



**Anwar Mohamed Bayusuf Limited v Diamond Trust Bank (K) Limited
(Civil Suit 13 of 2013) [2024] KEHC 3768 (KLR) (4 April 2024) (Ruling)**

Neutral citation: [2024] KEHC 3768 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 13 OF 2013
DKN MAGARE, J
APRIL 4, 2024**

BETWEEN

ANWAR MOHAMED BAYUSUF LIMITED PLAINTIFF

AND

DIAMOND TRUST BANK (K) LIMITED DEFENDANT

RULING

1. This is a Ruling in respect of the Plaintiff's Application dated 14th November 2023. The said application was filed immediately I dealt with three others. The Application sought the following prayers:
 - a. Spent
 - b. Spent
 - c. The Court be pleased to grant the Plaintiff leave to amend its Plaint to capture the exact particulars of fraudulent activities raised in the Plaint amended on 1st August 2017 and the loss suffered as a result of the fraudulent activities alleged.
 - d. The Court be pleased to exercise its discretion to order that the status quo in relation to the possession, occupation and use of the Plaintiff's parcel number Mombasa/Block X/249 and or any other properties be maintained pending the hearing and determination of the main suit.
 - e. The Court be pleased to order for expeditious hearing of the suit.
 - f. Costs be in the cause.
2. The Grounds upon which the Application was premised were the suit premises was advertised for sale on 16th November 2023. Further, the Defendant had frustrated the investigations into fraud involving



the suit premises requested by the court in Mombasa HCCR Revision No. 27 of 2019 and there was need for this court to enforce any illegal action brought to its attention.

3. It was their case that necessary to amend the Plaintiff to reflect the fraudulent actions by the Defendant. The Plaintiff discovered alleged that they discovered the fraud on 8th November 2023.
4. The Defendant filed a Replying Affidavit sworn on 17th November 2023 by one Faith Adonga. It was stated that the Application was barred by the doctrine of res judicata.
5. The second line of defence was that, that the amendments were being sought 6 years after filing the suit and so out of time. It was their case that the Application was a tactic to delay hearing of the suit and an abuse of the court process.
6. The Respondent stated that amending the Plaintiff to include fraud as a cause of action was unmerited because fraud never occurred. Further that the same is a waste of court's time.
7. The Plaintiff filed a further affidavit. Through this, a Draft Amended Plaintiff was annexed for this court's consideration of the necessity of the amendments.

Submissions

8. The Applicant submitted stating that amendments was merited. They were guided by a persuasive decision of Justice R Nyakundi in *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* (2018) eKLR. In that case the court held as doth: -

“On the same subject, in the case of *Abdul Karim Khan v Mohamed Roshan* (1965) EA.289 (C.A), the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaintiff. The principles upon which a court acts in an application to amend a pleading before/during trial are also well settled and succinctly stated in *Eastern Bakery v. Castelino*, (1958) E.A.461 (U.) at p.462:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.

18. The same was later buttressed by Bramwell, LJ in *Tildesley v Harper* (1878), 10 Ch.D. at p.296 stated as under:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise.”

19. In *Budding v. Murdoch* (1875) 1 Ch.D at p.42, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in *Ma Shwe Mya v. Maung Po Hnaung* (1921), 48 I.A. 214, 48 Cal.832 the court said that there is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment,



the subject matter of the suit; in *Raleigh v. Goschen*, (1898) 1 Ch.73 it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character. In *Weldon v. Neal* (1887). 19 Q.B. D, 394 and *Hilton v Sutton Steam Laundry*, (1946) K.B, 65; (1945) 2 ALL E.R. 425, (Crawshaw, J.A, Forbes. V.P and Gould, J.A unanimously agreed); it was also asserted that where the amendment would prejudice the rights of the opposite party existing at the date of the proposing amendment, for instance by depriving his of a defence of limitation accrued since the issue of the writ.”

9. To canvass the argument that amendments would freely be permitted at any stage of the proceedings before Judgement.
10. It was submitted that it was necessary to amend the pleadings to bring out all the issues in controversy between the parties. Reliance was placed on the case of *Philip Chemwolo & Another v Augustine Kubende* (1986) eKLR.
11. On the status quo, it was submitted that status quo was necessary to safeguard the substratum of the matter. They relied on the court’s reasoning in *Kenya Airline Pilots Association (KALPA) v Co-operative Bank of Kenya Limited & another* [2020] eKLR as doth:

“In Msa Misc Appln. (JR) No. 26 of 2010 The Chairman Business Premises Tribunal at Mombasa Exparte Baobab Beach Resort (Mbsa) Ltd (UR), it was held: -

“In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo”.

