



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT AT THIKA**

**ELC APPEAL CASE NO. 48 OF 2019**

**GRACE WAIRIMU NJIHIA.....APPELLANT**

**VERSUS**

**KIMANI MWANGI .....1<sup>ST</sup> RESPONDENT**

**MWANGI MUCHIRI.....2<sup>ND</sup> RESPONDENT**

*( Being an Appeal from the Ruling and order of Honourable M.W Wanjala, Senior Resident Magistrate delivered and dated 18<sup>th</sup> July 2019, in MCL & E Case Number 333 of 2014 at Thika)*

**JUDGMENT**

The Appellant is the Plaintiff in Thika **MCL & E 333 of 2014** while the Respondents are the Defendants. By a Notice of Motion Application dated **15<sup>th</sup> April 2019**, the Defendants (Respondents) sought for orders that;

- 1. That leave do and is hereby granted to the Defendants to amend the Defence dated 7<sup>th</sup> July 2014, in the manner demonstrated in the Draft Amended Defence and Counter Claim annexed to the Affidavit of Mwangi Muchiri annexed herewith as annexure MM1**
- 2. That the Court be pleased to grant any other appropriate relief that it deem fit in the interest of fair Administration of justice and the Rule of law,**
- 3. That Costs of this Application be provided for.**

The Application is premised on the grounds that a purposive scrutiny of the Defence filed by the Firm of Advocates previously on record for the Defendants (Respondents), does not offer a correct, substantive and elaborate purport of events and facts in the present dispute. That the said omission/ mistake by Counsel necessitates urgent amendment of the Defence to properly bring the Defendants ( Respondents) case before Court. That the Rules of Court constrain that leave must be obtained before any amendment can be made. Further, that allowing the Amendment and filing of the Counter Claim shall enable the Defendants(Respondents) to plead its entire case and enable the Court to effectually and completely adjudicate upon and settle all questions involved in the suit.

In his Supporting Affidavit, **Mwangi Muchiri** averred that he has been explained to by his Advocates on record which advice he believes to be true that the Defence as presently drafted does not bring to the Court the real matter in controversy between the parties herein specifically, it does not disclose the interest of the Defendants (Respondents) on the suit property **Ruiru /Kiu Block 2/2014**, as will be brought in the Counter Claim. That the draft Amended Defence and Counter claim demonstrates the manner in which the amendment is sought. Further, that he has been advised by his Advocates that the amendment as sought can be done at any time before Judgment, in accordance with the law.

The Application was opposed and **Grace Wairimu Njihia**, the Plaintiff ( Appellant) swore a Replying Affidavit on **20<sup>th</sup> May 2019**, and averred that the Application lacks merit as it is brought in bad faith as it is out to scuttle the hearing of her case, to its logical conclusion as it was filed on **30<sup>th</sup> April 2019**, but the same was served on her Advocates on **20<sup>th</sup> May 2019**, with no good reasons advanced. That the Plaintiff (Appellant) is a total stranger to the alleged suit property **Ruiru /Kiu block 2/2014**, as advanced in their Application and that she had been advised by her Advocate on record, that the Court cannot grant the orders sought in respect to a suit property not pleaded in the pleadings.

Further that the Defendants (Respondents) filed their Defence on **8<sup>th</sup> July 2014**, through their Advocates on record and rushing to Court **5 year later**, allegedly citing mistake and omission reeks of total contempt. Further that the alleged Amendment introduces a Counter Claim in this stage of proceedings, after she had testified and closed her case and is ill conceived as it seeks to introduce a new cause of action, which is time barred and thus asking the Court to substitute a cause for another and change the subject matter. That the **2<sup>nd</sup>** Defendant

(Applicant) has not come to this Court with clean hands, as the Application was served on her Advocates on the date that the suit was coming up for Defence hearing, notwithstanding it was filed on **30<sup>th</sup> April 2019**. That she has been advised by her Advocates that the Defendants (Respondents) have a habit of filing pleadings outside the timelines to scuttle the Court proceedings and embarrass the Court in delaying the suit.

