



Arasa (Suing as a Personal Representative of the Estate of the Late Sospeter Arasa Nyagwansa) v Tailor & 5 others (Environment & Land Case 82 of 2021) [2022] KEELC 2712 (KLR) (7 July 2022) (Ruling)

Neutral citation: [2022] KEELC 2712 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KISII
ENVIRONMENT & LAND CASE 82 OF 2021**

JM ONYANGO, J

JULY 7, 2022

BETWEEN

**PAULINE MORA ARASA PLAINTIFF
SUING AS A PERSONAL REPRESENTATIVE OF THE ESTATE OF THE LATE
SOSPETER ARASA NYAGWANSA**

AND

**DR. ANIL RATILAL TAILOR 1ST DEFENDANT
THE NATIONAL LAND COMMISSION 2ND DEFENDANT
THE COUNTY GOVERNMENT OF KISII 3RD DEFENDANT
EDWARD MAINGA KAGORO 4TH DEFENDANT
THE LAND REGISTRAR 5TH DEFENDANT
THE HONOURABLE ATTORNEY GENERAL 6TH DEFENDANT**

RULING

Introduction

1. By a Notice of Motion dated August 5, 2021 supported by affidavit sworn by Dr. Anil Ratilal Tailor, the 1st Defendant herein sought the following orders;
 - a) Pending the hearing and determination of this application, this Honourable Court be pleased to issue an order of inhibition to inhibit the registration and any dealings and/or dispositions with regards to that piece of the land known as L.R No. Kisii Municipality/block III/330 (hereinafter referred to as the suit property) at the instance of the Plaintiff, her agents, assigns, representatives and/or anyone acting in her name and/or under her authority.



- b) The *status quo* as at the date hereof obtaining with respect to the registration of any (further) dealings and/or dispositions with regards to the suit property at the instance of the Plaintiff, her agents, assigns, representatives and/or anyone acting in her name and/or under her authority.
 - c) Leave be granted to the 1st Defendant to amend the Defence.
 - d) The attached Defence and Counterclaim be deemed as duly filed and served upon payment of the requisite court fees.
 - e) Cost of the application.
2. In his Supporting Affidavit, the 1st Defendant averred that he filed the application to seek leave of the court to amend the statement of Defence in order to incorporate a Counterclaim against the Plaintiff.
 3. The Applicant further averred that the amendment sought will enable the Applicant to agitate all the issues in controversy and thus adequately ventilate his claim.
 4. It was his averment that the application has been necessitated by the issuance of a (second) lease and a Certificate of Lease over the suit property in favor of the Plaintiff on March 2, 2021 which lease came to his knowledge when he was served with a Supplementary List of Documents dated September 22, 2021.
 5. He contended that it was trite law that an application for leave may be brought at any stage of the proceedings.
 6. It was his deposition that the legality of the lease issued to the Plaintiff can only be challenged by means of a Counterclaim and allowing this application would give effect to the 1st Defendant's constitutional rights.
 7. He also deposed that it was only prudent that pending the hearing of the substantive suit, the suit property be preserved so as to ensure that any court orders directed at it are capable of being enforced.
 8. The application was opposed by the Plaintiff through a statement of Grounds of Opposition dated February 23, 2022 wherein he stated that the application was premature, misconceived incompetent and otherwise legally untenable. The Plaintiff also claimed that the Applicant had not satisfied the requisite conditions to warrant the court to grant orders of inhibition and an order of status quo as to the Registration with regard to the suit property. It was his contention that the application was a calculated move to circumvent or defeat the hearing of the suit.

Background

9. In order to put the application into perspective, it is necessary to briefly set out the background of the suit from the time it was instituted up to the time when this application was filed. This will enable this court to get a proper basis for allowing or disallowing the application.
10. The Plaintiff commenced this suit vide a plaint dated April 4, 2017 which was later amended vide an Amended Plaint dated March 13, 2019. In his Amended Plaint he sought the following orders against the Defendants;
 - a) A declaration that the Plaintiff is the registered owner of the suit property.
 - b) A declaration that the 2nd and 3rd Defendants hold in trust the proprietary interest in the suit property for the Plaintiff and that an order ought to be made directing the 3rd Defendant to transfer the title of the suit property to the Plaintiff.



