



REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT

AT NAIROBI

ELC SUIT NO. 5 OF 2010 (OS) CONSOLIDATED WITH ELC CIVIL CASE NO. 128 OF 2020

BERNARD MWANGI NDERITU.....1ST PLAINTIFF

HESBON OMONDI.....2ND PLAINTIFF

FRANCIS RUMANO.....3RD PLAINTIFF

PETER WAMBUGU.....4TH PLAINTIFF

STEPHEN KAMAU.....5TH PLAINTIFF

MARY WAMBU (DECEASED).....6TH PLAINTIFF

VERSUS

NDIARA ENTERPRISE LIMITED.....DEFENDANT

RULING

1. The above mentioned two suits were consolidated on 21.6.2021 following an application made by the Defendants dated 22.4.2021. On 14.2.2019, the case of Bernard Mwangi Nderitu, 1st Plaintiff in **ELC Case No. 5 of 2010** was marked as withdrawn. The court was also informed that the 6th Plaintiff in the same file died on 4.11.2012. Coming up for determination is a **Notice of Motion application dated 19th July 2021** brought forth by Applicants who are represented by N. Owino, advocate for 5th Plaintiff. The court will also determine the **Preliminary Objection** filed by the defendant **dated 27.9.2021**.

Case for the Applicants

2. The Notice of Motion dated 19th July 2021 seeks the following orders:

i. Spent

ii. That the Applicants be granted leave to amend the Originating Summon in terms of the annexed amended draft.

iii. That the amended originating summons dated the 31st day of May 2021 and filed on the 2nd day of June 2021 be deemed to be properly on record.

iv. That cost of the Application be in the cause.

3. This application is premised on the grounds on the face of the application and on the supporting affidavit of Norah Owino counsel for the Applicants. The Applicants aver that when the suit was instituted, the Plaintiffs were officials of Saikoma Self Help Group but have since been ousted and were being uncooperative. Counsel added that despite the Plaintiffs being officials of the said self-help group, they filed the suit in their personal capacity.

4. The submissions of the Applicants are dated 14th October 2021, where a back ground history of the suit has been given. That when this file and **ELC No. 128 of 2020** were consolidated, they were asked by court to file joint originating summons and other pleadings but this was not realised because the advocates representing the parties did not agree on joint pleadings. This resulted to the consent order to substitute

Plaintiffs being set aside. Counsel indicated that when the consent was set aside, they had already filed the amended pleadings and other supporting documents. It is submitted that the amendment was necessary as it brought on board officials acting on behalf of Saikoma Self Help Group who could ably prosecute the suit.

5. In support of their case, the Applicants made reference to the case of **Julia Akello Kunguru v Seth Lugonzo and Kenya Tourist Development Corporation H.C. Milimani Civil Suit No. 197 of 2001** where Justice Ringera allowed amendment to pleadings stating that *amendments to pleadings should be freely given at any stage so long as the other party is not prejudiced...* The case of **City Clock Ltd v County Clock Kenya Ltd and Bonface Mnange Kitiro (2020)** which laid out principles governing amendment of pleadings was also referred to.

6. It was further submitted that the Defendant's preliminary objection was not on a point of law but facts that require evidence and should be dismissed citing the case of **Mukisa Biscuit Manufacturing Company Ltd v West-End Distributors (1969) EA 696.**

Case for the 2nd - 4th Plaintiffs

7. On 4.10.2021, the day the court gave directions on the prosecution of the application dated 19.7.2021, Mr. Nyambergi appeared for the 2nd-4th Plaintiffs and he indicated that they opposed the aforementioned application of which they had filed grounds of opposition as well as a Preliminary Objection both dated 29.9.2021. However, no such documents could be traced in the courts CTS system or in the physical file.

Case for the Defendant

8. In opposition to the application, the Defendants have filed a rather lengthy affidavit of one Alfred Kariuki who identifies himself as the director of the Defendant. The issues raised therein are in essence recapped in the Preliminary Objection. The Defendant contends that Advocate N. Owino was only representing the 5th Plaintiff hence, she cannot purport to bring forth an amendment of the plaint without consensus with the other Plaintiffs and that the claim remains that of adverse possession and not a representative suit.

