



Wathanangu Holdings Ltd v Attorney General & 4 others (Environment & Land Case 116 of 2015) [2024] KEELC 1162 (KLR) (29 February 2024) (Ruling)

Neutral citation: [2024] KEELC 1162 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 116 OF 2015
OA ANGOTE, J
FEBRUARY 29, 2024**

BETWEEN

WATHANANGU HOLDINGS LTD PLAINTIFF

AND

HON ATTORNEY GENERAL 1ST DEFENDANT

UNIVERSITY OF NAIROBI 2ND DEFENDANT

KENYA MEDICAL TRAINING CENTER 3RD DEFENDANT

CHIEF LAND REGISTRAR 4TH DEFENDANT

NATIONAL LAND COMMISSION 5TH DEFENDANT

RULING

1. In the Notice of Motion dated 17th May 2023, the Plaintiff has sought for the following orders:
 - a. That this application be heard together with the Plaintiff’s application dated 28th November 2022.
 - b. That the Honourable Court be pleased to strike-out the 2nd Defendant’s Amended Defence and Amended Counter-Claim dated 13th March 2023.
 - c. That the costs of this application be borne by the 2nd Defendant.
2. The application is based on the grounds on its face and the Affidavit sworn in support thereof by Joseph Munyiri Munene, the Plaintiff’s Director who deposed that this case is part-heard and the Plaintiff’s first witness has already given his evidence-in-chief.
3. It was deponed that by its application dated 28th November 2022, the Plaintiff sought to amend its Plaint merely to include projections of incurred loss of rent and compounded return at 12% on annual



rent for a period of 25 years and that whereas the 2nd Defendant would have been entitled to respond to the proposed amendment to the Plaintiff, including by amending its Defence and Counterclaim, the 2nd Defendant has instead used its right to respond to introduce a new case.

4. The Plaintiff's Director deponed that the 2nd Defendant has no right in law to amend its Statement of Defence and Counter-Claim to introduce new parties without the leave of the court; that the 2nd Defendant has no right to introduce two Defendants in its counterclaim under the guise of responding to the Amended Plaintiff and that the filing of the Amended Defence and Counterclaim creates the impression that this court has acquiesced and condoned the institution of legal proceedings against Messrs. Wilson Gachanja and Silver Clouds Investment Limited, contrary to the law.
5. It was deponed that the 2nd Defendant has prematurely filed its Amended Defence and Amended Counterclaim given that the Plaintiff's application for amendment dated 28th November 2022 is yet to be heard and determined and that unless and until the Plaintiff's application is allowed and the Plaintiff file its Amended Plaintiff, the 2nd Defendant cannot lawfully amend its pleadings.
6. According to the Plaintiff, in order to allow the Plaintiff the right to fair a hearing, the 2nd Defendant's Amended Defence and Counter-Claim should be struck-out.
7. The 2nd Defendant opposed the application through a Replying Affidavit dated 10th July 2023, and sworn by Collins Omondi, the Director, Legal and Corporate Board Services of the 2nd Defendant, who deposed that the application is misconceived on account that the Plaintiff's application dated 28th November 2022 came up for hearing on 8th February 2023 before Justice Mwangi, who allowed the Plaintiff's application for amendment and granted the Defendants unconditional leave to Amend their Statements of Defence within 14 days of service of the Amended Plaintiff.
8. It was deposed that the Plaintiff's Advocates, Mr. Kibe Mungai, was present in court when the orders were made; that the Plaintiff complied with the orders of the court and filed its Amended Plaintiff dated 13th February 2023 and served the same on their advocates on 3rd March 2023 and that the 2nd Defendant equally filed and served the Amended Defence and Counterclaim in compliance with the orders of the Honourable Justice Mwangi.
9. According to the 2nd Defendant, Wilson Gachanja and Silver Clouds Investment Ltd are necessary parties to this suit and should be allowed to assist the court in arriving at the truth; and that the added parties have an opportunity to file their own responses and the Plaintiff has a right to reply to the 2nd Defendant's Amended Pleadings. Both parties filed submissions and authorities which I have considered.

Analysis and Determination

10. The Plaintiff filed this suit against the Defendants claiming that it bought the suit property from Silver Clouds Investment Ltd in 1995, which was allotted the suit property by the Government. The Plaintiff's case is that since 1999, the Defendants have interfered with its rights of ownership and occupation of the suit property, by placing a caveat on the suit property's title in 1999 which was removed in 2001 and by the 3rd Defendant building a fence on an adjacent property, which has denied the Plaintiff the opportunity to develop the suit property.
11. Some of the orders that the Plaintiff therefore seeks is a declaration that it is the lawful owner of the suit property; a declaration that the Defendants' actions violated its right to property; a declaration that the Defendants are liable to compensate it by way of damages for loss of user and other infringements of its rights and general damages for breach of rights and freedoms.