- c) A declaration that the purported sale agreement entered between the 1st and the 4th defendants and the transfer of the suit property to the 1st Defendant was fraudulent hence null and void.
 - d) A mandatory order compelling the 5th Defendant to cancel the title to the suit property issued in the name of the 1st Defendant and instead register the same in the name of the Plaintiff as the proprietor.
 - e) A mandatory order compelling the 1st Defendant to vacate, demolish and remove and or bring down the building and other structures erected on the suit property.
 - f) An order authorizing the Deputy Registrar to sign the transfer documents in case the 1st Defendant failed to do so.
 - g) A permanent injunction restraining and/or prohibiting the Defendants whether by themselves, their servants, employees, agents and/or by whomsoever from entering, constructing, selling, alienating, transferring, mortgaging, leasing, renting, offering for security or collateral and/or trespassing on the suit property.
 - h) General damages for trespass
 - i) An order that the Defendants do bear the costs of the suit.
 - j) Interest from the date of filing this suit.
11. In response, the 1st Defendant filed a Defence on June 14, 2017 which was later amended vide an Amended Defence dated May 22, 2019 in which he denied all the averments made by the Plaintiff. He averred that he acquired the suit property from the 4th Defendant who sold it to him vide a sale agreement dated September 24, 2012.
 12. He further averred that he acquired the title as a bonafide purchaser without notice of any defect in the title of the 4th Defendant, the erstwhile registered proprietor of the suit property. He averred that upon the purchase of the suit property from the 4th Defendant, he fenced it and upon acquisition of the title thereto on April 25, 2013 he developed it with two (2) storey commercial buildings. He also denied ever receiving any demand letter requiring him to render vacant possession of the suit property and stated that he had no obligation to heed any such purported demand.
 13. He further deponed that he had charged the suit property to secure a loan facility in the sum of Kshs. 50,000,000 in exercise of the proprietary interest that he held over the suit property in the same manner the 4th Defendant had also used the suit property as security for a loan with Cooperative Bank of Kenya Limited. The Defendant also stated that his development of the suit property as early as 2013 should have put the Plaintiff on notice of the 1st Defendant's title.
 14. The 4th Defendant filed his response vide a statement of Defence dated June 6, 2019 in which he denied all the allegations by the Plaintiff. He averred that he sold the suit property to the 1st Defendant on a "willing seller willing buyer" basis. After conducting due diligence the 1st Defendant paid the purchase price in full and obtained all requisite clearances from the relevant authorities.
 15. He further averred that he acquired proprietary rights over the suit property having bought it on a "willing seller willing buyer" basis vide an agreement dated May 7, 2010 from the first Lessees namely; Kennedy Ogora, Mongare, Ishmael Peter Michieka and Charles Omari Onchaga.



16. He deponed that he was an innocent purchaser of the suit property who upon conducting proper due diligence, bought the suit property from the aforementioned persons free from any known encumbrances and thus denied the claims of fraud levelled against him by the Plaintiff.
17. He contended that this was a case of misjoinder which he intended to challenge through a Preliminary Objection seeking to strike his name from the proceedings.
18. The suit came up for hearing on March 1, 2021 when the 1st Plaintiff gave his testimony. However, he was stood down for further cross-examination on June 10, 2021.
19. The hearing did not proceed on June 10, 2021 because the court had two lengthy part-heard cases to deal with and thus the same was fixed for hearing on October 10, 2021.
20. However, on September 22, 2021, the Plaintiff filed a supplementary List of Documents which included a copy of a Certificate of Lease issued to the Plaintiff with respect to the suit property on June 4, 2021, a copy of letter from the Cabinet Secretary addressed to the 5th Defendant forwarding the lease certificate and a copy of a lease dated March 29, 2021.
21. It is the aforesaid Supplementary List of Documents which triggered the filing of the application by the 1st Defendant who is seeking leave to amend his Defence to include a Counterclaim.
22. On February 28, 2022 the court directed that the application be canvassed by way of written submissions and both the 1st Defendant and the Plaintiff filed their written submissions.

