



**Nakitare v Speed Capital Limited & another (Environment & Land Case 211 of 2017) [2023] KEELC 21289 (KLR) (2 November 2023) (Ruling)**

Neutral citation: [2023] KEELC 21289 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 211 OF 2017  
OA ANGOTE, J  
NOVEMBER 2, 2023**

**BETWEEN**

**BEN MURUMBA NAKITARE ..... PLAINTIFF**

**AND**

**SPEED CAPITAL LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. This Ruling is in respect of the Plaintiff's Notice of Motion application dated 7<sup>th</sup> July, 2021 in which he seeks the following orders:
  - i. That the Plaintiff be granted leave to amend the Plaintiff as per the annexed Amended Plaintiff.
  - ii. That the annexed Amended Plaintiff be deemed as duly filed upon payment of the requisite court fees.
  - iii. That the Plaintiff be granted leave to file Supplementary and further Witness Statements.
  - iv. That the Plaintiff be granted leave to file Supplementary List of Documents.
  - v. That the costs of this Application be in the cause.
2. The application is supported by the Affidavit of Ben Murumba Nakitare, the Plaintiff, in which he has deponed that on discovering that his title over L.R. No. 5892/10 had been forged and used as security to obtain financing, he lodged a complaint at the Central Police Station under OB28/15/12/2016 and filed this suit on 28<sup>th</sup> March, 2017 and that his case was dismissed by Justice Obaga on 5<sup>th</sup> May, 2020.



3. The Plaintiff deponed that the investigations undertaken by the Directorate of Criminal Investigation (D.C.I) took a while to be concluded but were eventually concluded in March, 2021 and that the main architect of the fraud, one Osman Abdullahi Ali, was arrested and charged ten (10) months after his suit had been dismissed.
4. It was deponed by the Plaintiff that after the said Osman Abdullahi Ali was arrested and charged, he applied for review of the judgment on 22<sup>nd</sup> June, 2022 on grounds that there were new and material facts which warranted a review and that the court allowed the application, setting aside the dismissal and ordered for a trial.
5. It is the Plaintiff's case that he seeks to amend the Plaint to include the main architect of the fraud, who is currently facing criminal charges in Criminal Case No. E334/2021; and that the proposed amendments will bring out all issues in contention and bring onboard all the relevant parties to enable the court adjudicate the matter with all the relevant facts and key players in the matter.
6. The application was opposed. The 1<sup>st</sup> Defendant filed a Replying Affidavit sworn on 30<sup>th</sup> August, 2021 by James Karebe, its Recoveries Manager, who deponed that the application was brought in bad faith to defeat justice; that the amendments will introduce a new cause of action and that the 1<sup>st</sup> Defendant has appealed against the decision to re-open the matter which had already been concluded when judgment was delivered.
7. The 1<sup>st</sup> Defendant/Respondent deponed that the suit is fundamentally defective and no amendments can cure it; that litigation must come to an end; that the Plaintiff is guilty of indolence and laches and unexplained delays; and that the Plaintiff should not be allowed to re-frame his case and defeat limitation of time as well. The parties filed submissions and a list of authorities which I have considered.

### **Analysis and Determination**

8. The suit herein was commenced by way of a Plaint dated 13<sup>th</sup> March, 2017 and filed in court on 28<sup>th</sup> March, 2017. In the suit, the Plaintiff is seeking for a permanent injunction and an order directing the 1<sup>st</sup> Defendant to execute an instrument of discharge of charge over L.R. Number 5892/10 (the suit property).
9. What is in contention is the alleged fraud through which the Plaintiff's property was purportedly charged to the 1<sup>st</sup> Defendant as security for a loan allegedly advanced to one Osman Abdullahi Ali, the intended 2<sup>nd</sup> Defendant. The suit was dismissed by the court in a judgment delivered on 5<sup>th</sup> May, 2020 before being reinstated.
10. It is the Plaintiff's that he reported the forgery to Directorate of Criminal Investigations (DCI) who concluded their investigations in March, 2021 and that the said Osman Abdullahi Ali was arrested and charged with several offences relating to the purported forgery, thus the need to amend his Plaint.
11. The law as regards the grant of leave to amend pleadings is that generally, amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In the case of *Eastern Bakery vs Castelino* (1958) EA 461, where it was held that:-

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”



12. Under Order 8 Rule 3 of the Civil Procedure Rules, parties can amend their pleadings at any stage of the proceedings. The said provision reads as follows:-
 

“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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
13. Under the above provisions, the court may allow parties to amend pleadings, which power can be exercised at any stage of the proceedings before judgment. See *Central Kenya Ltd vs Trust Bank Ltd & 5 others* [2000] eKLR where the Court of Appeal held that:-
 

“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... The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties... The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”
14. Similarly, the Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, provides as follows:-
 

