



**Ethics and Anti-Corruption Commission v Kaitui Enterprises Company Limited & 2 others  
(Environment & Land Case 29 of 2019) [2024] KEELC 1073 (KLR) (29 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 1073 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NYERI  
ENVIRONMENT & LAND CASE 29 OF 2019  
JO OLOLA, J  
FEBRUARY 29, 2024**

**BETWEEN**

**ETHICS AND ANTI-CORRUPTION COMMISSION ..... PLAINTIFF**

**AND**

**KAITUI ENTERPRISES COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**REGISTERED TRUSTEES OF THE NATIONAL COUNCIL OF CHURCHES OF  
KENYA ..... 2<sup>ND</sup> DEFENDANT**

**WILSON GACANJA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. By the Notice of Motion dated 10<sup>th</sup> March 2023, the Registered Trustees of the National Council of Churches of Kenya (the 2<sup>nd</sup> Defendant) prays for orders:
  1. ...
  2. That the Honourable Court be pleased to grant leave to the 2<sup>nd</sup> Defendant/Applicant to amend their pleadings as shown in the draft amended Statement of Defence and Counterclaim and the same be deemed as duly filed;
  3. That the Honourable Court be pleased to set aside the hearing proceedings (sic) of 13<sup>th</sup> February, 2023 (and) any subsequent orders and all other consequential orders thereto;
  4. That the Honourable Court be pleased to order that the hearing of the main suit (do) commence de novo and the Applicant be allowed to defend the suit unconditionally;
  5. That the Honourable Court be pleased to issue an order prohibiting the media from covering, airing and/or publishing any story relating and/or connected to the case herein; and
  6. The costs of this application be provided for:



2. The application which is supported by an Affidavit sworn by the 2<sup>nd</sup> Defendant's Advocate Mark Gitonga Mathenge is premised on the grounds:
  - (a) That the leave is necessary as the amended Statement of Defence raises pertinent issues in controversy;
  - (b) That the amendment is necessary to enable the Court effectually and completely adjudicate and settle all questions in dispute;
  - (c) That the previous Advocates on record failed to include other pertinent issues in the initial defence filed;
  - (d) That the delay in filing the Amended Defence and Counterclaim, the Witness Statements and Bundle of Documents is not such as to be inexcusable or inordinate as parties had been engaging in negotiations in an attempt to resolve the matter.
  - (e) That the media is misreporting facts and information about this case which may adversely affect the Applicant's Defence and intimidate its witnesses or prejudice its Constitutional rights to a fair hearing; and
  - (f) That none of the Parties herein will be prejudiced in any way whatsoever if the application is allowed.
3. The Ethics and Anti-Corruption Commission (the Plaintiff) is opposed to the application. In its Replying Affidavit sworn on its behalf by its Advocate G. Moraa Omari, the Plaintiff avers that the Law Firm presently representing the 2<sup>nd</sup> Defendant came on record on 31<sup>st</sup> January, 2022 and that when the matter came up for pre-trial on 1<sup>st</sup> February 2022, the 2<sup>nd</sup> Defendant sought and was allowed to file their bundle of documents within 30 days.
4. The Plaintiff avers that the matter was thereafter fixed for pre-trial on 23<sup>rd</sup> May, 2022 on which date the 2<sup>nd</sup> Defendant again sought for extension of time to file their bundle of documents and leave to amend the defence. The 2<sup>nd</sup> Defendant was then advised by the Court that since pleadings had closed, they needed to make a formal application to amend the defence.
5. The Plaintiff asserts that it took the 2<sup>nd</sup> Defendant another 9 months before they filed the present application on 13<sup>th</sup> March, 2023. Before the application was filed, the Court did on 23<sup>rd</sup> May, 2022 allow the 2<sup>nd</sup> Defendant another 14 days to file their bundle and fixed the matter for hearing on 27<sup>th</sup> July, 2022. On the date fixed for hearing, the 2<sup>nd</sup> Defendant sought an adjournment which the Court allowed to enable them pursue an out of Court settlement and the matter was then fixed for mention on 11<sup>th</sup> October, 2022 to confirm if any settlement had been reached.
6. The Plaintiff further avers that the negotiations did not take off as the 2<sup>nd</sup> Defendant kept postponing the dates. On 11<sup>th</sup> October, 2022 the Plaintiffs requested for a hearing date in the presence of the Plaintiffs and the suit was scheduled for hearing on 13<sup>th</sup> February, 2023. It was on that date the 2<sup>nd</sup> Defendant informed the Court they had filed the instant application and sought another adjournment which was declined by the Court. It is accordingly the Plaintiff's case that the present application is just but another tactic to delay the hearing and disposal of this suit.
7. I have carefully perused and considered the 2<sup>nd</sup> Defendant's application as well as the response thereto by the Plaintiff. I have similarly considered the submissions and authorities placed before the Court by the Learned Advocates representing the Parties herein.



8. By this application before the Court, the 2<sup>nd</sup> Defendant's prays for leave to amend their defence and to introduce a Counterclaim against the Plaintiff. The 2<sup>nd</sup> Defendant further urged the Court to set aside the proceedings of 13<sup>th</sup> February, 2023 and to have the matter commence de novo. In addition, the 2<sup>nd</sup> Defendant craves an order prohibiting the media from covering, airing and/or publishing any story relating and/or connected to the suit herein.

