



REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ELC CASE NO E375 OF 2022

LAIKIANA RESORTS LODGES LTD.....
PLAINTIFF

VERSUS

MWANIKI WA NDEGWA
.....DEFENDANT

RULING

1. By a Notice of Motion dated 10th February 2025, brought under Sections 1A and 1B of the Civil Procedure Act, Order 8 Rules 5 and Order 51 Rule 1 of the Civil Procedure Rules, the Plaintiff/Applicant seeks the following orders:-

a) THAT the Plaintiff be granted leave to amend the Complaint dated 14th November 2022.

b) THAT upon hearing of this application, the amended Complaint be deemed as duly filed and served.

c) THAT the costs of this application be provided for.

2. The application is premised on the grounds appearing on its face together with the supporting affidavit of James Kariuki Kinyua, sworn on even date

THE APPLICANTS CASE

3. The deponent averred that on 25th May 2023, the court issued an injunction restraining the Defendant from interfering with the Plaintiff's property. Later, the Defendant filed an application to review the ruling, and before the ruling was issued, he moved onto the premises and began excavating.
4. On 29th February 2025, the court issued an order maintaining the status quo regarding the suit property pending the hearing and determination of the main suit. Despite this order, the Defendant continued excavation activities on the suit properties, damaging the Plaintiff's goods and property. He asserted that the Plaintiff company incurred special damages of Kshs 309,095,779.00/= . He argued that the Defendant would not suffer any prejudice if the orders sought are granted.

THE RESPONDENT'S CASE

5. The Respondent filed a replying affidavit dated 12th May 2025 in opposition to the application. He averred that the Plaintiff had voluntarily surrendered full possession of the suit property to him as shown in the further affidavit sworn on 2nd February 2023, which was not challenged. He argued that the status quo at the time of the order was that the premises were in his exclusive possession and control.

6. He further averred that the application is bad in law because the Plaintiff invoked Sections 6 and 7 of the Arbitration Act to seek injunctive relief and to refer the dispute to arbitration. Additionally, he stated that the prayer for special damages is inconsistent with the prayer seeking the appointment of an arbitrator. He contended that the court would lack jurisdiction if it found that an arbitration agreement exists. He maintained that the Plaintiff had elected to rely on the arbitration clause and therefore cannot both accept and reject it by filing a claim for special damages in this court.
7. He further stated that he had filed an originating summons against the Plaintiff, in which the court had issued directions. He asserted that the current application is an attempt to invoke the court's jurisdiction, which, he claims, does not exist.
8. The application was canvassed by way of written submissions.

THE APPLICANTS SUBMISSIONS

9. The Applicant filed its submissions dated 29th May 2025.
10. On behalf of the Plaintiff, Counsel outlined the following issues for the court's determination:-
 - a) *Whether the court has discretion to allow an amendment of pleadings at this stage of the proceedings.*
 - b) *Whether the Plaintiff has satisfied the legal threshold for amendment under Order 8 of the Civil Procedure Rules.*

c) Whether the proposed amendment will prejudice the Defendant or is made in bad faith.

11. Regarding the first issue, Counsel submitted that the court has unfettered discretion to permit amendments to pleadings at any stage, as long as such changes are necessary for the court to effectively and conclusively resolve the key issues between the parties. He stated that the proposed amendment seeks to include material developments, such as special damages and a declaration that the Defendant breached the lease agreement. To support this point, reliance was placed on Order 8 Rule 3(1) of the Civil Procedure Rules and on the case of **Joseph Yano v Stephen Kibet Kiptum (2019) KECA 509 (KLR)** and **Republic v Kenya Anti-Corruption Commission & 2 others (2009) KLR 31 cited in Muchoki & another v Elevator World Limited & another (2025) KEHC 6052 (KLR)**
12. Regarding the second issue, Counsel submitted that the amendment is necessary to resolve the issues in controversy. Counsel further submitted that the application was filed promptly after the material events that led to the new cause of action, and that the suit had not been scheduled for hearing.
13. It was submitted that although the existence of an arbitration clause is not disputed, the Defendant has actively participated in the proceedings without filing a formal application for a stay. To support this argument, reliance was

placed on the case of **Niazsons (K) Ltd v China Road & Bridge Corporation Kenya (2001) KECA 376 (KLR)**.