It was further averred that leave ought to be obtained, but the leave is **not absolute**, that it will be given, where it occasions injustice to another party to the pleadings and inadvertent error which is not in this case and it will be prejudicial to the Plaintiff (Appellant), coming after the close of her case. That amendments are generally allowed, if they don't create a new cause of action nor introduce new materials to the pleading after the close of the Plaintiff's (Appellant) case and it is not an abuse of the Court process as in the instant Application. That it is in the interest of Justice that the Orders sought by the 2<sup>nd</sup> Defendant (Respondent) are not to be allowed, as he pleaded a wrong suit property. That the Orders are futile and hence the Application ought to be dismissed.

The Application was canvassed by way of Written Submissions and the Court delivered its Ruling on **18<sup>th</sup> July 2019**, allowing the Defendants (Respondents) application and ordered that;

- a) *That the annexed draft amended Defence be deemed as duly filed upon payment of the requisite filing fees.*
- b) *The Plaintiff is at liberty to file a reply to that defence and Defence to counter Claim and have it served within 14 days of this Ruling.*
- c) *This case shall proceed to hearing on the 20<sup>th</sup> August 2019 starting with the Plaintiff if she wishes to adduce any further or their evidence,*
- d) *The costs of the Application are awarded to the Plaintiff.*

The Appellant being aggrieved by the above decision filed a Memorandum of Appeal dated **29<sup>th</sup> July 2019**, and sought for orders that ;

1. *That this Appeal be allowed with costs to the Appellant.*
2. *That the Decision, Ruling and Order of Honourable M.W Wanjala, Mr. Senior Resident Magistrate delivered on 18<sup>th</sup> July 2019, in MCL & E Case No. 333 of 2014, Thika which were adverse to the Appellant be set aside and vacated.*
3. *That the Application dated 30<sup>th</sup> April 2019 in MCL & E Case No. 333 of 2014 Thika by the Respondent be dismissed with cost to the Appellant.*

The grounds upon which the Appeal are grounded are ;

1. *That the Learned magistrate erred in Law and in fact by introducing a new issue that was never pleaded canvassed or proved by the Respondent in respect of Respondents intestate in the suit land.*
2. *That the Learned Magistrate erred in Law and in fact by failing to uphold the submissions by the Appellant that the Respondents had introduced a new cause of action in their Counter Claim which completely prejudiced the Appellant*
3. *That the Learned magistrate erred in law and in fact by failing to uphold the fact that the Appellant had testified and closed her case on 23<sup>rd</sup> September 2015, and what was pending since then was the Respondents Defence hearing.*
4. *That the Learned Magistrate erred in Law and in fact by failing to uphold that the Respondent were guilty of inordinate delay as their Defence was filed way back in 2014, on several occasions caused severally adjournments of this suit*
5. *That the learned Magistrate erred in law and in fact by falling to uphold that the Respondent had pleaded wrong suit property being Ruiru / Kiu Block 2/2014 which was never in contention in suit pleadings and thus introducing a new cause of action not initially pleaded.*
6. *That the Learned Magistrate erred in Law and in fact by failing to explicitly give a timeline to the Respondents to file and serve their intended Amended Defence and Defence to counter claim whereas giving the Appellant strict timeline to allegedly file a reply and have it served within 14 days of the ruling which is prejudicial and biased to the Appellant herein.*
7. *That the Learned Magistrate erred in Law and in fact by failing to uphold and state that the Appellant's suit stood reopened in his wise decision which is prejudicial and clearly understood as to what terms on how to proceed from there.*
8. *That the Learned magistrate erred in Law and in fact by failing to indicate that the Appellant was to reply to an Amended defence and not a Defence as alleged and openly showing favour by granting a tight timeline to the Appellant to reply to the alleged Defence and Counter Claim notwithstanding that the Respondent were never given any strict guidelines to file their alleged Defence and Counter claim which was prejudicial to the Appellant.*
9. *That the Learned Magistrate erred in Law and in fact in failing to give proper directions on the way forward this suit ought to proceed and arm twisting the parties by giving a hearing date in a months time without allowing time for compliance*

