



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT KISUMU

CASE NO. 357 OF 2015

NIZAR HASHAM VIRANI

SHAMSHUDIN GULAMHUSSEIN NANJI.....PLAINTIFFS/APPLICANT

VERSUS

KENYA PIPELINE COMPANY LTD.....DEFENDANT/RESPONDENT

RULING

Introduction

The application before me is dated the 1st of April 2021 seeking orders that time be enlarged for the Plaintiffs/Applicants to file an application for further amendment and that the further amended plaint filed and served herein be and is hereby deemed as having been properly filed and served upon payment of requisite fees. Costs of this application be provided for.

The genesis of the matter is that the plaintiffs instituted this suit vide a plaint dated 23rd December 2015 seeking an order of permanent injunction restraining the Defendant by itself, its agent, servants, employees, assigns from howsoever interfering with the Plaintiffs' proprietary rights, peaceful enjoyment and possession of its land parcel no. KISUMU/KOGONY/2642;

Further the plaintiff sought a declaration that the Plaintiffs are legally entitled to appropriate compensation before any Easementary right may be created or acquired by virtue of the Defendant laying or seeking to lay a pipe line or pipelines across the Plaintiffs parcel of land no. KISUMU/KOGONY/2642 Costs of the suit plus interest

Subsequently on the 15th of March 2019 the Plaintiffs/Applicants filed an Amended Plaint where they averred that the Defendant had plans to lay an additional pipe on the property. They therefore sought the following additional orders.

(aa). An order for removal of the second pipeline laid without addressing the issue of compensation

(bb). An Order for appropriate compensation for the damage occasioned at the time of laying the second pipeline across the Plaintiff's land and general damages for trespass.

It seems from the amended amended plaint attached to the application which is the subject of this ruling that the Defendants made good their plans and laid another pipe on the plaintiffs' land, as the plaintiff has sought for orders of removal of the second pipe and or compensation for damages on the property occasioned while laying the pipe.

The Plaintiffs/Applicants grounded their Application on the fact that the amendment was necessary to enable the court resolve the real issues in controversy between the parties. And that the Respondent will not be prejudiced in any manner.

Vide a supporting Affidavit dated 1st April 2021 sworn by counsel for the Applicants, it was contended that failure to file this application within the stipulated time as per leave granted on 24/2/2021 was due to pressure of work.

That the mistake of an advocate should therefore not be visited upon the client and that it was in the interest of justice that the orders sought be granted.

RESPONDENT'S REPLYING AFFIDAVIT

In response to the application the Respondent filed a replying affidavit dated 12th April 2021 sworn by their administrative manager Wilfred

Mengich in which they averred that the Plaintiffs had never bothered to prosecute the suit for the past 6 years save for incessantly filing applications to amend the plaint.

That the proposed amendment was time barred by the provisions of Section 4(2) of the limitations of Actions Act, having been made after the stipulated three-year period.

That further the proposed amendment to introduce a claim for 3 million was too drastic warranting the filing of a fresh suit.

That the application was an afterthought filed for the sole purpose of prolonging this matter.

That the delay in presenting the Application was inordinate and the same should therefore be dismissed with costs.

ISSUES AND ANALYSIS

From the foregoing the following issues for determination come to the fore.

- i. Whether the Plaintiff/Applicant may be granted leave to file amended plaint out of time.
- ii. Whether the draft amended plaint may be deemed as filed upon payment of the requisite fees.

i. Whether the Plaintiff/Applicant may be granted leave to file amended plaint out of time.

From the court record it is clear that the Plaintiffs/Applicants were granted leave to file the amended amended plaint within 14 days from the 24th of February 2021, but they did not comply. They then filed this Application on the 13th of April 2021 more than one month down the line. Counsel for the Applicants'/Plaintiffs' attributed this delay to inadvertent mistake on his part. The respondents on their part argued that the delay in filing of the application was inordinate, unexplained and unreasonable therefore undeserving of favourable exercise of the courts' discretion.

The statutory provision on failure of a party to amend despite being granted leave is Order 8 rule 7 of the Civil Procedure Rules 2010 which provides as follows; -

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if no period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

It is also important to note that section 95 of the Civil Procedure Act gives the court discretion to enlarge time fixed for doing any act even though such period may have lapsed.

It is indeed true as averred by the Respondent/Defendant that the reason for delay is unexplained. However, a delay of a month or so is not very long, and the Respondent/Defendant is not likely to suffer any prejudice that cannot be compensated by way of costs. Keeping in mind that here would be no miscarriage of justice if time is extended. This point is buttressed by the case of **Libya Oil Kenya Limited v Joel Kipkorir Siele & another [2021] eKLR** where the learned Judge in dealing with a similar scenario stated as follows: -

“I am of the view that the inconvenience suffered by the Defendant/Respondents as a result of reinstatement of the orders of 6th February 2019 can be adequately remedied through an award of costs”.

In view of the foregoing the court is inclined to grant leave to file an amended plaint.

ii. Whether the draft amended plaint may be adopted as is upon payment of the requisite fees.

The plaintiffs/Applicants have annexed a draft amended amended Plaint to this application which in a nutshell seeks further orders of compensation for damages caused by laying of another pipe on their land. The Respondent/Defendant has on his part averred that the proposed amendment introducing a claim of Kshs Three Hundred Million is too drastic and in essence should be the subject of another suit altogether. The question that comes to the fore from the foregoing therefore is whether the laying of a second pipe constitutes facts that are fundamentally different as to warrant the filing of a different suit.

A keen scrutiny of the previous pleadings clearly shows that the Plaintiffs/Applicants have generally been seeking damages over the same subject piece of land. This does not in any way contradict Order 2 Rule 6 (1) of the Civil procedure rules which provides that: -

“...no party may in any pleading make an allegation of fact or raise any new ground of claim inconsistent with a previous pleading of his in the same suit”.

There is no indication that the Plaintiffs/Applicants are seeking to introduce a new claim through the back door as the issue involves the same parties, the same piece of land and the continued and /or laying of infrastructure on the land by the Defendant/Respondent.

The principles governing amendment of pleadings were well laid down in the case of **AAT Holdings Ltd v Diamond Shields International**

Ltd [2014] eKLR as follows;

- i. The proposed amendment is necessary for determining the real question in controversy. It is not immaterial or useless or merely technical.**
- ii. There has been no undue delay in making the application.**
- iii. The amendments does not introduce a new or inconsistent cause of action which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. The documents which support the amendment of the impugned averments in the plaint, clarifies the mix-up, are part of the record and relate to the same facts on which the cause of action is based.**
- iv. There is no vested interest or accrued legal rights which will be affected; and**
- v. The amendment does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.**

From the principles above it is clear that the amendments sought relate to new developments that are material to this suit, and will in any case avoid multiplicity of suits.

In view of the foregoing I do grant orders sought in the Application thus that time be and is hereby enlarged for the Plaintiffs/Applicants to file an application for further amendment and that the further amended plaint filed and served herein be and is hereby deemed as having been properly filed and served upon payment of requisite fees.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 3RD DAY OF SEPTEMBER, 2021

ANTONY OMBWAYO

JUDGE

This Ruling has been delivered to the parties by electronic mail due to measures restricting court operations due to the COVID-19 pandemic and in the light of the directions issued by his Lordship, the Chief Justice on 15th March 2019.

ANTONY OMBWAYO

JUDGE