“The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion... The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”
15. One of the considerations in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy.
16. The Plaintiff seeks leave to amend his Plaint to not only include parties that are connected to the suit property, but the alleged forgery of the title and charge, which was the basis upon which the court (Obaga J) reviewed its earlier Judgment.
17. Indeed, a reading of the draft Amended Plaint shows that the new paragraphs are meant to expound the original averments in the original Plaint, especially on the issue of fraud.
18. The amendments further set out the Plaintiff’s case as against the proposed 2<sup>nd</sup> Defendant and the other intended parties sought to be added to the suit. The new additional prayers on the other hand, though numerous, clearly arise from the facts that came to the Plaintiff’s knowledge upon conclusion of the investigation. The prayers are also based on the same transaction, that is the alleged forgery, which is the subject of the suit herein.
19. It is clear therefore that the proposed amendments neither introduce a new suit nor do they arise from a different cause of action. They are meant to clarify all the issues in controversy between the parties



herein with regard to the suit premises, and assist the court in reaching a final and just determination thereof.

20. From the foregoing, this court is convinced that the proposed amendments will not change the action into one of a substantially different character, neither will they substitute it for another cause of action. The subject matter of the suit still remains the purported forgery.
21. In the circumstances, allowing the application will assist the court to conclusively deal with all issues in controversy. It is also for the above reasons that the court holds the view that the amendments are not brought in bad faith.
22. Allowing the Plaintiff's application for amendments would also result in joinder of new parties to this suit. Order 1, Rule 3 of the Civil Procedure Rules, deals with who may be joined as defendants and provides that:-

“All persons may be joined as defendants against whom any right to relief in respect of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons any common question of law or fact would arise.”

23. The relevant test in determining whether or not to join a party to a suit was conclusively stated in *Departed Asians Property Custodian Board vs Jaffer Brothers Ltd* [1999] 1 EA 55 where it was held as follows:-

“A clear distinction is called for between joining a party who ought to have been joined as a defendant and one whose presence before the Court is necessary in order to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit. A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the court effectually and completely adjudicate upon and settle all the questions involved in the cause or matter...For a person to be joined on the ground that his presence in the suit is necessary for effectual and complete settlement of all questions in the suit one of two things has to be shown. Either it has to be shown that the orders, which the plaintiff seeks in the suit, would legally affect the interests of that person, and that it is desirable, for avoidance of multiplicity of suits, to have such a person joined so that he is bound by the decision of the Court in that suit.”

24. In *Lucy Nungari Ngigi & 128 others vs National Bank of Kenya Limited & another* [2015] eKLR the court held that:-

“Invariably, the determination of the real issues in controversy between the Plaintiff and the intended plaintiffs on the one hand, and the Defendants on the other hand, will need all concerned parties to be before the court. This course not only prevents duplication of efforts but also allows the court to determine the relief in the entire transaction and all common issues of fact and law which arise among the parties.”

25. In the instant application, the parties sought to be joined as Defendants are: the person alleged to have used the suit property as security for a loan, the DCI who conducted the investigation into the alleged forgery of the Plaintiff's title and the Attorney-General who ideally appears in matters where the Government or Government Agencies are sued.



26. The Chief Land Registrar was already a party to the suit, and the only thing that has changed in the proposed amendments is the order in which he appears. Having been moved from appearing as the 2<sup>nd</sup> Defendant to the 3<sup>rd</sup> Defendant. His role in effecting the registration of the security document against the title was already highlighted in the original Plaintiff, which has not changed. All these persons will clarify issues relating to the alleged forgery, the subject matter of this suit.
27. There is no doubt that their presence in these proceedings is necessary in order to enable this court adjudicate upon and settle all the questions in the suit effectively and with finality. In addition, since the reliefs that the Plaintiff seeks against the 1<sup>st</sup> Defendant and the intended Defendants are in respect of or arising out of the same act or transaction, that is the purported forgery and charging of the suit property to the 1<sup>st</sup> Defendant by the intended 2<sup>nd</sup> Defendant, it is evident that if the Plaintiff was to bring separate suits against all the intended Defendants, the same questions of law of fact would arise.
28. As a result, it is only prudent that they be joined in the suit to enable the court make a conclusive determination on all issues and between all parties involved herein.
29. For the foregoing reasons, this court finds the Plaintiff's application is not without merit and the same is hereby allowed in the following terms:-
  - a. The Plaintiff be and is hereby granted leave to amend his Plaintiff in terms of the Draft Amended Plaintiff.
  - b. The annexed Amended Plaintiff to be filed and served on all parties within 21 days of the date of this Ruling.
  - c. The Defendants are at liberty to file their respective Defences and Amended Defences within 14 days of service of the Amended Plaintiff.
  - d. All the parties are hereby granted leave to file Supplementary Lists of Documents.
  - e. The costs of this application to be in the cause.

**DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 2<sup>ND</sup> DAY OF NOVEMBER, 2023.**

**O. A. ANGOTE**

**JUDGE**

**In the presence of;**

Ms Muchocho for Mugalo for Plaintiff

Ms Tuwei holding brief for Kirimi for 1<sup>st</sup> Defendant

Court Assistant - Tracy

