



**Kariuki v Tofina Rom Builders Limited & 2 others (Environment and Land Case Civil Suit 334 of 2015) [2022] KEELC 2507 (KLR) (7 July 2022) (Ruling)**

Neutral citation: [2022] KEELC 2507 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT AND LAND CASE CIVIL SUIT 334 OF 2015**

**SO OKONG'O, J**

**JULY 7, 2022**

**BETWEEN**

**JAMES NGUNJE KARIUKI ..... PLAINTIFF**

**AND**

**TOFINA ROM BUILDERS LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**SOCIAN VILLAS LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**DAVID KIVUTI NYAGA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff brought this suit against the 1<sup>st</sup> defendant on April 27, 2015 seeking several reliefs. The plaintiff was amended on December 23, 2015 to add the 2<sup>nd</sup> and 3<sup>rd</sup> defendants to the suit. In the amended plaintiff, the plaintiff averred that at all material times, the 2<sup>nd</sup> defendant was the registered proprietor of all that parcel of land known as L.R No. 209/3091 (herein after referred to as “the property”). The plaintiff averred that on or about October 13, 2010, he agreed to participate in a project that was proposed by the 1<sup>st</sup> defendant under which the 1<sup>st</sup> defendant was to construct several 3 bedroom apartments on the property for sale to the participants or contributors to the project. The plaintiff averred that it was agreed between the plaintiff and the 1<sup>st</sup> defendant that he would pay a sum of Kshs. 8,700,000/- in instalments that would entitle him to one unit of 3 bed room apartment.
2. The plaintiff averred that he paid the said sum of Kshs. 8,700,000/- in full and he was allocated a unit known as C5 (hereinafter referred to as “the suit property”) on the property. The plaintiff averred that the 1<sup>st</sup> defendant undertook to complete the project within 24 months which undertaking the 1<sup>st</sup> defendant did not honour since the project was still underway as at the time of filing suit. The plaintiff averred that sometimes in June 2014, the 1<sup>st</sup> defendant demanded additional sum of Kshs. 2,600,000/- from him for the project without giving any basis on which amount the 1<sup>st</sup> defendant purported to charge interest at the rate of 3% per month.



3. The plaintiff averred that through a letter dated April 17, 2015, the 1<sup>st</sup> defendant demanded the payment of a sum of Kshs. 3,494,184/- which it claimed to be outstanding from the plaintiff within 7 days in default of which the 1<sup>st</sup> defendant threatened to sell the suit property. The plaintiff averred that on April 27, 2010, the 2<sup>nd</sup> defendant purported to sell the suit property to the 3<sup>rd</sup> defendant at Kshs. 15,000,000/- which was below its market value.
4. The plaintiff sought judgment against the defendants for:
  - a. A declaration that the plaintiff having performed his part of the contract between him and the 1<sup>st</sup> and 2<sup>nd</sup> defendants he was entitled to own and hold the suit property.
  - b. A permanent injunction restraining the defendants from unlawfully increasing the costs of the project and levying interest thereon without consulting the plaintiff.
  - c. A permanent injunction restraining the 2<sup>nd</sup> defendant from transferring, processing title documents and/or altering the records of ownership of the suit property in any manner adverse to the plaintiff.
  - d. A permanent injunction restraining the 3<sup>rd</sup> defendant from taking possession and/or entering into the suit property.
  - e. An order compelling the 2<sup>nd</sup> defendant to transfer the ownership and possession of the suit property to the plaintiff.
  - f. Costs of the suit
5. The defendants filed amended statement of defence on April 12, 2016 in which they denied the plaintiff's claim in its entirety. The defendants averred that the plaintiff was bound under the agreement that the parties had entered into to pay any additional costs that arose during the construction of the apartments. The defendants averred that the suit property was to be transferred to the plaintiff subject to the plaintiff fulfilling all his financial obligations which included the payment of additional costs for the project. The defendants admitted that the 2<sup>nd</sup> defendant sold the suit property to the 3<sup>rd</sup> defendant. The defendants contended however that the action was taken after the plaintiff failed to abide by the terms of the contract that the plaintiff had entered into with the 1<sup>st</sup> and 2<sup>nd</sup> defendants.
6. The suit came up for hearing on September 22, 2020 when the plaintiff gave evidence and was cross-examined and re-examined. The plaintiff's advocate thereafter told the court that the plaintiff wished to consider making further amendment to the plaint before proceeding further with the hearing of the suit.
7. What is now before me is the plaintiff's Notice of Motion application dated October 15, 2020 seeking leave to amend its amended plaint and for the draft further amended plaint attached to the application to be deemed as duly filed upon payment of the court fees. The application which is supported by the affidavit of the plaintiff was brought on several grounds. The plaintiff averred that after the hearing that took place on September 22, 2020, the plaintiff noted that it had not sought some necessary reliefs in its amended plaint. The plaintiff averred that the defendants would not be prejudiced by the amendments sought to be effected since the defendants will have an opportunity to respond to the same. The plaintiff averred that the amendment sought is necessary for the determination of the real questions in controversy between the parties in the suit before the court. The plaintiff averred that the amended plaint in its current state was inadequate to completely resolve the dispute between the parties. The plaintiff averred that the application was brought in good faith. The Plaintiff averred that the intended amendment was not intended to introduce any new issue.



