



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT EMBU

PETITION NO. 2 OF 2017

IN THE MATTER OF ARTICLE 40(3), AND 47 OF THE CONSTITUTION

AND

IN THE MATTER OF THE CONTRAVENTION OF FUNDAMENTAL RIGHTS AND FREEDOMS MATTER UNDER ARTICLE 19,20,22,23,29 AND 40 OF THE CONSTITUTION

AND

IN THE MATTER OF THE FAIR ADMINISTRATION ACTION UNDER ARTICLE 47 OF THE CONSTITUTION

AND

IN THE MATTER OF PROTECTION OF RIGHTS TO PROPERTY UNDER ARTICLE 40 OF THE CONSTITUTION AND SECTION 13(3) OF THE ENVIRONMENT AND LAND ACT 2011

ALFRED MUNYI & 34 OTHERS.....PETITIONERS

VERSUS

THE MINISTER FOR LANDS.....1ST RESPONDENT

THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT....2ND RESPONDENT

THE NATIONAL LAND COMMISSION.....3RD RESPONDENT

THE CHIEF LANDS REGISTRAR.....4TH RESPONDENT

MARGARET WAMITI JONAH (Sued as the Legal Representative

of the Estate of Jonah Kabuta).....5th RESPONDENT

RULING

INTRODUCTION

1. Before the court is a notice of motion filed on 22nd February 2021 and dated 18th February 2021. The Application is expressed to be brought under Rules 18 & 19 of the Mutunga Rules Act (sic) 2011 and all other enabling provisions of the law. The Applicants are **ALFRED MUNYI & 34 OTHERS** who are the petitioners in the suit while the Respondents are **THE MINISTER FOR LANDS, THE DIRECTOR OF LAND ADJUDICATION & SETTLEMENT, THE NATIONAL LAND COMMISSION, THE CHIEF LAND REGISTRAR & MARGARET WAMITI JONAH**.

APPLICATION

2. In the application, the applicant sought leave to amend the petition. The application was supported by grounds *inter alia*, that there are glaring errors on the face of the petition capable of defeating justice; and that owing to the typographical errors the prayers in the petition are

incapable of being granted as they are. The applicants pleaded that an amendment would avert miscarriage of justice likely to be occasioned by the errors. They further averred that the application was made in good faith and it was in the interest of justice that the application be granted. The Petitioners filed a supporting affidavit dated 18.2.2021 sworn by Alfred Munyi the 1st petitioner, in which he reiterated the grounds in the application in support of the case.

RESPONSE

3. Only the 5th Respondent responded to the application vide a replying affidavit which was filed on 18.3.2021 and dated 17.3.2021. The replying affidavit was sworn by the advocate on record one Njeru Ithiga who averred that the applicants were not within their rights to file the amendment at this stage of trial; and that the typographical errors were not identified in the affidavit and neither were there annexures in support of the prayers sought. He further averred that the 4 year delay in discovering the errors was not explained; and that directions for filing submissions were given but the applicants delayed in filing and were granted several adjournments and eventually the court allowed them to file submissions. However, the applicants failed to file submissions and a notice to show cause was issued which then prompted the present application. He termed the application as a frivolity and an abuse of the court process.

4. The applicants filed a supplementary affidavit and annexed the amended petition which they aver their advocates had inadvertently failed to attach. They pleaded that the law allows them to amend pleadings with leave of court at any stage of the proceedings. They further averred that the prayers in the application would be the same except for the reference of the 3rd Respondent in place of the 5th Respondent.

SUBMISSIONS

5. The application was canvassed by way of written submissions. The 5th Respondent filed her submissions first. The applicants' submissions were filed on 28.5.2021. They extensively relied on the averments in their application and further submitted that amendments to pleadings should not be unduly denied unless the proposed amendments are frivolous and would not help the court to arrive at a proper determination of the suit. It's their submission that amendments are to avoid a multiplicity of suits. They submitted that denying them leave to amend the petition would force them to file another suit. They relied on the case of ***Central Bank Limited Vs Trust Bank Limited (2000) 2EA*** cited in ***Andrew Ouko Vs Kenya Commercial Bank Limited & 3 others (2014) eKLR*** where it was stated that mere delay is not a ground for declining to grant leave unless the delay is likely to prejudice the opposite side beyond monetary compensation in costs. They also placed reliance on the case of ***Central Kenya Ltd Vs Trust Bank Limited (2000) 2EA Civil Appeal No. 222 of 1998*** which set out the threshold which guides the exercise of discretion in amendment of pleadings.

6. Lastly they relied on the case of ***Eastern Bakery Vs Castelino (1958)*** as cited in the case of ***In Rewinding Up of Consolidated Marine Contractors Ltd (Comarco Ltd) eKLR*** where it was stated that courts will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the action would prejudice the rights of the opposite party existing at the date of the amendment. With that, they submitted the amendments would assist the court to conclusively deal with the matter and they prayed for the application to be allowed.

