



REPUBLIC OF KENYA



**KENYA LAW**  
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**Waweru v Extropica Food Limited & 5 others (Environment & Land Case  
184 of 2015) [2022] KEELC 14641 (KLR) (1 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14641 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 184 OF 2015  
AA OMOLLO, J  
NOVEMBER 1, 2022**

**BETWEEN**

**PETER MAINA WAWERU ..... PLAINTIFF**

**AND**

**EXTROPICA FOOD LIMITED ..... RESPONDENT**

**AND**

**WILLIAM ATATI ANGASA ..... 1<sup>ST</sup> DEFENDANT**

**LINDA KAARI MUCHUNKU ..... 2<sup>ND</sup> DEFENDANT**

**THE NATIONAL LAND COMMISSION ..... 3<sup>RD</sup> DEFENDANT**

**THE CHIEF LAND REGISTRAR ..... 4<sup>TH</sup> DEFENDANT**

**THE HON. ATTORNEY GENERAL ..... 5<sup>TH</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants filed a notice of motion dated June 22, 2022 seeking the following orders;
  - i. Spent;
  - ii. Spent;
  - iii. That the proceedings (*ex parte*) of July 16, 2019 and consequential orders be set aside;
  - iv. That the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants be granted leave to amend their pleadings as per the draft amended statement of defendants and counter claim and notice of claim against the co-defendants annexed herewith;



- v. That this suit be reinstated for hearing de novo and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants/applicants be allowed to defend the suit on merits;
  - vi. That any other orders that meet the ends of justice be given; and
  - vii. That the costs of this application be in the cause.
2. The motion was supported by the affidavit sworn by William Atati Ang'asa on June 22, 2022 on grounds that the hearing of the main suit proceeded on July 16, 2019 in the absence of the applicants or their counsel and the same was set to further proceed on June 23, 2022. The applicants stated that the non-attendance was caused by the illness of their counsel who sent a representative to seek an adjournment and a further hearing date but the representative left the firm without properly updating/ notifying of the progress of the July 16, 2019 hearing and it was during a recent perusal of the court file that they discovered that the matter had progressed and plaintiff closed his case.
  3. The applicants further stated that the delay in seeking to set aside the said proceedings was counsel's inadvertent administrative error and that the applicants must not suffer prejudice and that they are desirous of cross examining the plaintiff hence the proceedings should proceed denovo. Further, the applicants stated that they wish to amend their statement of defendants to include a counter claim as at the time they filed their defendants, the 4<sup>th</sup>, 5<sup>th</sup> and 6<sup>th</sup> co-defendants were yet to file their defendants which has raised issues that need a response.
  4. The applicants stated that their delay to amend their defendants is also because they had been contending with several interlocutory applications, misfiling of the 5<sup>th</sup> and 6<sup>th</sup> statement of defendants and witness statements in counsel's chambers, the file missing at some point and the outbreak of covid -19 pandemic which halted both the court and law firm's operations. The applicants further stated that the 1<sup>st</sup> defendant is the legal owner of the land in dispute, maintains possession and developed it to the current value of Kshs 66,000,000/- hence the amendment shall enable the court to determine the real issues in the suit and prevent multiplicity of suits. That the amendments raise substantially from the same facts on record and that no new or inconsistent cause of action is introduced.
  5. The plaintiff/respondent filed grounds of opposition dated September 14, 2022 stating that the suit was filed on March 4, 2015 and seven years later, there has been delay caused by the applicants' applications contrary to the overriding objectives of the court. He argues that the proposed amendments raise new facts which would change the cause of action thereby constituting a new suit contrary to order 2 rule 6(1) of the [Civil Procedure Rules](#) and that the prejudice visited on him cannot be compensated by way of costs.
  6. The plaintiff contended further that the proposed amendments contrary to the provisions of section 100 of the [Civil Procedure Act](#) as they have not been made with the purpose of determining the real issue in the plaint but rather a deviation from the purpose of the suit. The respondent avers that the application was an affront to [Civil Procedure Rules](#) and an afterthought trying to fill the gaps of their case, and that the proposed counter-claim is an abuse of the court process and in contravention of order 3 rule 4(2) of the [Civil Procedure Rules](#) as the applicants seek to sue in respect of a portion omitted in their defence.
  7. The applicants filed their submissions dated October 11, 2022 stating that the proposed defence to the defendants as provided in section 100 of the [Civil Procedure Act](#) and order 8 of the [Civil Procedure Rules](#) should be allowed citing the case of [John Nyagaka Osoro v Reynold Karisa Charo & 5 others \(2021\) eKLR](#) which held that the court has the power to amend pleadings at any stage before judgement. The applicants urged that the client should not be prejudiced for administrative faults of their counsel,



that they have demonstrated a sufficient cause warranting setting aside the ex parte proceedings and the court has jurisdiction to set them aside as held in the case of [\*Tabsei Chepnogeno Tormoi & another v John C Koeh & 3 others \(2021\) eKLR\*](#), *Shah v Mbogo and Another [1967] EA 116* among others.

