



**Agalo v County Government of Trans Nzoia & another; Anne Wanjiku Kibe t/
a Anne Kibe & Co. Advocates & 4 others (Interested Parties) (Environment
& Land Case 35 of 2017) [2022] KEELC 3156 (KLR) (2 June 2022) (Ruling)**

Neutral citation: [2022] KEELC 3156 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
ENVIRONMENT & LAND CASE 35 OF 2017
FO NYAGAKA, J
JUNE 2, 2022**

BETWEEN

PETER MIDIMO AGALO PLAINTIFF

AND

COUNTY GOVERNMENT OF TRANS NZOIA 1ST DEFENDANT

THE HON. ATTORNEY GENERAL 2ND DEFENDANT

AND

**ANNE WANJIKU KIBE T/A ANNE KIBE & CO.
ADVOCATES INTERESTED PARTY**

DANIEL KAGECHE MUNGAI INTERESTED PARTY

KEPHAS ONSINYO AYIECHA INTERESTED PARTY

JOHN WANJALA MULONGA INTERESTED PARTY

MONICA WAITHERA INTERESTED PARTY

RULING

1. On 05/05/2022, this suit was supposed to be heard. However, before parties could present their viva voce evidence, learned counsel for the 1st Defendant orally applied for the Originating Summons dated 09/03/2022 and filed on 11/03/2022 to be struck out with costs for want of form. In support of this prayer, the 1st Defendant submitted that the suit, at that stage, was improper as it appeared to stand as an Originating Summons yet it was instituted by way of a Plaint. At this juncture, I find it of paramount importance to outline a brief abridgment of the pertinent facts in this matter. I shall come back to the arguments submitted before me on this issue.



2. This suit was initially instituted by way of a Plaint dated 24/02/2017. Whilst it appears that the same did not bear the Court stamp, a cursory perusal of the pleading reveals that it was assessed. It is also embedded with a copy of the receipt in support of Court fees payment on the pleadings. It appears that was done on 27/02/2017. Since the Plaint was paid for, I take it that compliance with regard to the proper institution of the suit was made since affixing the Court stamp thereto was a mere matter of form and procedure.
3. This matter then proceeded for hearing on 24/04/2018 when the Plaintiff testified. However, it was adjourned to a later date. On 25/04/2019, the Plaintiff orally applied before this court for leave to amend his Plaint “to cover some of the new developments”. According to the Plaintiff, the prayers in the suit had been overtaken by events as other parties had constructed new structures on the subject parcel of land. Since the application was unopposed, the Court gave the following directions:

“ This matter is hereby adjourned to enable the Plaintiff amend the Plaint. The Application for amendment shall be filed and served within fourteen (14) days. Costs of this day to be in the cause. Plaintiff to pay Court Adjournment Fees.”
4. Instead of the Application being filed, this matter suffered a lull. Its turbines were only activated, and regrettably by the Court acting suo motto, when Notices to Show Cause why the suit should not be dismissed for non-prosecution pursuant to the provisions envisaged in order 17 rule 2 (1) of the Civil Procedure Rules 2010 were taken out. The Notices were taken out on 21/10/2021.
5. In the meantime, the Plaintiff on 24/11/2021 elected to act pro se. After several adjournments, the Show Cause was finally heard on 01/02/2022 when the Plaintiff was once again directed to file an Application to amend his Plaint within twenty-one (21) days. That did not happen. In its stead, he filed an Originating Summons. Atop the first page of the pleading and which words are in bold red color, it is written: “Amended draft copy of pleadings and joinder of parties liable on same contract with leave of the court and with no order as to costs.” It is this particular pleading that instigated the present Application.

Grounds And Submissions

6. The 1st Defendant submitted that the Originating Summons is improper, irregular and an affront to the legal process. He thus propositioned that it should be struck out for want of leave and procedure. He stated that the grant of leave was on amendment of Plaint and not the procedure in this matter. He urged this Court to dismiss the Originating Summons and revert the suit into its original character fashioned by the filed Plaint.
7. The 2nd Defendant’s Advocate submitted by first giving a background chronology of the events which I have basically summarized above. Learned counsel reiterated the sentiments of the 1st Defendant. He urged this Court to strike out the Originating Summons with costs as it was an abuse of the process of the court. Counsel for the interested parties similarly rehashed the submissions of both Defendants. Similarly, he sought a prayer for the Originating Summons to be dismissed with costs.
8. The Application was opposed by the Plaintiff. He submitted that he was a layman hence he could not know much about the issues being raised. He added that he suffered financial distress and was hence unable to file the amended Plaint in good time. He informed that the suit was originally filed before the subordinate Court but was transferred to this Court. He submitted that his understanding was that a suit against the Government could only be instituted by way of an Originating Summons and not a Plaint. He asked this Court to sanctify the life of the suit by sustaining and not dismissing it, and issue appropriate guidelines and modalities in the manner it should proceed.