14. Counsel further submitted that the Applicant has met the threshold for amendment of pleadings outlined in the Court of Appeal case **of St Patrick Hill School Limited v Bank of Africa Kenya Limited (2018) KEHC 2539 (KLR)**
15. Finally, Counsel argued that the Defendant would not suffer prejudice that cannot be remedied by costs if the amendment is permitted. It was also noted that the Defendant will have an opportunity to respond to the amended plaint.

THE DEFENDANT'S SUBMISSIONS

16. The Defendant filed his submissions dated 28th May 2025.

Counsel reiterated the contents of the replying affidavit to support his submissions. Counsel submitted that the proposed amendments seek to change the character of the Plaint. Counsel urged the Court to dismiss the application with costs.

ANALYSIS AND DETERMINATION

17. Having considered the application, the affidavits, and the rival submissions, the only issue that arises for determination is whether the Plaintiff should be granted leave to amend his Plaint.
18. Section 100 of the Civil Procedure Act makes provisions on the general power to amend, and gives the Court discretion on whether to allow an amendment or not.

19. Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows;

“(1) For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may, either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

20. The law governing leave to amend pleadings is well established. The general rule is that amendments of pleadings sought before the hearing should be freely allowed if they can be made without causing injustice to the other side, and there is no injustice if costs can compensate the other party. The main principle is that an amendment should not be allowed if it causes injustice to the other side.

21. The Court of Appeal set out the principles under which Courts may grant leave to amend pleadings in the case of **Ochieng and Others vs First National Bank of Chicago Civil Appeal No. 147 of 1991**, where it was held that:-

a) The power of the court to allow amendment is intended to determine the true substantive merits of the case.

b) The amendments should be timeously applied for.

c) Power to amend can be exercised by the court at any stage of the proceedings.

d) 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 be compensated to the other side.

e) 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 reply on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of the current period of limitation.

22. The Court has inherent power under Section 3A of the Civil Procedure Act to allow a party to amend its pleadings at any stage before judgment. The overriding considerations in an application for leave to amend are whether the proposed amendment is necessary to determine the real question in controversy and whether it would prejudice the opposing party.

23. In the matter at hand, the proposed amendment seeks to introduce a claim for special damages allegedly arising from acts said to have been committed after the filing of the suit and in violation of a court order.

24. The Defendant is opposed to the application on the grounds that the Plaintiff invoked Sections 6 and 7 of the Arbitration Act. Section 6 relates to stay of proceedings pending

reference to arbitration, while Section 7 empowers the court to grant interim measures of protection. Neither provision ousts the court's jurisdiction, particularly where no stay of proceedings has been granted.

25. The amendment sought does not alter the character of the suit or introduce a new cause of action. The question before this court at this stage is not whether the dispute is subject to arbitration, but whether the proposed amendment is necessary. The existence of an arbitration agreement in itself does not prevent the court from exercising its discretion under Order 8 Rule 5 of the Civil Procedure Rules.
26. This matter has not yet proceeded to hearing. The Defendant has not demonstrated what specific prejudice, if any, he will suffer if the amendment is allowed, or that he will not be adequately compensated if the amendment is allowed at this stage. The Defendant will not be prejudiced because he will have an opportunity to respond to the amendment.
27. I find that the amendment sought by the Plaintiff is necessary to determine the real question in controversy.
28. The upshot of the foregoing is that the Application dated 10th February 2025 is merited and I proceed to allow it in the following terms:-

a) Leave is granted to the Plaintiff to amend the Plaintiff in terms of the annexed draft amended Plaintiff.

b) The amended Plaintiff shall be filed and served within 14 days from the date hereof.

c) That Defendant is granted leave to file and serve an amended defence within 14 days after service.

d) That the Applicant shall meet the cost of this application.

.....
**HON. T. MURIGI
JUDGE**

RULING SIGNED, DATED, AND DELIVERED VIA MICROSOFT TEAMS THIS 11TH DAY OF DECEMBER, 2025.

IN THE PRESENCE OF: -

Manthi holding brief for Mwiti for the Plaintiff

Malesi holding for Gatheru Gathemia for the Defendant

Ahmed - Court Assistant