



Columba (Suing as the appointed attorney of Ruth Tauber) v Gulam (Environment & Land Case 251 of 2012) [2022] KEELC 3498 (KLR) (4 May 2022) (Ruling)

Neutral citation: [2022] KEELC 3498 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 251 OF 2012**

M SILA, J

MAY 4, 2022

BETWEEN

MWAGANDA BOSCO COLUMBA PLAINTIFF

SUING AS THE APPOINTED ATTORNEY OF RUTH TAUBER

AND

MOHAMED GULAM DEFENDANT

RULING

(Application to strike out amended plaintiff; leave having been granted to the plaintiff to amend plaintiff; an amended plaintiff filed; defendant now pointing out that what is filed is not in conformity to what leave was granted; apparent that what the plaintiff filed is radically different from the draft amended plaintiff that was annexed to the application for leave to amend; no leave therefore granted to amend plaintiff in the manner filed by the plaintiff; necessary that a party only effects amendments in conformity to what leave was granted; application allowed; amended plaintiff struck out)

1. The application before me is that dated 5 November 2021 filed by the original sole defendant to this suit. The application seeks orders to have struck out, the amended plaintiff dated 10 August 2021 and filed on 11 August 2021. The plaintiff opposes the application.
2. By way of background, this suit was commenced through a plaintiff which was filed on 7 November 2012 by one Mwaganda Bosco Columba, against one defendant, Mohamed Gulam who is the applicant herein. In the suit, the plaintiff pleaded to be the appointed attorney of one Ruth Tauber. He pleaded that he (probably meant the donor of the power of attorney) is the registered owner of the land parcel identified as Plot No. 1056/III/MN (321/4/III). He pleaded that he had rented out the property to one Gabi Engelhart who died on 13 August 2012. He sued the applicant for vacant possession on the basis that he had no contractual relationship with him and that he was a trespasser. The applicant filed defence where he pleaded to have purchased the suit property and was rightfully in possession.



3. Through an application dated 30 August 2013, the plaintiff applied for leave to amend the plaint and annexed a draft amended plaint. In the draft, the plaintiff sought to add four more defendants, three individuals, and the Land Registrar, Mombasa. There were also amendments in the body of the plaint and in the prayers to accommodate pleadings against the new defendants.
4. On 8 June 2021, the application to amend was allowed by consent. Subsequently, an amended plaint was filed on 11 August 2021. It is this amended plaint that the applicant seeks to strike out.
5. The application is based on the ground that what the plaintiff has filed as an amended plaint does not conform to the draft amended plaint which was annexed to the application for amendment and for which leave was given. The supporting affidavit is sworn by the applicant himself. He avers that the plaintiff has now departed from the draft amended plaint. He points out that the amended plaint adds other parties and that there are other amendments in the body of the plaint which do not conform to the draft amended plaint for which leave was granted.
6. The application is opposed by the replying affidavit of Cecilia Luvuno Mbaga. She has deposed inter alia that she has filed this suit as administrator of the estate of Ruth Tauber (deceased) after she obtained letters of administration ad litem. She has stated that upon her demise, the power of attorney to Mwanganda Bosco Columba became obsolete. She admits however that the application dated 30 August 2013 did not contain a prayer to substitute the plaintiff and that the amended plaint also has the Attorney General as an additional party. She has added that a party can amend pleadings at any time. She has stated that the amendment should be allowed so as to save time and avoid bringing another application for leave to amend.
7. I have considered the application alongside the submissions made by counsel.
8. I have already mentioned that the plaintiff filed an application dated 30 August 2013 to amend plaint which application was allowed by consent on 8 June 2021. There was a draft amended plaint which was annexed to that application. It is this draft that the defendant allowed by consent and nothing else.
9. When a party is applying to amend pleadings and leave is given, such party can only amend in accordance with the leave that was given. For example, if you seek leave to amend one paragraph of the plaint and leave is granted, you cannot now proceed to amend two or three paragraphs of the plaint. That will be acting beyond the leave that was given. A party is not permitted to depart from what was allowed to be amended and proceed to make other amendments beyond what leave was granted. If this is allowed, the effect would be to deny the other party a right to be heard on whether or not leave to make such other amendments should be granted and will violate the rules of natural justice.
10. In our instance, it is apparent that what was filed as an amended plaint went far beyond the leave that was granted. Even the name of the plaintiff has changed. It is said that the donor of the power of attorney died. If that is the case, an application for substitution must be filed for consideration, and there are special rules to such an application, for which the defendant must be given an opportunity to respond to. There is also an addition of the Attorney General as a party yet the Attorney General was not in the draft amended plaint for which leave was given. Apart from that there are also several other amendments in the body of the plaint which were not demonstrated in the draft amended plaint. The plaintiff argues that circumstances changed. If that is the position, then the plaintiff needed to withdraw the application dated 30 August 2013 and file a fresh application for amendment so as to conform to the changed circumstances. Filing an amended plaint that was different from what leave was granted was not an option.
11. There is no doubt that the plaintiff did not file an amended plaint that conformed to what leave was granted. I therefore find merit in this application and I hereby allow it. I proceed to order that the



amended plaint filed on 11 August 2021 be struck out. The effect is that the plaint that is on record is the original plaint filed on 7 November 2012.

12. The plaintiff will bear the costs of this application.

13. Orders accordingly.

DATED AND DELIVERED THIS 4 DAY OF MAY 2022

JUSTICE MUNYAO SILA

JUDGE, ENVIRONMENT AND LAND COURT

AT MOMBASA