12. It was urged to allow the Application.
13. For the Respondent, it was submitted that the Application was res judicata similar Application on injunction having been made and declined.
14. It was further submitted that the proposed amendments were being filed too late after 6 years.
15. I was urged to disallow the Application.

Analysis

16. I have perused the Application, responses and the submissions and authorities filed by the parties.



17. The issue before me are;
- a. Whether the proposed amendments are tenable
 - b. Whether status quo should be issued
18. In *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR the court held:-

“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 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 an injustice to the other side.”

19. Further, the Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of *Joseph Ochieng & 2 others v. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

20. I agree with the decision referred by the Applicant, that is *St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited* (*Supra*). In that case the court held as doth: -

“19. In *Budding v. Murdoch* (1875) 1 Ch.D at p.42, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in *Ma Shwe Mya v. Maung Po Hnaung* (1921), 48 I.A. 214,



48 Cal.832 the court said that there is no power to enable one distinct cause of action to be substituted with another, nor to change by means of amendment, the subject matter of the suit; in *Raleigh v. Goschen*, (1898) 1 Ch.73 it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character. In *Weldon v. Neal* (1887). 19 Q.B. D, 394 and *Hilton v Sutton Steam Laundry*, (1946) K.B, 65; (1945) 2 ALL E.R. 425, (*Crawshaw, J.A, Forbes. V.P and Gould, J.A* unanimously agreed); it was also asserted that where the amendment would prejudice the rights of the opposite party existing at the date of the proposing amendment, for instance by depriving him of a defence of limitation accrued since the issue of the writ.”

21. The amendment sought was made 6 years after the last amendment and 11 years after filing of suit. It seeks to introduce fraud which is a tort and whose limitation period is 3 years. Though the Applicant posited that they learnt on 8/11/2023, they did not show how this was the case. They have a duty to show that this was outside their knowledge, both constructive and actual.
22. Basically failing to know is not enough. The test is whether an ordinary prudent person, in the position of the Applicant could have with exercise of due diligence known of the fraud.
23. Section 26 of the [Limitation of Actions Act](#) provides for an extension of the limitation of time in case of fraud or mistake wherein time starts running at the point when the fraud is discovered by the plaintiff as doth:-

“ Where, in the case of an action for which a period of limitation is prescribed, either:

- (a) the action is based upon the fraud of the defendant or his agent, or of any person through whom he claims or his agent; or
- (b) the right of action is concealed by the fraud of any such person as aforesaid; or
- (c) the action is for relief from the consequences of a mistake, the period of limitation does not begin to run until the plaintiff has discovered the fraud or the mistake or could with reasonable diligence have discovered it.”

24. There is no demonstration that the factors related to the discovery of fraud were outside the knowledge of the Applicant. Concomitantly, it is my finding that the intended amendment is meant to introduce a time barred cause of action and a completely new cause of action. The amendment is not meant to refine the real issues in controversy but to obfuscate issues and engage the court in a suspended animation ad infinitum, ad nauseum.
25. The net effect of the foregoing is that I find and hold that the amendment is not applied for bona fides and as such I disallow the same,
26. As to the issue of status quo, I am fortified by the reasoning of [Mabeya I in Kenya Airline Pilots Association \(KALPA\) v Co-operative Bank of Kenya Limited & another](#) [2020] eKLR as follows:
In Msa Misc Appln. (JR) No. 26 of 2010 The Chairman Business Premises Tribunal at Mombasa *Ex parte* Baobab Beach Resort (Mbsa) Ltd (UR), it was held: -

“ In my view, an order for status quo to be maintained is different from an order of injunction both in terms of the principles for grant and the practical effect of each. While the latter is a substantive equitable remedy granted upon establishment of a right, or at interlocutory



stage, a prima facie case, among other principles to be considered, the former is simply an ancillary order for the preservation of the situation as it exists in relation to pending proceedings before the hearing and determination thereof.

It does not depend on proof of right or prima facie case. In its effect, an injunction may compel the doing or restrain the doing of a certain act, such as, respectively, the reinstatement of an evicted tenant or the eviction of the tenant in possession. An order for status quo merely leaves the situation or things as they stand pending the hearing of the reference or complaint. In its negative form, however, an injunction may have the same effect as an order for status quo”.