*on pre trial issues emanating from the alleged Counter Claim having introduced a new party which is prejudicial and quiet biased to the Appellant considering that the Respondent had included new cause of action and thereby arrived at an erroneous decision.*

**10. That the Learned Magistrate erred in Law and in fact by failing to appreciate the gravity of the Appellant's evidence and submissions.**

The Appeal was canvassed by way of written submissions and the Appellant through the Law Firm of **Kibathi & Company Advocates**, filed her written submissions dated **31<sup>st</sup> May 2021**, and submitted that in the case of **Abdul Karim Khan...Vs... Mohamed Roshan (1965) EA 289**, the Court laid down the principles that the Courts will not permit an amendment that is inconsistent with the original pleading, which entirely alters the nature of the Defence or Plaintiff. It was further submitted that the Amendment that are sought, introduce a new cause of action founded partly in fraud and false misrepresentations. That the said actions are in tort and ought to have been brought before the lapse of three years.

It was the Appellant's further submissions that in as much as amendment may be sought at any time of the proceedings, but that at this level, of the proceedings an amendment that is not superficial in nature, but substantial may be difficult to procure as there is a probability of the same being highly prejudicial to the Appellant, as the party will have closed their case and may not have a chance to re open it, in order to challenge any new matter that may have been raised. That the trial Court entered into the arena of **Succession Law** that was never pleaded nor an issue herein being intestacy. Further, that the land in dispute is not registered in the name of any Deceased person and that the said issue has not been pleaded by any party and must not be raised in this case. The Court was therefore urged to allow the Appeal.

The Respondents filed their written submissions through the Law Firm of **Echesa & Bwire Advocates LLP**, dated **29<sup>th</sup> June 2021**, and submitted that the mentioning and or inclusion of the word **intestate** in instead of the word **interest** in the trial Court's Ruling was a pure **typographical error**, and the same can be cured by the trial Court on its own motion as no issue of succession was ever pleaded by either party and it is only logical that the same was a clerical error. That Applications for amendment of pleadings are guided by the provisions of **Order 8 Rule 3 of the Civil Procedure 2010**. Further, that the Defence filed by the Respondent's previous Advocates is a mere denial and does not offer an elaborate purport of the events and by setting aside of the ruling by the trial Court and allowing the matter to proceed in absence of the amendment, already effected, the Court shall cripple the trial Court as the Court shall not effectively determine the substantive merits of the case. The Respondents relied on the case of **Institute for Social Accountability & Another ...vs... Parliament of Kenya & 3 others (2014) eKLR** where the Court held that;

*“ the object of the 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 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,”*

That the Respondents are apprehensive of a possible miscarriage of justice unless the amendment is allowed. That in determining when an amendment can be made, the Court ought to be guided by the provisions of **Order 8 Rule 5(1) of the Civil Procedure Rule**, where the Civil Procedure provides that the discretion may be exercised at any stage of the proceedings and that is to say before or at the trial, after the trial, after the judgment or on appeal and on this the Respondents relied on the case of **Martin Wesula Machyo ...Vs... Housing Finance Company of Kenya Limited & Another (2015)** where the Court held that

*“...mere delay is not a ground for declining leave to amend but that such delay must be one likely to prejudice the other party beyond monetary compensation. In my view if no prejudice which cannot be compensated by an award of cost will be visited upon the Defendants if the Application for amendment is allowed as the Defendants will have the opportunity to respond to the amendment if they so wish.’*

That the above precedent confirms that the trial Court has wide and unfettered discretion to allow amendment of claim provided that it is not after an **inordinate delay** or it would occasion prejudice to the other side. That the amendment is being sought after the close of the Appellant's case and the same is not too late in the day and the Appellants will have an opportunity to fashion a Defence and give evidence to counter the issues by the amendment, as she is the 2<sup>nd</sup> Defendant in the Counter Claim.

That it is trite that the mistake of the Counsel should not be visited in an innocent litigant as the Respondents are laymen and they have been diligently attending Court. It was therefore submitted that the Application was without any form of delay.