Analysis And Disposition

9. I have considered the oral application as well as the rival submissions. I have also given due consideration of the law. At the same time, I have perused and analyzed the developments in the matter. The oral Application seeks to strike out the Originating Summons filed herein as it changes the character of the entire matter altogether. The Plaintiff on the other hand, appears to concede to those submissions. He, however, urges this Court to not dismiss the suit as it will be draconian on his rights and reliefs.
10. It cannot be gainsaid, that on two occasions, the Plaintiff was granted leave to file an Application to amend his Plaint. It must be noted that this was not contemporaneous to the actual filing of the amended Plaint. The Plaintiff was to first, move this Court, by Application, to enable parties argue the same and the court to consider its merits or the parties consent to the Application. Regrettably, the Plaintiff jumped the gun. He went straight for the kill by filing an Originating Summons without first obtaining leave of this court to file any amended pleading in the matter. In ordinary parlance, the practice would necessitate the Application for leave which exhibits by way of an attachment, a draft copy of the proposed amended pleading. The same is drawn in such a manner as to show the additions, subtractions or changes to it.
11. Under Order 8 Rule 1 of the Civil Procedure Rules, pleadings can only be amended without leave of the court before pleadings are closed. However, after that period, the Rules necessitate that an Application must be filed first before the proposed amended pleading is filed. The relevant Application for amendments is intended to firstly alert the other parties on the proposed amendments the proponent intends to introduce. To otherwise amend a pleading that first necessitates the filing an application for leave to do so would amount to stealing a march on the other parties. Secondly, an amended pleading can change the dynamics of a matter. For this reason, save as stated above about amendment without leave, it is critical that leave be granted be first before the amended pleading can be filed so that the court determines on a pendulum, the interests of justice the amended pleading will dictate.
12. The Civil Procedure Rules were not drafted in vain. If the intention was to allow any parties, on their own volition, to file amended pleadings at all times, without leave of the court, as long as the suit remained alive, nothing would have stopped the drafters from saying so. I bear in mind that amendments can be freely allowed at any stage of the proceedings, including after judgment as long as they do not prejudice the adverse party.
13. I am similarly alive to the provisions of article 159 (2) (d) of *the Constitution* which dictate that justice shall be administered without undue regard to procedural technicalities. However, a perfunctory look at the Originating Summons outlines grave issues that cannot be cured by article 159 (2) (d). Firstly, it is an Originating Summons -a pleading separate and distinct from that of a Plaint. It must be borne in mind that in the legal system, there is always a province reserved for institution of a suit or claim by a Plaint, Originating Summons or Motion, Petition and others. Such delineations were not given in vain. Again, an amendment of one cannot for all intents and purposes, cause one to transition from itself form to another. Secondly, the Originating Summons bears no indelible tracked changes on it. Save for the obvious joinder of parties, it is difficult to tell what amendments have been introduced to the pleading. Fourthly, it was filed without any leave of the Court. To permit such a pleading to stand in this matter, I believe, would occasion a grave miscarriage of justice to the other parties including those on record and those purported to be joined. Thirdly, the amended pleading as it is, has locked out the parties to this suit from filing their required responses since they have no leave to do so.
14. Nothing stopped the Plaintiff from instituting an Application, in the normal manner to be argued by all the parties in these proceedings. I therefore find that indeed the Originating Summons improper



before this court. If the pleadings were to be personified and bear the character traits of a human being, I would find it persona non grata.

15. Court orders are not made in vain. Neither are the laws, rules and regulations which have been properly and lawfully enacted. I must therefore insist, which I hereby reiterate, that the Plaintiff must adhere to the orders of this Court. The Plaintiff may be a layman. And well, that appears to be so. But it has always been borne in mind that ignorance of the law is not a defence. Whoever goes to battle gets himself or herself prepared to face the consequences fully as though he/she was a trained and season man or woman of war, and must stick to the rules of warfare engagement. Conversely, I urge the plaintiff to familiarize himself with the Rules of procedure and act within and in accordance with them. Otherwise, he ought to engage the services of a legal practitioner to do for him the right thing.
16. To this end, as much as it may be draconian and painful, I must give effect to what the law requires me to. Thus, I must and do order that the Originating Summons dated 09/03/2022 and filed on 11/03/2022 be and is hereby struck out with no orders as to costs.
17. While it is not lost to this Court that the Plaintiff did not comply with the previous orders on making an Application to amend his Plaint, this Court leaves him with the wide path to choose what he needs to do, within the timelines that shall not place his suit on the path of dismissal for want of prosecution.

Orders accordingly.

RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS 2ND DAY OF JUNE, 2022.

DR. IURFRED NYAGAKA

JUDGE, ELC, KITALE.

