenged the application on several fronts. The Court finds that the issues raised by the parties are controversial and it is best left to the trial Court to hear the gist of the suit on merit.
30. In the upshot application is allowed as follows;
- a. That the Plaintiff be and is hereby allowed to amend his Plaint dated 28/6/2018 in line with the draft annexed thereto.
 - b. That the amended Plaint annexed thereto be and is hereby deemed as having been filed and served upon payment of requisite fees.



- c. That thereafter the Amended Plaint be served upon all the Defendants within 5 days from the date hereof who shall have the liberty to so amend their pleadings within a period of 30 days, if so desired.
- d. Thereafter the matter to be expediently fixed for hearing within a reasonable period.
- e. Costs of the application shall be met by the Applicant.

31. Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT THIKA THIS 2ND DAY OF NOVEMBER, 2023 VIA MICROSOFT TEAMS.

J G KEMEI

JUDGE

Delivered online in the presence of;

Kangethe for Plaintiff

Ms. Wandurwa hb Mr. Lando for 1st Defendant

2nd Defendant – Absent

Court Assistant – Lilian