9. The grounds raised in the Preliminary Objection dated 27th September 2021 are summarised as follows:

i. The Application is frivolous, vexatious and a gross abuse of the Court Process, as the Applicant has not been properly or clearly identified.

ii. The matters raised in the application are res judicata having been the subject matter of an application dated 1st February 2015, which application was disposed of by way of a consent that was recorded in open court before Honourable Eboso J. on 28th January 2021.

iii. The suit was filed by persons on their own behalf and was not a representative suit and removing/ adding other persons was prejudicial to the defendant.

iv. Moses Kamuri Kingora and Stephen Kamau are named in ELC No. 128 of 2020 as the 5th and 11th Defendants respectively. They have filed a Statement of Defence and Counterclaim dated 4th December 2020.

v. Allowing the proposed Plaintiffs in ELC no.5 of 2010 to unilaterally amend pleadings in ELC No. 5 of 2010 in which none were initially named as parties, while they have already ventilated their claim to the suit and through their Counterclaim in ELC NO. 128 OF 2020 will result in them having two different sets of pleadings concerning the same matter.

10. The defendants filed their submissions dated 15th October 2021 raising the following three issues: *whether the applicants have locus to file the instant application; whether the application was res judicata and whether the application had met the threshold to warrant court's discretion to grant to leave.*

11. On the issue of locus, it was submitted that the Plaintiffs did not have locus to institute the suit as had been established in Supreme Court case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others (2014) eKLR** and **Daykio Plantations Ltd v National Bank of Kenya Ltd & 2 others (2019) eKLR.** It was submitted that the suit had been instituted by 6 people yet the application to amend the suit had the effect of bringing new Parties/Plaintiffs.

12. On the issue of *res judicata*, it was submitted that the Plaintiffs had been given an opportunity to amend their pleadings but did not do so, thus the consent order was set aside and matter set down for hearing. To this end, reference was made to the provisions of **Section 6 of the Civil Procedure Act** and the cases of; **ANM v PMN (2016) eKLR & Invesco Assurance Company Ltd & 2 others v Auctioneers Licensing Board & Another; Kinyanjui Njuguna & Company Advocates & Another (interested parties) (2020) eKLR.**

13. It was further submitted that the law on amendment of pleadings was settled in **Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Ltd (2013) eKLR, Rubina Ahmed & 3 others v Guardian Bank Ltd (sued in its capacity as a successor in title to first National Finance Bank Ltd) (2019) eKLR** and **Anders Bruel T/A Queenscross Avitaition v Nyambura Musyimi & 2 others (2017) eKLR** in which the common factor was that amendment of pleadings should be timeous and made in good faith.

14. It was also submitted that the suit was filed in 2010 but the said self-help group was registered in 2011 as per the certificate of registration and this was a misrepresentation which was against the set principles for amendment. Defendant contends that the issue of amendment had not been timeous because, not only was counsel for Applicants given an opportunity to amend the pleadings but failed to do so, but the change in leadership as claimed took place in 2013 and they had an opportunity to amend the pleadings since that time.

15. In conclusion, Defendant submitted that the amendment would change the suit from being a personal suit to a representative suit and that the proposed Plaintiffs were Defendants in **ELC No. 128 of 2020**, where they have already filed their defence and counterclaim. As such the proposed amendment was an abuse of court process and should be dismissed with costs.

Analysis and determination

16. This court finds that the issues for determination are:

i. Whether the Defendant's preliminary objection is merited.

ii. Whether the Applicants should be granted leave to amend the originating summons.

17. It has been said time and again that a preliminary objection should be raised on purely points of law and not on facts that require evidence as outlined in the case of **Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd (1969) EA 696**. Without making pronouncements on the issues raised in the preliminary objection since they are at the core of the Notice of Motion application, this court finds that they all require evidence for court to ascertain their veracity. As such, they do not meet the set out principles for preliminary objections. Instead, the court will treat the preliminary objection as a response by the Defendant to the current application.