7. As pointed out earlier the 5th Respondent's submissions were filed on 24.5.2021. She relied on the replying affidavit filed by her advocate. According to the applicant the court cannot be faulted for its inability to render a considered opinion of their petition as there is nothing substantial in the Application. She relied on the case of ***Meru ELC No. 324 of 2017 Mary Igoki Mutuaruchiu Vs Johnson Rwigy*** where it was held that a court cannot entertain an application for arresting a judgment where no new and important evidence has been provided. She submitted that parties are bound by their pleadings and that the applicants have not given a compelling reason as to why they have delayed in seeking leave to amend the petition for four years. The Respondent views the present application as an attempt to wiggle out of the Notice to show cause application. The Respondent calls upon the court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

8. I have considered the application as filed, rival submissions, and the court record in general. The applicants have filed the application seeking to amend the petition. They aver that they noted typographical errors which prompted them to seek to arrest the judgment in order to amend the petition for purposes of bringing to court and determining all the real questions in controversy between the parties. The typographical errors referred to in the application are to the effect that reference made to the 3rd Respondent in the petition ought to be the 5th Respondent and if the petition is determined as it is, then the prayers sought are not capable of being granted as they are.

9. The Respondent has strongly opposed the application. According to her, the applicants have not explained the reason for the delay of four years and further they had failed to comply with the court's directions to file submissions for the petition only to be issued with a notice to show cause why the petition should not be dismissed. They now seek to amend the petition. She further pointed out that the typographical errors were not identified in the application and neither were any annexures enclosed to the application.

10. In my view, the sole issue for determination is whether leave to amend the petition ought to be allowed. As a general rule, amendment of pleadings may be done at any time during the proceedings for purposes of determining the real question in controversy between the parties. ***Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76***, states the following about amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”.

11. The threshold for grant of amendment of pleadings was set out in the **Court of Appeal in case Central Kenya Limited v Trust Bank limited (2000)2 E.A 365 as follows:-**

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.” Further in the case of **Nyamode Ochieng Nyamogo V Kenya Posts & Telecommunication Corporation [2007] eKLR** the court stated that

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely or to claim”.

12. The Respondent has submitted that there is an unexplained delay of four years and further that the applicants failed to comply with the court’s discretion regarding filing the submissions. It is not in dispute that the applicants were granted several chances to file submissions but sought an extension of time and later sought to file the present application. According to the Respondent this should be taken into consideration when determining the present application. Further, the applicant terms the application as a delaying tactic to avoid determination of notice to show cause application.

13. I have perused the notice to show cause application which was issued on 25th February 2021. I have also perused the present application and it appears that the application was filed two days before the notice to show cause was filed. Based on the court record, it seems to me that the present application had not been brought to the deputy registrar’s attention at the time of issuing the notice to show cause. I am therefore satisfied that the application was not in any way a delaying tactic to the determination of the notice to show cause application. But I think I agree with the Respondent that the applicant delayed in filing its submissions by seeking extension of time on when to file. In the case of *Central Kenya Limited –v- Trust Bank Limited (supra)* it was *however stated 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.*

14. Relying on the above authority, I find that the delay notwithstanding, there is no prejudice, if any, which cannot be compensated by an award of costs to the Respondent. Further, this court still has the inherent power under Section 3A of the Civil Procedure Act, to allow the applicant to amend its pleadings at any time before judgment. The court further has a duty to determine whether there would be any prejudice suffered by the applicant as a result of allowing the amendment. In the case of **J. C. Patel v D. Joshi [1952] 19 EACA 12**, the court held:

“The rule of conduct of this court in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be made if it can be made without injustice to the other side.”

15. The Respondent has not stated any prejudice likely to be suffered if the amendment is allowed or that they will suffer any form of injustice. Based on the nature of the amendment sought to be made, which are typographical errors, the court is of the view that no prejudice whatsoever will be occasioned to the Respondent by allowing the amendment sought.

Courts have been cautioned from allowing amendments that change the cause of action of the suit. The applicants have sought an amendment to the effect that the reference in the application to the 3rd respondent ought to be the 5th Respondent. I have carefully looked at the petition itself and the specific amendments sought to be made. The amendments to me do not seem to alter the cause of action of the suit. As stated by the applicants they are mere typographical errors.

16. This suit is at the judgment stage, though the Respondent has already filed her submissions the court is of the view that the amendment sought aids it in dealing with the real issues in controversy. If any orders are to be made for or against any of the parties in the petition then the court needs to issue the orders to or against the right parties to ensure the orders or judgment is not in vain and is capable of being implemented. The application therefore has merit. I however condemn the petitioner to pay cost of the application.

17. Ultimately it is the court’s finding that the application herein has merit and it allowed in the following terms:

- a. That leave be and is hereby granted to the petitioners to amend the Petition in terms of the draft Amended Petition annexed to the supplementary affidavit herein.
- b. That the Amended Petition be filed and served within 7 days from the date hereof; leave is equally granted to the Respondent to amend its Replying affidavit, if need be.
- c. That the costs of the application be borne by the Petitioners.

RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AT EMBU THIS 25TH DAY OF OCTOBER, 2021

In the presence of M/s Njenga for 1st to 4th respondents and in the absence of Nyamu for petitioner and Njeru Ithiga for the 5th respondent.

Court Assistant: Leadys

A.K. KANIARU

JUDGE

25.10.2021