27. Therefore, the Applicant has to demonstrate an existing situation that warrants a status quo. The Applicant herein seeks to safeguard the subject matter before it is eroded or radically changes. The application is nothing more than regurgitation and re-clothing of the dismissed applications, a record 4 of them.

28. The issue of the subject matter not being sold has been dealt with in many applications. What the Applicant seeks to get is what was denied in the former applications. Section 7 of the [Civil Procedure Act](#) Cap 21 Laws of Kenya defines the doctrine of *Res Judicata* in the following terms: -

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.”

29. [In re Estate of Riungu Nkuuri \(Deceased\)](#) [2021] eKLR the court stated as follows:

“The test for determining the Application of the doctrine of *res-judicata* in any given case is spelt out under Section 7 of the [Civil Procedure Act](#). In [Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others](#) [2017] eKLR, the Supreme Court while considering the said provision held that all the elements outlined thereunder must be satisfied conjunctively for the doctrine to be invoked. That is:

- (a) The suit or issue was directly and substantially in issue in the former suit.
- (b) That former suit was between the same parties or parties under whom they or any of them claim.
- (c) Those parties were litigating under the same title.
- (d) The issue was heard and finally determined in the former suit.
- (e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

30. In the case of [Attorney General & another ET v](#) (2012) eKLR where it was held that;

“ The courts must always be vigilant to guard litigants evading the doctrine of *res judicata* by introducing new causes of action so as to seek the same remedy before the court. The test is whether the plaintiff in the second suit is trying to bring before the court in another



way and in form of a new cause of action which has been resolved by a court of competent jurisdiction. In the case of *Omondi s NBK & Others* (2001) EA 177 the court held that “parties cannot evade the doctrine of res judicata by merely adding other parties or causes of action in a subsequent suit”.

In that case the court quoted Kuloba J, (as he then was) in the case of *Njanju v Wambugu and another* Nairobi HCC No. 2340 of 1991 (unreported) where he stated: If parties were allowed to go on litigating forever over the same issue with the same opponent before courts of competent jurisdiction merely because he gives his case some cosmetic face lift in every occasion he comes to court, then I do not see the use of doctrine of *res judicata*.....”.

31. Res judicata applies to applications just like suits. In the case of *Julia Muthoni Gitthinji v African Banking Corporation Limited* [2020] eKLR the court stated thus:

14. After a careful reappraisal of the application for injunction before the lower court, I have come to the conclusion that the application was resjudicata and the entire suit was subjudice as there was an active pending suit before a court of competent jurisdiction being Nakuru ELC No. 272 of 2017. All issues raised in the suit before the subordinate court could be properly litigated in the suit pending before the ELC. The filing of the suit by the appellant in the subordinate court when she had a similar suit in the ELC Court was an abuse of the Court process which the Court cannot countenance.

32. Similarly, in *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment *Maumbwa & 3 others v Kisemei* (Civil Appeal E009 of 2021) [2022] KEHC 10416 (KLR) (26 May 2022) (Judgment) the court stated doth:

By comparing the two applications and the authorities on res judicata, it is clear to me that the issues being canvassed in the application dated 11th January 2021 is res judicata. The issues in issue in that application were directly and substantially in issue in the application dated 13th September 2017. These issues relate to the same parties and these issues have been tried by a competent court. To my mind to bring the same issues between the same parties that have been determined by a court of competent jurisdiction is an abuse of the court process.

33. I do not find any merit in the entire application. It is accordingly dismissed with costs to the respondent. In order to fast track, the hearing, it is important that the matter takes off on an irreversible trajectory till conclusion. I direct that the suit shall be heard on priority basis, with dates not more than one month apart and the plaintiff's case must be concluded by 31/12/2024, failing which it shall stand dismissed with costs to the defendants.

34. The matter shall be heard on 6/5/2024. Parties to fully comply before then

Determination

35. In the circumstances I make the following orders: -

- a. The Application dated 14/11/2023 lacks merit and is dismissed with costs of Ksh 27,000/=. All costs ordered hitherto be paid by 4/5/2024, failing which the suit shall stand dismissed with costs.
- b. The matter to proceed for hearing on 6/5/2024. Parties to comply with order 11 before then, if they have not complied.



- c. The suit be heard on priority basis and concluded by 31/12/2024, failing which the suit shall stand dismissed.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 4TH DAY OF APRIL, 2024.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Mr. Amuga for the Plaintiff

Mr. Shah for the Defendant

Court Assistant- Norah

KIZITO MAGARE J.

