



Mbiyu Koinange (Suing through next friend Eliza Mbatia) v Guan (Environment & Land Case E002 of 2022) [2024] KEELC 1142 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1142 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT THIKA
ENVIRONMENT & LAND CASE E002 OF 2022**

JG KEMEI, J

FEBRUARY 29, 2024

BETWEEN

**PAUL MBATIA MBIYU KOINANGE (SUING THROUGH NEXT FRIEND
ELIZA MBATIA) PLAINTIFF**

AND

CHEN GUAN DEFENDANT

RULING

1. Before Court is the Plaintiff's Application dated 12/4/2023 seeking in the main leave to amend his Plaint dated 10/1/2022. It is premised on the grounds on the face it which are reiterated in the Supporting Affidavit of Eliza Mbatia, the Plaintiff. She avers that she filed her Plaint on 10/1/2022 seeking eviction orders against the Defendant who has since left the suit premises. In light of the forgoing and upon advice of her counsel, she now seeks to amend her Plaint to pursue general damages for loss of user instead of eviction.
2. Opposing the Application, the Defendant Chen Xiong Guang swore his Replying Affidavit on 6/6/2023. He termed the Application frivolous, vexatious and an abuse of Court process noting that the Plaintiff's Application dated 10/1/2022 seeking eviction was dismissed on 20/12/2022. That his move to vacate from the suit property does not in any way establish a *prima facie* case in the Plaintiff's favor because he was not a trespasser on the suit property. That he lawfully leased the property for two years from the administrators of the estate of the deceased but the Plaintiff frustrated his peaceful occupation thereon. That the Application is an after that and guise aimed at extorting money from him. He urged the Court to dismiss the Application with costs.
3. Directions were taken to canvas the Application by way of written submissions.



4. The Plaintiff through the firm of Rosemary Monyangi & Co. Advocates filed submissions dated 27/7/2023 whilst the Defendant's submissions are dated 7/7/2023 by the firm of Nyingi Wanjiru & Co. Advocates.
5. The Plaintiff submitted that the Application is necessitated by the fact the Defendant has vacated the suit property and he now seek to claim general damages for loss of user. That it is imperative for the Court to allow the instant Application so that the real issues be determined conclusively.
6. The Defendant drew three issues for determination to wit; whether the Plaintiff should be allowed to amend his Plaint, whether the Defendant was a trespasser in the suit property and whether the Court should grant the prayers sought in the Application. He submitted that the Court having dismissed the Plaintiff's Application dated 10/1/2022, the instant Application violates the doctrine of res judicata as it amounts to litigating in installments. The Defendant denied that he was trespasser on the suit land and that the Plaintiff has not availed any evidence to that end. He beseeched the Court to strike out the Application with costs.
7. The germane issue for determination is whether the Application is merited.
8. The Court's power to grant an order of amendment is expressed under Section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) Civil Procedure Rules that;

“5. General power to amend [Order 8, rule 5]
(1) For the purpose 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.”
9. The Defendant in objection averred that the Application is an abuse of Court process since the Plaintiff wishes to amend an Application which the Court had already dismissed on 20/12/2022. That his departure from the suit property does not establish a prima facie case in favor of the Plaintiff and further denied being a trespass on the suit land.
10. Contrary to the Defendant's averment, the Court dismissed the Plaintiff's Application dated 10/1/2022 seeking eviction and not the substantive Plaint filed thereto. That said it is the view of this Court that issues of whether the Defendant was a trespasser or not form the gist of the Plaintiff's case and can be properly canvassed by way of evidence at the hearing.
11. Section 3A of the Civil Procedure Act empowers the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court. Further Section 3 of the Environment and Land Court Act require parties and their duly authorized representatives, as the case may be, to assist the Court to further the overriding objective and participate in the proceedings of the Court. Additionally, Articles 48 and 159 of the Constitution of Kenya espouse the need to ensure access to justice for all.
12. The upshot of the forgoing is that the Application succeeds in the following terms;
 - a. The Application dated 12/4/2023 is allowed in terms of prayer no. 1.
 - b. The Plaintiff is directed to file and serve the Amended Plaint within 7 days from today.



- c. The Defendant is at liberty to file his amended defence within 15 days of service.
- d. Thereafter Pretrial conference to follow.
- e. Costs be in the cause.

DATED, SIGNED & DELIVERED AT THIKA VIA MICROSOFT TEAMS THIS 29TH DAY OF FEBRUARY, 2024.

J G KEMEI

JUDGE

Delivered online in the presence of;

Ms. Monyangi for Plaintiff/Applicant

Defendant/Respondent - Absent

Court Assistants – Phyllis/Oliver