1st Defendant/Applicant's Submissions

23. Learned counsel for the Applicant submitted that this court has a wide jurisdiction to allow an application for leave to amend pleadings by a party at any stage of the proceedings and should be slow to disallow such an application except for reasons of prejudice which cannot be compensated by way of costs or where injustice would be occasioned. He argued that in the absence of a Replying Affidavit to the application, no injustice could be inferred.
24. Counsel submitted that there was no contestation that the Plaintiff/Respondent had obtained title to the suit property which was disclosed through the Supplementary List of Documents filed on September 22, 2021. He contended that it only made legal sense for the Applicant to seek to amend his Defence to incorporate a Counterclaim for the invalidation of the Respondent's title.
25. Counsel further argued that the Applicant could not have filed the application earlier on since the application became necessary only after the Respondent acquired a title as evidenced by the Supplementary List of Documents. He pointed out that the Respondent cannot claim that the Applicant is out to scuttle the hearing of the suit when she is the one who had filed a Supplementary List of Documents on September 22, 2021 four years after the suit was instituted.
26. It was the counsel's submission that the hearing of the suit was yet to be concluded and hence the Respondent would not be prejudiced because she would have ample time to react to the proposed amendments.
27. Regarding the prayer for an inhibition to restrain any dealings on the suit premises, counsel submitted that the same was necessary to ensure that the suit property which was the subject of litigation was preserved. He argued that there was no practical benefit in hearing a suit knowing that its substratum was at risk of being dissipated in the interim period. Counsel contended that it was incontestable that there were two titles in respect of the suit property and that itself pointed to a situation where the court has to sift through rival facts in order to come to a conclusion.



28. Counsel further argued that there was no hard and fast rule to the effect that once a suit is part-heard, no amendment can be allowed. To support his argument, he referred to the cases of *Ochieng & Others vs First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported); *St Patrick Hill School Ltd vs Bank of Africa Limited* (2018) eKLR and *City Clock Ltd vs County Clock Kenya Limited & another* (2020).
29. In the Supplementary submissions, counsel further submitted that the amendment was a reaction to the fact that the Applicant had discovered through the Supplementary List of Documents that a Certificate of Lease was issued to the Respondent after she had testified. Counsel contended that it would be unjust for the Respondent to claim that she was entitled to justice by filing documents after the pretrial had been done without according the Applicant a chance to respond. Counsel further contended that the Respondent had not demonstrated what prejudice she stood to suffer. He argued that Order 8 rule 3(1) of the *Civil Procedure Rules*, 2010 which is the fundamental provision of the law governing amendments anticipates that the amendments can be made at any stage in the course of litigation.

Plaintiff's/Respondent's Submissions

30. Learned counsel for the Respondent submitted that the Plaintiff had through the Plaint explained the circumstances that culminated into her being registered as the owner of the suit property. He contended therefore that the 1st Defendant was the registered owner of the suit property as early as April 25, 2013 and therefore the need of filing the Counterclaim should have been evident many years ago when he filed the Defence. He contended that the request to file the Counterclaim was being made after inordinate delay which has not been explained.
31. Counsel also submitted that the intention of the Applicant to challenge the Certificate of Lease was simplistic because the Certificate of Lease issued to the Plaintiff was not issued in isolation. He argued that there were other documents that were prepared earlier that culminated in the issuance of the lease certificate and therefore the purported challenge of the said Certificate of the Lease was legally untenable.
32. It was counsel's submission that the Applicant's intention to amend the Defence had been made when the Respondent had already testified in chief and had been cross-examined partially. He therefore contended that the application for leave to amend the Statement of Defence was being made to fill the gaps that may have emerged during examination in chief and partial cross-examination. It was further contended that the request to amend the Defence was geared towards circumventing the hearing of the suit and thus the same should be rejected. In support of this argument counsel relied on the cases of *Evaline Rosa vs Catherine Korinko and 3 others* (2011) eKLR, *Central Bank of Kenya Ltd vs Trust Bank Ltd and others* (1998) eKLR and *Agnes Moraa Nyangeso and another vs Joseph Barongo Monyancha and another* (2010) eKLR.

Issues for Determination

33. Having considered the application, the response thereto and submissions filed by the Plaintiff and 1st Defendant, the main issues for determination are:-
- a. Whether the Applicant has met the requirements for amendments of pleadings.
 - b. Whether the order of inhibition should be granted inhibiting the registration and any dealings and/or dispositions with regards to the suit property pending the hearing and determination of the suit.