That if the Court allows the Appeal, the Respondents will be forced to file another suit and the same will occasion multiplicity of suits over the same suit property. It was further submitted that the facts raised in the amendment did not raise any new issue, case and or new ground that changes the action into one of a substantially different character, which could more conveniently be made the substance of a fresh suit. That the amendment offers the genesis of the proprietorship, of the suit property and through the amendment, the trial Court will be able to effectively determine the genesis of the case.

It was further submitted that the amendments herein were done in good faith and would aid the Court in determining the real question in controversy as they are aimed at aiding the efficient determination of the suit. The Court was urged to consider that the advantage of granting the Application guaranteed the possibility that all claims relating to the suit property may be resolved in one suit. That the drafting of the Application before the trial Court seeking to amend the pleadings as filed by previous Counsel, the Respondents made reference to the suit property as being **L.R 2/2014**, instead of **LR 2/4014**, whereof to an inadvertent typographical error, the Respondents replaced the **“4”** with a **“2”** and that the same was purely a typographical error. That no prejudice was visited upon the Appellant as she was allowed to file her Defence and Counter Claim and if the period was not sufficient, she ought to have sought for extension.. Further, that the trial Court acknowledges that the suit stood re opened. Further that it is in the interest of justice that the

amendment be allowed.

Being a first appeal, it is the duty of this Court to re-evaluate the evidence led before the trial court both on points of law and facts and come up with its own findings and conclusions. See the case of **Kamau ...Vs...Mungai [2006] 1 KLR 15**, where the Court held that;

***“Being a first appeal, it is the duty of the court to re-evaluate the evidence, assess it and reach its own conclusions remembering that it had neither seen nor heard witnesses hence making due allowance for that.”***

Further as the Court determines this Appeal, it takes into account that it will only interfere with the discretion of the trial Court where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. See the case of **Ocean Freight Shipping Co. Ltd...Vs.. Oakdale Commodities Ltd(1997)eKLR, Civil App.No.198 of 1995**, where the Court held that:-

***“This is of course not an appeal to us from the decision of the single Judge. The discretion given by Rule 4 is exercised on behalf of the court by a single Judge and for a full bench to interfere with the exercise of the discretion, it must be shown that the discretion was exercised contrary to law, i.e. that the single Judge misapprehended the applicable law, or that he failed to take into account a relevant factor, or took into account an irrelevant one or that on the facts and the law as they are known, the decision is plainly wrong”.***

The Court has carefully read and considered the Written Submissions, the Record of Appeal the grounds thereof and the Judgment by the trial Court and finds that the issue for determination is ***Whether the Appeal is merited.***

The Appellant seeks to set aside the decision and order of the trial court that allowed the Respondents to file an **Amended Defence**, and **Counter Claim**. Before the determination on whether the Appeal is merited, the Court will first seek to determine certain issues raised by the Appellant being that the Court erred by introducing an issue that was never pleaded by the parties with regards to the suit being Intestate.

The Court has gone through the Ruling dated **18<sup>th</sup> July 2019**, by the trial Court and notes that the Court stated;

***“...did not disclose the Defendants intestate in the suit land and that the intended amendment seeks to cure that...”***

Having holistically read the said determination, the Court concurs with the Respondents that the same may have been a typographical error, and could not have meant **intestate** but rather **interest**, in the suit, as no other findings have been made and or alluded to with regards to intestacy.

In order to determine whether the Appeal is merited or not, the Court will have to re-evaluate the evidence and find whether the Application by the Respondents was merited. The Respondents in the Application dated **15<sup>th</sup> April 2019**, had sought for leave to amend the Defence. In its draft Defence, the Respondents had also annexed a Counter Claim. It is not in doubt that the Plaintiff's suit was heard on **9<sup>th</sup> July 2014**, and the instant Application was filed in **2019**. The reason that the Respondents have given in seeking to Amend the Defence is that their previous Advocates had filed a Defence that did not offer elaborate purport of events and facts in the present dispute and therefore they are seeking to cure the same to enable the Court to efficiently and effectively adjudicate upon the issues.

