



**Kalama & others v Two Thirds Investments Limited & others (Environment & Land Case 232 of 2014) [2022] KEELC 14784 (KLR) (2 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14784 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA  
ENVIRONMENT & LAND CASE 232 OF 2014  
SM KIBUNJA, J  
NOVEMBER 2, 2022**

**BETWEEN**

**KATANA SAID KALAMA & OTHERS ..... PLAINTIFF**

**AND**

**TWO THIRDS INVESTMENTS LIMITED & OTHERS ..... DEFENDANT**

**RULING**

1. This matter came up for mention on the October 11, 2022, when Mr Kenga, the learned counsel for the 2<sup>nd</sup> to the 32<sup>nd</sup> plaintiffs, and holding brief for Mr Kamunda for the 1<sup>st</sup> plaintiff, and Mr Maundu, Learned Counsel for the defendants submitted on whether or not the application dated May 4, 2022, should be allowed. The application seeks for;
  - a. Leave to be granted to the 2<sup>nd</sup> to 32<sup>nd</sup> and 41<sup>st</sup> plaintiffs to amend their originating summons in terms of the draft further amended originating summons annexed.
  - b. That the draft further amended originating summons annexed to be deemed as properly filed upon payment of filing fees.
  - c. That costs be provided for.The application is based on the twelve (12) grounds on its face and supported by the affidavit sworn by Ali Juma Wakaneno on the May 4, 2022.
2. The application is opposed by the defendants through the replying affidavit sworn by JK Wanyoike, a director of the 1<sup>st</sup> defendant, on the June 13, 2022.
3. That upon considering the grounds on the application, the affidavit evidence, oral submissions by counsel, and the record, the court has come to the following determinations;



- a. That in the course of the proceeding of October 7, 2019, Mr Kamunda and Mr Kenga for the plaintiffs and Mr Maundu for the defendants, addressed the court on whether or not the plaintiffs should be given time to file an application for amendment of pleadings. The court gave its ruling/directions on the same date directing *inter alia* that;

“.. so that the plaintiffs can be allowed a chance to ventilate their case, I will in my discretion allow the plaintiffs to amend the OS. This will of course occasion an adjournment and for that, the plaintiffs will pay CAF of Kshs 1000/- and costs of Kshs 15,000/- to Mr Maundu and to his client which I will assess and they will need to be paid in 14 days. The OS may be amended and filed and served in 14 days and there must be strict compliance with the provisions of O 37 rule 7. Upon service, the defendant is at liberty to file a reply to the amended OS in 14 days. In case the plaint in suit ELC No 3 / 2015 needs also to be amended in light of the above, this can be done in 14 days as well...”

- b. In the subsequent proceedings of the November 14, 2019, the court was informed that no amendments of pleadings had been filed. The court then directed as follows;

“I regret that I am unable to extend the time that I gave on October 7, 2019. In fact, this court bent over backwards to accommodate the plaintiffs. The plaintiffs have the option of either proceeding with this case as it is or to withdraw it. The leave to amend is now lapsed.”

That the record shows that the counsel for the plaintiffs indicated that they will proceed with the case as it was, and sought for a hearing date which was fixed. Indeed, the cross examination of PW1 took place on the March 1, 2021 and an application for injunction was subsequently filed, heard and determined.

- c. Then on the June 15, 2022, the court was addressed on the application dated May 4, 2022 and the following directions were issued;

“This matter was fixed for hearing today. On May 31, 2022 Mr Kenga filed an application to amend the OS. I agree with Mr Maundu that there was time to file such application and I agree that its late filing should not derail today’s hearing. As it stands, that application has not been served upon Mr Muyala. I will not let it stand in the way of today’s hearing. I will give directions on it after we take the evidence of the witnesses present”

The record shows that two witnesses, PW2 and PW3, were then heard and thereafter, the court directed that the application dated May 4, 2022 be served and responses be filed. The foregoing findings shows clearly that the said application is yet to be decided and has been pending since that date.

- d. That it is apparent that the plaintiffs have previously been accorded an opportunity to file and serve amended pleadings within specified timelines but failed and or neglected to do so. Their previous efforts for extension of time to amend pleadings were unsuccessful, and they opted to proceed with their case as it was. The plaintiffs appear to be seeking a review of the court’s refusal to extend the time to amend pleadings, without stating so in the instant application. The court is of the view that the plaintiffs should have considered filing an appeal on the court’s order if they were dissatisfied, but they did not do so. They instead opted to proceed with the



hearing and substantial ground has been covered since. I do not find any reasonable basis upon which the fresh application for leave to amend the plaintiffs' pleadings would be grounded upon. That the finding of the court is that as earlier ordered, the plaintiffs should proceed with their claim as it is.

- e. That the defendants having opposed the application are under section 27 of the Civil Procedure Act chapter 21 of the laws of Kenya entitled to costs of the motion.
4. That in view of the above findings I order as follows;
- a. That the notice of motion dated the May 4, 2022 is without merit and is hereby dismissed with costs.
  - b. That the plaintiffs do proceed with their claim as it is as they elected on the November 14, 2019.
- Orders accordingly.

**DATED AND VIRTUALLY DELIVERED ON THE 2<sup>ND</sup> NOVEMBER 2022.**

**S.M. KIBUNJA, J.**

**ELC MOMBASA.**

IN THE PRESENCE OF;

PLAINTIFFS

.....

DEFENDANTS

.....

COUNSEL

.....

.....

WILSON .. COURT ASSISTANT.

**S.M. KIBUNJA, J.**

**ELC MOMBASA.**