Analysis and Determination

Whether the Applicant has met the requirements for amendment of pleadings.

34. The provisions that govern the amendment of pleadings are provided for under Order 8 rule 3 of the Civil Procedure Rules, 2010, which states: -

- “(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 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.

35. Case law has also settled that, amendment of pleadings should be freely allowed, if made without injustice to the other side. This is supported by several decisions, including but not limited to the cases of; *Eastern Bakery vs Castelino* (1958) EA 461 and *Central (K) Limited vs Trust Bank of Kenya Ltd* (2002) 2EA 365.

36. Clearly from the above provisions of the law and authorities, the grant of leave to amend pleadings, is a discretionary power of the court that should be exercised judiciously and in the interest of justice.

37. The requirements to be considered by the Judge in exercise of such discretion were set out in the case of *Harrison C. Kamau vs Blue Shield Insurance Co. Ltd* (2006) eKLR, where the court stated that: -

“the amendments of pleadings.... (is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:



- (i) There has been no undue delay;
- (ii) No new inconsistent cause of action (is) introduced;
- (iii) No vested interest or accrued legal right (is) affected; and
- (iv) The amendment (can) be allowed without injustice to the other side.....”

38. The requirements were also emphasized in the case of; Joseph Ochieng & 2 others vs First National Bank of Chicago Civil Appeal No. 149 of 1999 where the court stated as follows; -

“The ratio that emerges out of what was quoted from the same book is that powers of the court to allow amendment is to determine the true substantive merits of the case, amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendments introduce a new case or new ground of defense. It can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action, that the plaintiff will not be allowed to reframe his case or claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Actions.”

39. I have considered the proposed amendments herein and I find that, the only new matter proposed to be introduced is the claim in the Counter-claim. According to the Applicant, he was forced to seek leave to amend his Defence and introduce a Counterclaim after being served with a Supplementary List of Documents that were filed in court surprisingly without leave of the court. According to the Applicant, the said documents demonstrate a change in registration of the suit premises from his name to that of the Respondent unilaterally and without his knowledge or hearing.
40. Without even going deeper into analysis of whether the requirements set out in the cases I have highlighted hereinabove have been met by the Applicant, it appears that the Respondent wants to steal a march on the 1st Defendant.
41. Clearly from the day she instituted this suit to the day she gave her testimony, the Respondent’s main claim was that the suit property had been illegally registered in the name of the Applicant and thus she prayed for cancellation of the alleged illegal registration of the property. Surprisingly on September 22, 2021, she filed Supplementary List of Documents without seeking leave of the court. The said documents clearly show that all she had stated in her testimony had been overtaken by events as the property had already been transferred to her. The said documents include a copy of a Certificate of Lease issued to her with respect to the suit property on June 4, 2021, a copy of a letter from the Cabinet Secretary addressed to the 5th Defendant forwarding the lease certificate, a copy of a lease dated March 29, 2021 and a copy of the Lease Certificate dated March 31, 2021. As if that is not enough, the documents were crafted on dates after the Respondent had given her testimony in chief praying for the cancellation of registration of the said documents which had already been carried out by other bodies.
42. Even though the court disregarded and expunged the Supplementary List of Documents from record for reasons that they were filed late without leave of this court. It is only fair to allow the Applicant leave to amend his Defence to include a Counter-claim challenging the legality of the said documents. This will be necessary in order to avoid a multiplicity of suits touching on the same subject matter.
43. In the final result therefore, it is my finding that the application by the Petitioner is merited.



Whether order of inhibition should be granted inhibiting or restraining any dealings and/or dispositions with regards to the suit property pending the hearing and determination of the suit.

44. Having held that it would be just to grant the Applicant leave to amend his statement of Defence, it would be just to preserve the suit property which is the subject of litigation by granting an order of inhibition.
45. The upshot is that the application is merited and it is therefore allowed it in terms of prayers (c), (d), (e) and (f). The Plaintiff shall bear the costs of the application.

DATED, SIGNED AND DELIVERED AT KISII THIS 7TH DAY OF JULY, 2022.

J.M ONYANGO

JUDGE

