



**Ofisi Ya Pili Ltd v Jaya Investments Ltd (Environment & Land Case
34 of 2019) [2022] KEELC 4771 (KLR) (15 September 2022) (Ruling)**

Neutral citation: [2022] KEELC 4771 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 34 OF 2019
MAO ODENY, J
SEPTEMBER 15, 2022**

BETWEEN

OFISI YA PILI LTD PLAINTIFF

AND

JAYA INVESTMENTS LTD DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated September 13, 2021 by the defendant/applicant seeking the following orders
 - a) Spent
 - b) That this honourable court be pleased to grant the defendant/ applicant leave to amend its statement of defence and counterclaim.
 - c) That this honourable court be pleased to grant the defendant/ applicant leave to file additional witness statements.
 - d) That this honourable court be pleased to order the firm of Muli & Ole Kina Advocates to deposit the original title deed to Kilifi/ Madeteni/421 to this honourable court.
 - e) That costs be in the cause.
2. Counsel agreed to canvas the application *vide* written submissions which were duly filed.

defendant/applicant's Submissions

3. The applicant relied on the grounds on the face of the application and the supporting affidavit sworn by Kassim Ahmed Omar sworn on September 13, 2021 whereby he deponed that he had instructed the firm of Lucy Wangari Mwangi & Associates to defend its interests in this suit and that the statement



- of defence and counter claim were done contrary to the instructions as the same were never sent to the defendant for approval.
4. The applicant blamed his former counsel for failing to notify the authorized defendant's Director to come and testify until two days before the hearing date which prompted the adjournment when the matter came up for defence hearing and the filing of the present application for amendment of defence and counterclaim.
 5. Counsel for applicant identified three issues for determination namely:
 - a) Whether the applicant should be granted leave to amend its statement of defence and counterclaim and file further witness statements as the same raise cogent points for determination of this suit.
 - b) Whether any prejudice shall be occasioned to the plaintiff should the application be allowed.
 - c) Whether it is in the interest of justice that the land title documents unlawfully in possession of Lucy Muli, the former company secretary be relinquished to the defendant.
 6. On the first issue, counsel relied on order 8 rule 3 (5) which provides for amendment of pleadings at any stage and cited the cases of *Gasu Transport (Bus) Services Ltd v Obene* (1990-1994) EA 88 and *Harrison C Kamau vs Blue Shield Insurance Co Ltd* (2006) eKLR.
 7. On the second issue, counsel submitted that amendments should not be allowed if it will cause injustice to the other party and relied on the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* 2014 eKLR and the Court of Appeal decision in the case of *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 where the court held that a party may be allowed to make such amendments as may be necessary in determining the real question in controversy or to avoid multiplicity of suits, provided there has been no undue delay , that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.
 8. Counsel further relied on the case of *Serve in Love Africa (Sila) Trust v David Kipsang Kipyego & 7 others* (2017) eKLR and the *Law Society of Kenya Code of standards of Professional Practice and Ethical Conduct*, 2016 on the issue of conflict of interest which gives substantial risk which may affect the Advocates representation of a client and submitted that the amendment will not prejudice the plaintiff in any way.

Plaintiff's Submissions

9. The plaintiff/respondent filed a replying affidavit in response to the application sworn by Andrea Vernizzi on November 9, 2021 and deponed that Lucy Muli Advocate is not a party to these proceedings hence the prayer to deposit the title in court without availing her an opportunity to explain why she is holding the same is an abuse of the court process
10. He further deponed that it is not true that Kassim Ahmed Omar did not know about the contents of the counterclaim filed against the plaintiff as he executed the verifying affidavit dated August 16, 2019. That he has not stated that he had been coerced into signing the said affidavit.
11. The respondent deponed that the said Kassim was present in court when he testified and that the matter has been adjourned severally at the behest of the defence. It was his averment that the reopening of the case at this stage will cause prejudice as he has already testified and closed his case and that the proposed amendments seek to introduce new causes of action and defence.



12. Counsel submitted that no explanation has been given by the defendant as to why the amendment is being sought after the plaintiff has given evidence and closed its case. It was counsel's submission that the delay in filing the application has not been given and that while it is true that under order 8 (3) (5) of the [Civil Procedure Rules](#) the court has the discretion to allow amendment of pleadings at any stage, there has to be sufficient reason for such discretion to be exercised. Counsel submitted that the explanation given is not sufficient and relied on the case of [Municipal Council of Thika and Another vs Local Government Workers Union \(Thika Branch\)](#), Court of Appeal, Civil appeal No Nai41 of 2001.
13. Mr Nyongesa submitted that the amendments sought to be introduced and the elimination of all the particulars are so extensive that it not only changes the case but the plaintiff whose witnesses have already testified and closed its case would have to be recalled to testify a fresh. Further that the intended amendments also name individuals, assassinate their characters without naming them as defendants or calling upon them to answer to the extensive claims made against them.
14. Counsel also submitted that order 52 of [the Civil Procedure Rules](#) is clear as to the procedure to be adopted where there is a dispute between an advocate and a client over deed and further that the firm of Muli Ole Kina advocates are not parties to the suit.

Analysis and Determination.

15. This is an application for amendment of defence and counterclaim. The issues for determination in this case are whether the applicant has established a sufficient cause why the amendment should be allowed and whether the court should order the firm of Muli & Ole Kina Advocates to deposit the original title deed to this honourable court.

Order 8 rule 5 of the [Civil Procedure Rules](#) provides 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.”

16. In the case of [St. Patrick's Hill School Ltd V Bank of Africa Kenya Ltd](#) (2018) eKLR, the Court of Appeal set out the principles of amendment of pleadings as follows: -
 - a) The power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b) The amendments should be timeously applied for;
 - c) Power to amend can be exercised by the court at any stage of the proceedings;
 - d) 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.
 - e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
17. The court has discretion to allow amendments freely at any stage of the proceedings so long as the amendments are brought in good faith, without undue delay, and does not cause any prejudice to any party.



18. In this case, the applicant has faulted that former counsel and on how she handled the defence stated that counsel did not disclose the contents of the defence and counter claim. A party seeking to benefit from the discretion of the court must be truthful and come to court with clean hands.
19. It is not enough to blame counsel by stating that counsel did not disclose the contents of the defence and counterclaim. It is on record that the defendant signed a verifying affidavit to the correctness of the defence and counterclaim and there is no evidence that he was forced to sign it.
20. This matter was filed on May 31, 2019 and the defendants filed their defence and counterclaim on September 25, 2019 and the same was not heard until the October 7, 2020 and similarly, this matter has been adjourned severally at the instance of the defence.
21. I have looked at the proposed amendments and I am of the view that the same can be well canvassed during the hearing of the defence and counterclaim already filed as most of the averments are repetition of facts. The amendment will delay this matter further as the plaintiff has already tendered evidence and closed the case. Each case must be looked at on its own merits.
22. On the issue as to whether the firm of Ole Kina & Muli Advocates should be compelled to deposit the original title deed to the suit land, the applicant has not given sufficient reason why such an order should be granted. No background has been laid to show the court how the firm of advocates came to be in possession of the title deed, further the firm is not a party to this suit and the court cannot condemn a party unheard. The application therefore lacks merit on that limb and is therefore disallowed.
25. I find that the application lacks merit and is therefore dismissed with costs to the respondent. Parties to fix the case for defence hearing within the next 30 days.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 15TH DAY OF SEPTEMBER, 2022.

M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this Ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

