



**ASSL v ASMB alias ASM (Originating Summons 3 of 2018)
[2024] KEHC 1537 (KLR) (16 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1537 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
ORIGINATING SUMMONS 3 OF 2018**

G MUTAI, J

FEBRUARY 16, 2024

BETWEEN

ASSL APPLICANT

AND

ASMB ALIAS ASM RESPONDENT

RULING

1. The Notice of Motion before the Court is dated 7th November 2023. It was filed by the Respondent/Applicant. It seeks the following orders:-
 - a. That this honourable court be pleased to grant leave to the respondent herein to amend his response in the manner stated in the draft counter-claim and the applicant be granted corresponding leave to file a reply to the counter-claim; and
 - b. That the costs of this application be in the cause.
2. The application is premised on the grounds stated in the body of the Motion and also on the supporting affidavit of ASMB sworn on 7th November 2023.
3. The Respondent/Applicant deposed that he filed a response in this case through the replying affidavit dated 22nd May 2018 and the further affidavit dated 31st July 2018. In his response, Flat No H5, which is on the 5th floor of the Tudor Sea View Project, was mentioned severally. It was his contention that the same is a matrimonial property for the purposes of this case, having been acquired during the subsistence of marriage between the parties. He thus averred that the amendment would resolve all the issues in dispute between him and the Applicant/Respondent.
4. In response, the Applicant/Respondent filed a replying affidavit sworn on 24th November 2023.
5. She stated that the application lacks merit, is made in bad faith and the same ought to be dismissed. She deposed that this matter proceeded by way of viva voce evidence on 1st November 2018, and all



- documents were produced. The Respondent/Applicant objected to the playing of the videotape and the documents stated in the list filed on 21st January 2018 touching on the Tudor property, and the court dismissed the same in its ruling delivered on 19th June 2020. The applicant filed a Notice of Appeal, which was struck out on 22nd July 2022.
6. She further stated that the amendment seeks to contradict the Respondent/Applicant's averments in paragraph 21(b) (iii) of his Replying Affidavit filed on 22nd May 2018 and paragraphs 21, 33(ii) and 35 of his further affidavit filed on the 31st July 2018. She contended that the said property is held in trust for her brother, as stated in paragraphs 30 and 51(xi), (xii), (xiii) and (xiv) of her affidavit and her evidence.
 7. She averred that the amendment seeks to introduce a new cause of action which may affect the case. The same is frivolous, an abuse of the court process and aimed at defeating the efficient determination of the suit.
 8. The Respondent/Applicant filed a Supplementary Affidavit denying the averments made by the Applicant/Respondent in her replying affidavit and stated that the anomaly on the property in question was only noticed after the change of legal representation. The said property is a matrimonial property for all intents and purposes, and the amendment seeks to clarify the same.
 9. The application was canvassed by way of written submissions. The Respondent/Applicant, through his advocates Prime Lawyers LLP, filed written submissions dated 13th December 2023.
 10. Counsel relied on Order 8 of the [Civil Procedure Rules, 2010](#) and submitted that the court has inherent powers to allow amendments for purposes of determining the true and substantive issues in dispute in a matter. The guiding principle in dealing with applications to amend pleadings is that the same ought to be liberally and freely permitted unless in exceptional circumstances. It was submitted that the proposed amendments are in line with the overriding objectives of the court. Even when the relevant period of limitation has expired, the court may still grant leave if it is fair and just to do so. Counsel urged the court to allow the application.
 11. The Applicant/Respondent, on the other hand, through her advocates P.A. Osino & Company Advocates, filed her written submissions dated 12th December 2023.
 12. Counsel reiterated the Applicant/Respondent's position in her replying affidavit and submitted that the court may at any stage of proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his/her pleadings. She, however, submitted that an amendment is not necessary in this instance as the applicant had already pleaded on the subject property, and the amendment seeks to contradict the same. It was urged that parties are bound by their pleadings. The matter had already proceeded, and the amendment of pleadings at this point would create confusion and injustice to the Applicant/Respondent. Further, the claim is statute-barred.
 13. Counsel further submitted that the amendment seeks to introduce a new cause of action, as it seeks to divide what is stated to have been gifted to the Applicant/Respondent. She urged that the amendment offends Rules 14 and 15 of the Matrimonial Property Rules, 2022. If the amendment is allowed, the Applicant/Respondent will be prejudiced. Counsel urged the court to dismiss the application.
 14. I have considered the application, the responses therein and the rival submissions by both counsels.
 15. Amendment of pleadings is provided for under Section 100 of the [Civil Procedure Act](#) and Order 8 rules 3 and 5 of the [Civil Procedure Rules, 2010](#), which provide:-



Section 100

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit, and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”

Order 8 rule 3

1. Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
2. Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
3. An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
5. An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

Order 8 rule 5;

1. 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
 2. This rule shall not have effect in relation to a judgment or order.
16. The court in the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR stated:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to the form of the action or proceedings... The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided



there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

17. The Respondent/Applicant’s argument in this case is that the amendment is necessary as it will enable the court to resolve all disputes raised in this suit. The respondent, on the other hand, has argued that the amendment seeks to introduce a new cause of action which will prejudice her. She also termed the application as bad in law, frivolous, vexatious, an abuse of the court process, and one meant to delay the hearing and determination of the suit.
18. I have perused the pleadings in the court file and court proceedings in respect of the subject property. Having done so, I have noted that the issue of the subject property came up in the Respondent/Applicant’s Replying Affidavit and Further Affidavit filed on 22nd May 2018 and 31st July 2018, respectively. The Applicant/Respondent responded to the same in her Further Affidavit filed on 18th June 2018 and the oral evidence before the court on 1st November 2018.
19. The court in the case of *TMN v MK* (Civil Suit 37 of 2013) [2022] KEHC 16002 (KLR) (Family) (2 December 2022) (Ruling) stated:-

“The court has the discretion at any stage of the proceedings on whether or not to grant leave to amend pleadings. The major considerations are whether the proposed amendment is necessary to enable the court to reach a just determination of the matter and whether the respondent will suffer any prejudice if the proposed amendments is/are allowed.”
20. This matter is part heard with the Applicant/Respondent having testified. Although the same has been brought late in the day, and the Applicant/Respondent has raised the issue of limitation of time, it is my view that the Court nevertheless has the discretion to allow the amendment.
21. Having considered all facts and materials on record, it is my view that the proposed amendment does not introduce a new cause of action, as what is sought to be introduced was raised in the pleadings. The same will, in my view, help the court reach a just determination on the matter.
22. I do not think that the Applicant/Respondent will be prejudiced as she will have the opportunity to amend her response.
23. From the foregoing, it is clear that I have found merit in the application. The same is allowed.
24. The Respondent/Applicant took too long before filing this application. Filing this Motion 5 year after the proceedings commenced betrays indolence on his part. Although his application has succeeded, I nevertheless condemn him to pay costs to the Applicant/Respondent.

Orders accordingly.

DATED AND SIGNED AT MOMBASA THIS 16TH DAY OF FEBRUARY 2024.

GREGORY MUTAI

JUDGE

In the presence of:-

Ms. Osino, for the Applicant/Respondent;

Mr. Muchiri, for the Respondent/Applicant; and

Arthur – Court Assistant.