18. The second issue for consideration is whether the application dated **19.7.2021** should be allowed. The gist of the application is that the Plaintiffs had instituted the suit in their own capacity and ought to be replaced by officials of Saikoma Self Help Group because they are the elected representatives of people residing on the suit land hence the need for the amendment.

19. **Order 8** of the **Civil Procedure Rules, 2010** comprehensively covers amendment of pleadings. **Rule 3** thereof provides that;

“ ... 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”.

20. There is no controversy that on 28th January 2021 this court granted a consent order in the following words:

By Consent:

1. The Plaintiff in the OS dated 8th January 2010 shall be amended to include the following persons as Plaintiffs: Moses Kamuri Kingo, Josephine Kung'u Kimani (all suing on behalf of Saikoma Self Help Group); Hesborn Omondi; Francis Rumano; Peter Wambugu.

2. The list of Defendants in Nairobi ELC No. 128 of 2020 shall be amended to include all the Plaintiffs in the amended originating summons.

3. In order to give effect to order No. 1, all advocates for the current Plaintiffs No. 2, 3, 4, and 5 together with all the new Plaintiffs shall within 30 days from today file and serve a joint amended O.S together with all supporting affidavits, lists and bundle of documents and list and witness statements.

4. Upon service of the documents listed in 3 above, the advocate for the Defendant shall file and serve a replying affidavit in O.S No. 5/2010 as well as an amended plaint in ELC No. 128/2020 within 30 days of service.

5. The replying affidavit shall be filed together with witness statements and list and bundle of documents.

6. Upon service of the amended plaint in Nairobi ELC 128/2020, the Defendants shall be at liberty to file defences or amended defences together with bundle of written statements and documentary evidence.

7. Upon close of pleadings the two suits i.e. ELC O.S. NO. 5/2010 and ELC No. 128/2020 shall be consolidated and heard together” .

21. The Plaintiffs in **ELC Case No. 5 of 2010** failed or neglected to comply with the consent order leading to the setting aside of the said consent on 21st June 2021. Having failed to abide by the order to amend pleadings and join additional Plaintiffs, counsel for the 5th Plaintiff has now filed the current application seeking for the same orders to amend the Originating Summons. **Order 8 Rule 6 of the Civil Procedure Rules** is very clear on what happens after lapse of time given for amendment of pleadings:

“ 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” .

22. The Court of Appeal in **Joseph ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] eKLR** cited in concurrence the case of **Ketteman vs Hansel Properties Limited (1988) 1 ALL ER 3S** at page 62 that,

“... Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the

exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion...

23. It is not refuted that the rules of amendment of pleadings are underpinned on principles of justice and fairness, however these principles should not be invoked at whim by parties whose doings or misdeeds drive them from the seat of justice. From the court record, it is clear that counsel for the 5th Plaintiff had been given an opportunity by this court to amend the pleadings as well as enjoin other persons as Plaintiffs in the suit, but squandered that opportunity without reasonable cause and now beseeches the same court to grant it the same orders.

24. This court is moved and again reproduces the holding of the above cited case of **Joseph ochieng & 2 others Trading v First National Bank of Chicago** where Justice A.B. Shah stated:

“... All in all the conduct of plaintiffs’ case has been so slovenly that it would be impossible now to have a fair trial if the proposed amendments were allowed ... Ransley and Another vs K.N.C.C. Ltd Civil Application No. NAI 116 of 1988 (Unreported):

“Another factor that a judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same indulgence towards the negligent conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads ...”

25. It is noted that an application dated **1.2.2015** seeking more or less similar orders had marked time in this file for **5 (five)** years until **26.11.2020** when the court was moved to give directions on its prosecution.

26. Further, upon analysing the proposed Amended Originating Summons, the court notes that the applicants proposes to remove all the Plaintiffs in the original pleadings save the **5th Plaintiff (Stephen Kamau)** and replace them with others who are: **Moses Kamuri King’ora**, and **Joshua Kung’u Kimani**. The question begging for an answer is, who is/are the Applicants. After all, none of the Applicants, not even the **5th Plaintiff** swore the affidavit in support of the current application. It was sworn by the advocate for **5th Plaintiff**!