8. The application was opposed by the defendants through a replying affidavit of Lucy Mwendwa Ringera sworn on February 23, 2021. The defendants averred that after the close of pleadings, the suit was fixed for hearing and the plaintiff gave evidence and concluded his testimony. The defendants averred that the parties' respective positions had crystalized and that what the plaintiff was seeking through the proposed amendments was to put up a new case against the defendants an act that would be prejudicial to the defendants. The defendants contended that the plaintiff was trying to repair his case after its deficiencies were exposed by the defendants during cross-examination.
9. The application was argued by way of written submissions. The plaintiff filed submissions dated April 30, 2021. The plaintiff submitted that applications for amendments should be freely allowed unless the same would cause prejudice to the other side which cannot be compensated in costs. The plaintiff cited several authorities in support of his submissions and urged the court to allow the same since no prejudice would be occasioned to the defendants.
10. The defendants filed submissions dated September 23, 2021. The defendants submitted that the plaintiff's application was brought after inordinate delay which delay was not explained. The defendants submitted further that amendment sought if allowed was bound to completely or substantially change of the character of the plaintiff's claim which would highly prejudice the defendants. The defendants submitted that the plaintiff intended to introduce new causes of action and to seek new reliefs which were bound to prejudice the defence put up by the defendants. The defendants submitted that that the plaintiff was litigating in piecemeal which was against public policy. For the foregoing reasons, the defendants urged the court to dismiss the plaintiff's application with costs.
11. I have considered the plaintiff's application together with the replying affidavit filed by the defendants in opposition thereto. The plaintiff's application was brought principally under Order 8 rules 3 and 5 of the *Civil Procedure Rules*. Order 8 rule 3(1) of the [Civil Procedure Rules](#) gives the court power at any stage of the proceedings to allow any party to amend his pleadings while Order 8 rule 3(5) of the [Civil Procedure Rules](#) provides that such amendment may be allowed even if its effect is to add or substitute a new cause of action.
12. The power to grant leave to a party to amend his pleadings is discretionary. The principles upon which the court exercises its discretion in applications for leave to amend pleadings are well settled. In *Bullen & Leake & Jacob's Precedents of Pleadings, 12<sup>th</sup> Edition* that was cited with approval in [Joseph Ochieng and 2 others v First National Bank of Chicago](#), Civil Appeal No. 149 of 1991, [1995] KECA 31 (KLR) the authors stated as follows:
 

" .....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 the costs can compensate the other side; that the proposed amendments must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action with one of a substantially different character which could more conveniently be made the subject of a fresh action...."
13. In *Central Kenya Limited v Trust Bank & 5 others*, Civil Appeal No. 222 of 1998 the court stated 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 be properly compensated in costs."



14. It is on the foregoing principles that the plaintiff's application falls for consideration. I have perused the amended plaint on record which is sought to be further amended. I have also perused the draft amended plaint attached to the plaintiff's application. I have also considered the reasons given by the plaintiff for the amendment sought and the reasons given in opposition. At the hearing of the suit, the plaintiff noted that its pleadings had deficiencies in that some reliefs that were necessary considering the nature of his claim had not been sought. The plaintiff's advocate informed the court that although the plaintiff was through with his testimony, he wished to consider amending the plaint further before closing his case.
15. I am in agreement with the defendants that there has been a delay in bringing the application for amendment. It is however not correct that the delay has not been explained. As concerns, the defendants' contention that the intended amendment would introduce a new cause of action and that it would completely or substantially alter the character of the plaintiff's suit, I am not in agreement. What the plaintiff is seeking to introduce through the proposed amendments are prayers for specific performance of the agreement that the plaintiff entered into with the 1<sup>st</sup> and 2<sup>nd</sup> defendants and in the alternative; allocation of an alternative property, a refund of the purchase price together with interest and damages for breach of contract. These reliefs arise from the same causes of action that are already pleaded. The defendants will be granted leave to amend their defence so as to respond to the issues and claims raised in the proposed amended plaint. It is common ground that the defendants have not given evidence. This means that they will also have an opportunity to tender evidence in their defence to these claims. I am unable therefore to see any prejudice that will be occasioned to the defendants if the leave sought is granted. I disagree that the intended amendment is against public policy. The defendants have not demonstrated that the plaintiff is litigating in piecemeal.
16. For the foregoing reasons, no valid grounds have been put forward by the defendants to warrant the refusal of the leave sought by the plaintiff. I am satisfied from the material before me that the plaintiff's application has been brought in good faith and that it is necessary for the determination of the real issues in dispute between the parties that the amended plaint on record be amended further. I am also satisfied that no prejudice or injustice would be occasioned to any of the defendants by the proposed amendment which cannot be remedied in costs.
17. The upshot of the foregoing is that the plaintiff's application dated October 15, 2020 has merit. The application is allowed in terms of prayer 1 thereof. The plaintiff shall file further amended plaint within 14 days from the date hereof. The defendants shall be at liberty to amend their statement of amended defence within 14 days from the date of service of the further amended plaint. The defendants shall have the costs of the application.

**DELIVERED AND DATED AT NAIROBI THIS 7<sup>TH</sup> DAY OF JULY 2022.**

**S. OKONG'O**

**JUDGE**

**Ruling delivered virtually through Microsoft Teams Video Conferencing Platform in the presence of:**

Mr. McRonald for the Plaintiff

N/A for the Defendants

Ms. C.Nyokabi-Court Assistant

