



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT THIKA**

**ELC NO. 308 OF 2018**

**(FORMALLY NAIROBI ELC NO.370 OF 2012)**

**NYAMU FOUNDATION LIMITED.....PLAINTIFF/ RESPONDENT**

**-VERSUS-**

**THE HON. ATTORNEY GENERAL.....DEFENDANT/APPLICANT**

**RULING**

By a Notice of Motion Application dated **23 August 2020**, by the Defendant/Applicant brought under **Order 1 Rule 14, Order 50 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act**, the Defendant/Applicant has sought for the following Orders:-

- 1. That the parties be granted leave to amend the pleadings out of time.**
- 2. Costs be in the cause.**

The application is premised on the grounds **that the allocation and registration of the suit land in the name of the Plaintiff, which land is a public land, was acquired irregularly, unprocedurally, fraudulently and through misrepresentation.**

The application is supported by the Affidavit sworn by **Julius Waweru, the Kiambu County Director of Housing under the Ministry of Transport, Infrastructure, Housing and Urban Development**. He deponed that the suit land is a public land, which encompasses a **Government house, toilet, sewer and sewer line serving the government house**. He also averred that the dispute herein will be properly articulated when all the relevant pleadings are in place and the Defendant/Applicant be allowed to amend and Counterclaim in the suit herein. He further averred that no prejudice will be suffered if the application is allowed.

The application is opposed and the Plaintiff/Respondent filed Grounds of Opposition dated **1<sup>st</sup> September 2020**, and stated that there is no justification on why the Defendant/Applicant failed to file the application or seek to amend the pleadings since **2012**. It further stated that this matter has been certified ready for main trial and no new facts have emerged. Additionally, there have been several attendances for pre-trial conferences in the absence of the Defendant thus, the Court should not be used to facilitate the Defendant's/Applicant's abuse of the Court process. Further that the filing of the list of documents and witness statements is contrary to **Order 7 Rule 5**.

Parties were directed to file written submissions. The Defendant/ Applicant filed its written submissions dated **17<sup>th</sup> September 2020**, through state **J. Motari Matunda**, a State Counsel based at the **Attorney General's Chambers**, while the Plaintiff/Respondent filed its submissions dated **27<sup>th</sup> October 2020**, through the Law Firm of **M/s Mogeni & Co. Advocates**.

The Court has now considered the instant application and the annexures thereto. The Court has also considered the other pleadings and the rival written submissions as filed by the parties herein and renders itself as follows;

Under **Order 8 Rule 3 & 5** of the **Civil Procedure Act**, it is trite that Court has discretion to allow amendments to the proceedings any time before Judgment. See the case of **Central Kenya Ltd...Vs...Trust Bank & 4 Others C.A No.222 of 1998**, where the Court held that:-

***“All amendment should be freely allowed 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 properly be compensated for in costs”.***

The Court notes that, this suit was filed on **28<sup>th</sup> May 2012**, and the Defendant/Applicant filed its **Defence and Notice of Preliminary Objection** on **16<sup>th</sup> August 2012**. The application to amend the Defence was filed in the year **2020**, which is **8 years** down the line.

The Court has discretionary power to order amendment of pleadings before Judgment for purposes of determining the real issues in controversy. However, such discretion ought to be exercised reasonably and judicially.

The Defendant /Applicant urges this Court to allow the application on the basis that **the suit land is a public land, which was acquired irregularly, unprocedurally, fraudulently and through misrepresentation.** The Plaintiff/Respondent on its part states that there is no justification as to why the Defendant/Applicant failed to file the application or seek to amend the pleadings since 2012.

A wider footage on amendment of pleadings was given in the case of *Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991*, where the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is 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 and amendment notwithstanding the expiry of current period of limitation.*

The general rule is that amendments sought before judgment should be allowed, unless some prejudice which cannot be cured by an award of costs will be occasioned to the Respondent.

In the present case, the amendments introduce new facts that fundamentally changes the nature of the case. Further, there has been inordinate delay in bringing this application for amendments on the part of the Defendant/Applicant. The delay has not been explained and evidence of such delay has not been tabled in Court. Additionally, the said amendment would prejudice the Plaintiff/Respondent, as it would cause further delay to the suit.

For the above reasons, the Court finds that the Defendant's/ Applicant's **Notice of Motion** Application dated **23<sup>rd</sup> August 2020**, seeking to amend the Defence and Counterclaim is **not merited** and the same is dismissed entirely with costs to the Plaintiff/Respondent.

This suit was filed in **2012**, and it is more than **8 years old** and should be heard and determined expeditiously as *Justice delayed is Justice denied*.

It is ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 13TH DAY OF MAY 2021.**

**L. GACHERU**

**JUDGE**

**13/5/2021**

**Court Assistant – Lucy**

**ORDER**

In view of the declaration of measures restricting court operations due to the **COVID-19** Pandemic, and in light of the directions issued by His Lordship, the Chief Justice on **15<sup>th</sup> March 2020**, this **Ruling** has been delivered to the parties online with their consents. They have waived compliance with **Order 21 rule 1** of the **Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open Court.

**With Consent of and virtual appearance via video conference – Microsoft Teams Platform**

**Mr. Omangi Gichana holding brief for Mogeni for the Plaintiff/Respondent**

**Mr. Motari For the Defendant/Applicant**

**L. GACHERU**

**JUDGE**