27. It is also noted that, the counsel for these other Plaintiffs did not consent to the prayers sought in the current application. Indeed, the lack of consensus amongst the Plaintiffs is what apparently led to the failure to comply with the consent of **28.1.2021**. It is quite apparent that the current application has been brought forth so that the Applicants may join this suit in their own terms by getting rid of the other Plaintiffs.

28. I also find that the application has not been filed timeously. The suit **No. 5/2010** was filed more than 10 years ago. At what point in the lifespan of this suit did it dawn upon the Applicants that the suit was filed in the personal capacity of the Plaintiffs. I find that the amendment is being sought rather late in the day. One of the cardinal principles in our constitution is **“the expeditious delivery of justice”** –see **Article 159 (2) (b) of the Constitution of Kenya**, which in effect codifies the 17th century maxim of **“Justice delayed is justice denied”**. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates the human rights of the litigants and their family. That is precisely why rights to speedy trials are incorporated in law worldwide. Thus in law and in Equity, delayed justice is abhorred. It would be the hallmark of injustice if this court was to allow the removal of some Plaintiffs without their consent when they having been waiting in the corridors of justice for the last ten years.

29. Another notable point is the lack of good faith on the side of the Applicants. When it became apparent to the court that there was no consensus amongst the Plaintiffs and the consent of **28.1.2021** was set aside, the court promptly fixed the matter for hearing on **26.7. 2021**. The current application was filed just a week to the date of hearing which is a mark of bad faith. The application had the effect of scuttling the hearing scheduled on **27.7.2021** and on **27.10.2021**. It is not lost to this court that the court had already put the Plaintiffs on notice as they had been given last adjournments on **23.9.2020**; while the 5th Plaintiff was specifically granted a last adjournment on **26.7.2021**.

30. The court has also taken into account that the proposed amendment has the effect of shifting goal posts since the Applicants want to introduce a new feature of the claim, that of a representative suit 10 years down the line. It has been stated that amendment of pleadings should only be allowed if it does not alter the cause of the suit. This was cited by the Court of Appeal in **Catherine Koriko & 3 others v Evaline Rosa [2020] eKLR** making reference to **Abdul Karim Khan –v- Mohamed Roshan (1965) EA.289** that ;

“...the courts will not permit an amendment that is inconsistent with original pleading and which entirely alters the nature of the defence or plaint...”

31. It is also not lost to this court that **Moses Kamuri** (a proposed Plaintiff) is the **5th Defendant** while **Stephen Kamau** is the **11th Defendant** in the other suit **128/2020** where they have not only filed a defence, but they have a counterclaim. Thus the proposed Plaintiffs already have another platform of ventilating their claim.

32. Another point of consideration is that the lifespan of the suit **ELC 5 of 2010** has been anchored on nothing but applications for the last 10 years. Litigation has to come to an end one way or the other. In the case of **Lawrence Kinyua Mwai vs. Nyariginu Farmers CO. Ltd & Another (2019)eKLR**, I stated thus;

“ The circumstances of this case where the dispute has been in the legal arena for decades demand that this court imposes Active Case Management in order to achieve the overriding Objective set out under section 1A and 1B of the Civil Procedure Act even if it appears to be rather late in the day to do so, in order to have a closure in this file. Active Case Management is one of the best practices to combat case backlog and it is anchored on the courts ability to exercise Judicial control over the legal processes

with a view to ensuring that the overriding objective is achieved.”

33. Similarly, this court will apply Active Case Management to ensure that the matter is steered away from the stormy vast ocean of endless applications and preliminary objections so as to dock and tie up at a wharf of conclusion. Simply put, this court will not entertain applications which will hamper the main hearing anymore.

34. The disposal orders are that; *The Notice of Motion application dated 19th July 2021 seeking leave to amend the pleadings is disallowed with costs to the Defendant.*

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 24TH DAY OF NOVEMBER, 2021 THROUGH MICROSOFT TEAMS.

LUCY N. MBUGUA

JUDGE

In the presence of:-

B. Kariuki for the Ndiara Enterprises/Defendants

Nyamberi for 2nd, 3rd and 4th Plaintiffs

Bosire for 5th Defendant in Case No. 128/2020

Court Assistant: Eddel Barasa