8. I have not seen the plaintiff's submissions on record.
9. The issue for determination before this court is whether the applicants have met the threshold to warrant setting aside the court proceedings and be granted leave to amend their pleadings. The court has wide and unfettered jurisdiction to review and set aside its decisions. In *Shah v Mbogo and Another [1967] EA 116* the Court of Appeal of East Africa held that:

“This discretion (to set aside ex parte proceedings or decision) is intended so to be exercised to avoid injustice or hardship resulting from accident, inadvertence, or excusable mistake or error, but is not designed to assist a person who has deliberately sought, whether by evasion or otherwise, to obstruct or delay the course of justice.” (emphasis added)

10. The legal threshold that the court ought to consider before exercising the discretion to set aside its proceedings is whether the applicants have demonstrated a sufficient cause warranting the same. [\*Black's Law Dictionary, 9th Edition, page 251\*](#) defines sufficient cause as;

“Sufficient cause must therefore be rational, plausible, logical, convincing, reasonable and truthful. It should not be an explanation that leaves doubts in a judge's mind. The explanation should not leave unexplained gaps in the sequence of events.”

11. Justice Mativo held in the case of [\*Wachira Karani v Bildad Wachira \[2016\] eKLR\*](#) that,

“Sufficient cause is thus the cause for which the defendant could not be blamed for his absence. Sufficient cause is a question of fact and the court has to exercise its discretion in the varied and special circumstances in the case at hand. There cannot be a straight-jacket formula of universal application. Thus, the defendant must demonstrate that he was prevented from attending court by a sufficient cause...”

12. The applicants have explained to this court that the delay of filing the proposed amendments was caused by inadvertent mistake by their counsel on record and the outbreak of the Covid-19 pandemic. In an almost similar scenario in the case of [\*Joswa Kenyatta case\*](#) (sic) the court held,

“20. In this case the reason given for the respondent's failure to attend court is that the counsel who had the conduct of the matter did not update his diary to indicate the hearing date in the diary and left the law firm. A copy of the diary annexed to the supporting affidavit indicates that only two cases were scheduled for hearing on June 18, 2019 excluding the instant case. The question that arises is whether the applicant failed to attend the hearing on the said date due to wilful neglect or deliberately to delay the course justice. Having carefully considered the explanation given by the applicant and the circumstances of this case, I am satisfied that the failure to attend the hearing by the applicant was not due to his negligence but a genuine error on the part his lawyer. Consequently, I hold that the applicant has demonstrated a sufficient cause upon the court can exercise its discretion.”

13. The respondent opposed the application on the grounds that it raised new and different set of issues from what is pleaded in the plaint. In [\*PIO v BO & another \[2021\] eKLR\*](#), the court in deciding a similar



issue relied on the Ugandan case *Sebei District Administration v Gasyali* [1968] EA 300,301,302 in which the words of Ainsley J, (as he then was) in *Jamnadas Sodha v Gordandas Hemraj* (1952) 7 ULR 7 were adopted. That;

“The nature of the action should be considered, the defendants if one has been brought to the notice of the court, however, irregularly, should be considered, the question as to whether the plaintiff can reasonably be compensated by costs for any delay occasioned should be considered, and finally, I think, it should always be remembered that to deny the subject a hearing should be the last resort of a court.”

14. A perusal of the plaint filed reveals that the cause of action centers on the contested title which is alleged to have been fraudulently issued. The proposed amendments in my view do not introduce new issues deviating from the dispute at hand, as it also dwells on the ownership of the land in subject. Halsbury’s Laws of England, 4th Ed (re-issue), Vol 36(1) at paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. ....

15. It is therefore my considered opinion and I so hold that the application is merited and is allowed in the following terms;
- i. That the proceedings (*ex parte*) of July 16, 2019 and consequential orders be and are hereby set aside;
  - ii. That the 1st, 2nd and 3rd defendants are granted leave to amend their pleadings and the amended statement of defendants and counter claim shall be filed and served within 14 days from the date hereof
  - iii. That corresponding leave is granted to the plaintiff and 4<sup>th</sup> – 6<sup>th</sup> defendants to amend their plaint and or reply to the counter-claim within 14 days of being served
  - iv. The parties to appear before this court December 5, 2022 to confirm compliance with order (ii) and (iii) above
  - v. That the costs of court attendance on July 16, 2019 together with the costs of this application is awarded to the plaintiff/respondent assessed at Kshs 15,000/= payable before the next hearing date.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1<sup>ST</sup> DAY OF NOVEMBER, 2022**

**A OMOLLO**

**JUDGE**