9. As was stated in *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR:

“The object of 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 the 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 the form of action or proceedings ... The Court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

10. In *Elijah Kipng'eno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the Court of Appeal outlined the principles to be considered in amendment of pleadings as follows:

“The law on amendment in terms of Section 100 of the *Civil Procedure Act* and Order via rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's *Precedents of Pleading* – 12<sup>th</sup> Edition, in the case of *Joseph Ochieng & 2 Others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:

“The ratio that emerges out of what was quoted from the said book is that powers of the Court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the Court at any stage of the proceedings (including appeal stages); 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 compensate the other side; that proposed amendments must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could move conveniently be made the subject of a fresh action; that 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 rely on the Limitation Act.”

11. The suit herein was filed on 14<sup>th</sup> October, 2019. Two months later on 3<sup>rd</sup> December 2019, the 2<sup>nd</sup> Defendant filed a Statement of Defence through Mukele Moni & Company Advocates. Two years later on 31<sup>st</sup> January 2022, the 2<sup>nd</sup> Defendant changed its advocate to Messrs Mathenge Gitonga & Company Advocates who remain on record to-date.



12. By the application before the Court, the 2<sup>nd</sup> Defendant contends that its previous Advocates on record failed to include other pertinent issues in the initial Statement of Defence as filed on 3<sup>rd</sup> December, 2019.
13. As it were, the record herein reveals that on 1<sup>st</sup> December 2021, this matter came up for pre-trial. The 2<sup>nd</sup> Defendant's then Advocates informed the Court they were yet to file their Witness Statements and requested for 30 days within which to file the same. The request was granted and the matter was again fixed for pre-trial on 1<sup>st</sup> February, 2022.
14. Those directions were however not complied with. On 23<sup>rd</sup> May 2022, the 2<sup>nd</sup> Defendant informed the Court through its current Advocates that they needed time to amend their Defence and to file their bundle of documents. The Court then advised the 2<sup>nd</sup> Defendant to file a formal application to amend as the pleadings had closed. They were also granted a further 14 days within which to file their bundle of documents and the matter was then set for hearing on 27<sup>th</sup> July, 2022.
15. On the said date even though the Plaintiffs were ready for hearing, the 2<sup>nd</sup> Defendant informed the Court that they had resolved to negotiate for an out-of-Court settlement and the matter was adjourned to allow them to complete the negotiations. When the matter came up for mention on 11<sup>th</sup> October 2022, they informed the Court that they had not agreed on a settlement and urged the Court to fix the matter for hearing. The Court then fixed the matter for hearing on 13<sup>th</sup> February, 2023.
16. Some four (4) days to the date of hearing, the 2<sup>nd</sup> Defendant filed an application dated 9<sup>th</sup> February 2023 seeking leave to amend the Defence. When the matter came up for hearing on 13<sup>th</sup> February 2023, the 2<sup>nd</sup> Defendant relying on the said application sought to have the matter adjourned ostensibly to allow that application to be disposed with first. The Court rejected that request and the trial commenced with the Plaintiff calling two witnesses who were cross-examined by Counsel for the 2<sup>nd</sup> Defendant. Some one month later, the 2<sup>nd</sup> Defendant instituted the present application seeking leave to amend the Defence to introduce a Counterclaim and for the proceedings of 13<sup>th</sup> February, 2023 to be set aside.
17. In my considered view, there was no plausible explanation why the amendment sought to be made were not made in good time. As it were any delay should be satisfactorily explained to the Court. From a perusal of the record, the Court has  
  
afforded ample time to the 2<sup>nd</sup> Defendant to amend its pleadings and to file their Bundle of Documents and Witness Statements. No satisfactory explanation has been offered as to why the initial extensions of time were not complied with.
18. By filing an application for leave to amend the Defence 4 days to the date fixed for hearing, the 2<sup>nd</sup> Defendant was evidently acting in bad faith with an obvious intent in delaying the hearing of this suit.
19. Similarly there was no justification offered by the 2<sup>nd</sup> Defendant as to why the media should be prohibited from covering these proceedings. While in the body of the application the 2<sup>nd</sup> Defendant contends that the media has been misreporting facts and information about the case, there was nowhere in the Supporting Affidavit of Mark Gitonga Mathenge where any explanation was given as to how and when the media had misreported the proceedings herein.
20. In the result I did not find any merit in the Motion dated 10<sup>th</sup> March, 2013. The same is dismissed with costs to the Plaintiff.

**RULING DATED, SIGNED AND DELIVERED IN OPEN COURT AND VIRTUALLY AT NYERI  
THIS 29TH DAYS OF FEBRUARY, 2024.**



In the presence of:

Ms. Omari for the Plaintiff/Respondent

No appearance for the 1<sup>st</sup> and 2<sup>nd</sup> Defendants

Mr. Kiprotich for the 3<sup>rd</sup> Defendant

Court assistant - Kendi

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**J. O. Olola**

**JUDGE**