12. The Plaintiff filed an application to amend its Plaintiff dated 28th November 2022. It is not disputed that at the time of filing the application, the Plaintiff's first witness, PW1 was in the middle of his testimony, which had begun on 31st October 2022. The suit was adjourned with further hearing scheduled for 17th January 2023.
13. The application dated 28th November 2022 came up for hearing on 8th February 2023 before Justice David Mwangi. The court allowed the application dated 28th November 2022 and granted the Plaintiff leave to amend its Plaintiff in accordance with the attached draft.
14. Further, the court ordered the Plaintiff to file and serve the amended Plaintiff upon all the parties within four days. The court also ordered that the Defendants shall have unconditional leave to amend their Statements of Defences within 14 days of service. Lastly, the court stated that parties should comply with the provisions of Order 11 of *Civil Procedure Rules* with respect to filing of documents and witness statements in 30 days after close of the pleadings. The court thereafter scheduled a mention on 23rd May 2023 to confirm compliance and take a hearing date.
15. The Plaintiff's Amended Plaintiff is dated 13th February 2023. The 2nd Defendant filed its Amended Defence and Counterclaim dated 13th March 2023. The Plaintiff has filed the current application to strike out the amended Defence and Counter Claim.
16. Order 8 Rule 3 of the *Civil Procedure Rules* prescribes the law on amendment of pleadings with leave of the court. The said Order provides as follows:
 - “(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.
 - (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaintiff or counterclaim, he could have sued.
 - (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”



17. In the case of *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR, the court considered the rationale behind the court's power to allow amendment of pleadings:

“The law on amendment of pleading 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* - 12th Edition, in the case of *Joseph Ochieng & 2 others vs. 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 the proposed amendment 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 more 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 Limitation Acts.”

18. In this case, Justice Mwangi gave the Defendants unconditional leave to respond to the Plaintiff's Amended Plaint by filing Amended Defences. The Plaintiff/ Applicant has opposed the amendments by the 2nd Defendant on the grounds that it has added a new cause of action and introduced new parties to the suit. As provided in Order 8 Rule 3(5) above, an amendment may be allowed notwithstanding that its effect is to add a new cause of action, provided that the new cause of action arises substantially out of the same facts.
19. In this case, from the pleadings filed, it is clear that the 2nd Defendant had in its earlier Defence claimed fraud and illegality on the part of the Plaintiff. The changes introduced by the amended Defence include particulars of negligence on the part of the Plaintiff and inclusion of Wilson Gachanja and Silver Clouds Investment Ltd as 4th and 5th Defendants in its Counterclaim; inclusion of particulars of fraud and illegality on the part of the said Wilson Gachanja and Silver Clouds Investment Ltd.
20. In the Amended Defence and Counter claim, the 2nd Defendant has included the alternative reliefs of cancellation of the Plaintiff's title and an order for issuance of a title to the University of Nairobi. It is therefore apparent that in line with Order 8 Rule 3(5) of the *Civil Procedure Rules*, the amendments introduced by the 2nd Defendant arise out of the same facts, which in this case are that the Plaintiff purchased the suit property fraudulently.
21. As to the 2nd Defendant's joinder of Wilson Gachanja and Silver Clouds Investment Ltd, the law on joinder is set out under Order 1 Rule 10(2) of the *Civil Procedure Rules*, which provides that a court may, either on application made by a party or without, allow joinder of a party whose presence it considers to be necessary in a suit. This rule provides as follows:

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that



the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

22. In *Civicon Limited vs Kivuwatt Limited and 2 Others* [2015] eKLR, the court observed as follows:

“Again, the power given under *the Rules* is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”

23. The 2nd Defendant in its Amended Defence and Counterclaim makes several claims that dispute the validity of the title that the Plaintiff claims it acquired from Silver Clouds Investment Ltd. The 2nd Defendant asserts that the acts of illegality were perpetrated by the actions of Mr. Wilson Gachanja, the party they have introduced in the Counter claim.

24. The 2nd Defendant seeks declaratory reliefs against Silver Clouds Investment Ltd and while no specific relief is sought against Mr. Gachanja, it is the view of the court that his joinder is necessary to settle the question of fraud raised by the 2nd Defendant.

25. In conclusion, this court is satisfied that the 2nd Defendant’s Amended Defence and Counterclaim is properly filed and on the record, following the unconditional leave granted to it by Justice Mwangi. Indeed, this court is satisfied that the two introduced parties, Silver Clouds Investment Ltd and Wilson Gachanja are necessary parties to the suit and have been appropriately joined in this suit.

26. Having been allowed to amend the Defences by the court, and in view of the new parties that have been introduced in the Amended Defence and Counter Claim, the new parties will have to be served, and unless by the consent of the parties, the matter will commence de novo to give the new parties an opportunity to participate in the hearing.

27. For those reasons, the Plaintiff’s application dated 17th May 2023 is dismissed with costs.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 29TH FEBRUARY, 2024

O. A. ANGOTE

JUDGE

In the presence of;

Ms Wairimu for Kibe for the Plaintiff

Ms Moga holding brief or Lutta for the Defendant

Ms Akinyi holding brief for Tugo for 3rd Defendant