The Court is guided by the provisions of **Order 8, Rule 3 of the Civil Procedure Rules which provides as follows:**

***“ (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.”***

Further the principles that should guide the court in dealing with applications for amendments are elaborated in **Mulla, the Code of Civil Procedure, 18<sup>th</sup> Ed, Vol 2 pages 1751-1752**, which has been cited in various authorities including the case of **Coffee Board of Kenya V Thika Coffee Mills Limited & 2 Others (2014) eKLR**, where the Court held that ;

- i. Amendments should be allowed which are necessary for determination of the real controversies in the suit;***
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;***
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;***
- iv. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;***
- v. Amendments of a claim or relief barred by time should not be allowed;***
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of***

*lapse of time*

*vii. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties*

*viii. The delay in filing the petitions for amendment should be properly compensated by costs*

*ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings”*

The above being the principles that guide the Court in either allowing or disallowing an Application for leave to Amend pleadings, the Court has carefully read and considered the **Draft Amended Defence** and **Counter Claim** to identify whether the said principles are met. Having gone through the same, the Court notes that in the Amended Statement of Defence, the Respondents are merely responding to the averments in the Plaintiff and responding to issues that have been raised in the Plaintiff. Further, in the **Counter Claim**, the Respondents have alleged that the cause of action arose on or about **March 2013**, when the Appellant began development, the Application having been brought in **2019**, it is therefore not in doubt that the same is not barred by time.

Upon further perusal of the Counter Claim, the Court notes that the reference is to the instant suit property, and that the Respondents have sought to give an account of the happenings regarding the acquisition of the suit property. The Court therefore finds and holds that no new cause of action has been raised, as the same relates to the instant suit property and the amendments seeks to bring facts that the Respondents seeks to rely on. Consequently, the Court finds and holds that the amendment is necessary to enable the Court determine the issues in dispute.

The Court notes that the Amendment was brought after the Appellant had already given her evidence. In the case of **Suleiman v Karasha [1989]eKLR** the Court of Appeal held that:

*“Under the Civil Procedure Rules, the parties can amend their pleading with the leave of the court at any time before judgment. Such amendment would clearly set the issues in dispute to enable the Court to arrive at a just decision. It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as it may deem just.”*

The trial Court in its Ruling noted that greater justice will be served in allowing the intended amendments as these will allow the Court to Succinctly adjudicate over all the issues in this matter. It is evident that a Court sitting on Appeal will only interfere with the discretion of the trial Court, where it is shown that the said discretion was exercised contrary to the law or that the trial Magistrate misapprehended the applicable law and failed to take into account a relevant factor or took into account an irrelevant factor or that on the facts and law as known, the decision is plainly wrong. Having gone through the trial Court’s determination, the Court finds **no reason** to interfere with the said determination.

However, the Court notes that parties are responsible for the inactions of their Advocates, if they chose to be represented by the said Advocates. The delay of **5 years** was a long time and the same having come after the Appellant had tendered her evidence, it would be in the interest of justice that at the very least the Appellant is compensated by way of costs

The Appellant has also faulted the trial Court on various issues including failing to find that her case stood closed and failing to give proper directions on the way forward. The Court having gone through the Ruling notes that the trial Court did give directions on how to proceed and allowed the Appellant to adduce any evidence thereby effectively re-opening the Appellant’s case.

Having now carefully re-evaluated and re-assessed the available evidence before the trial Court, and the **Memorandum of Appeal**, together with the written submissions, the Court finds that the trial Magistrate arrived at a **proper determination** and this Court finds no reason to upset the same. However, the Court will grant the appellant throw away costs of **Kshs. 50,000/=** to compensate her for the lost time.

The upshot of the foregoing is that the Appellant’s Appeal is found **not merited** and consequently the said Appeal is **disallowed** and the Ruling and order of the trial court is upheld. The Respondents will pay a throw away costs of **Kshs. 50,000/=** to the Appellant. Costs of the Appeal to be in cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT THIKA THIS 30TH DAY OF SEPTEMBER, 2021.**

**L. GACHERU**

**JUDGE**

**Court Assistant – Kuiyaki**