



**Ombongi v Simiyu & another (Environment and Land Case Civil Suit
88 of 2017) [2024] KEELC 892 (KLR) (22 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 892 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND CASE CIVIL SUIT 88 OF 2017
LN MBUGUA, J
FEBRUARY 22, 2024**

BETWEEN

JOEL MOTAROKI OMBONGI PLAINTIFF

AND

CHAMI SIMIYU 1ST DEFENDANT

EMBAKASI RANCHING COMPANY LIMITED 2ND DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 7.8.2023 is coming up for determination. He seeks leave to amend his Complaint as per the draft amended Complaint annexed to the application. The application is premised on grounds on its face and on the Plaintiff's supporting affidavit sworn on 7.8.2023 as well as his supplementary affidavit sworn on 11.1.2024.
2. He avers that he filed the instant suit in 2017 with his cause of action being trespass onto his property known as Plot No. G13 (C244). He desires to plead facts against the 2nd defendant, but such facts do not raise any new grounds or cause of action.
3. It is submitted that the Plaintiff has met the legal parameters governing amendments which are stated in the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR as well as the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR.
4. It is argued that the proposed amendments do not depart from the original claim and that should the application be declined, there is a likelihood of multiplicity of suits since the Plaintiff would be forced to sue the 2nd Defendant in fresh proceedings.
5. The plaintiff avers that his application was made timeously after the defendants were allowed to defend the suit, and that no prejudice will be occasioned upon the Defendants. The case of *Emerge Development Limited v Chestnut Uganda Limited & another* [2020] eKLR is relied upon.



6. The application is opposed by the 1st Defendant vide his replying affidavit sworn on 23.11.2023. He avers that the Plaintiff's intended amendments are completely foreign and will cause inconsistencies as they seek to introduce new grounds and cause of action namely fraud, contrary to the law, and that this suit can still be determined effectively and efficiently without introducing a further amendment as the cause of action has been clearly spelt out against all the Defendants.
7. In his submissions, the 1st Defendant contends that Plaintiff's claim was for trespass but he now seeks to introduce a claim of fraud which is new and inconsistent with the initial claim. It is argued that the amendments are filed rather late being 7 years after the initial claim was filed and that the delay is unreasonable and inexcusable and will be prejudicial to the 1st Defendant.
8. The 1st Defendant relies on the cases of *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & another* [2016] eKLR, *Tripaat Singh Managat (Suing on his behalf and on behalf of Managat I B Patel (MIBP) Limited v Manjeet Singh Bhachu & 3 others* [2021] eKLR and *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.
9. The 2nd Defendant did not file a response to the application despite having been served.
10. The issue for determination herein is whether the Plaintiff ought to be granted leave to further amend his amended plaint dated 28.4.2018. The provisions of order 8 rule 5 rule 1 of the *Civil Procedure Rules* gives the court discretion as far as amendment of pleadings is concerned.
11. The Plaintiff seeks amendment on grounds that at the time of amending the initial plaint herein, he omitted to plead facts against the 2nd Defendant.
12. The record indicates that the initial plaint dated 6.2.2017 was amended on 28.4.2018 and the only amendment effected was the joinder of the 2nd Defendant herein as a party. But the facts against the 2nd Defendant were not pleaded.
13. I have considered the amended plaint and the draft further amended plaint, and it is clear that no facts had been proffered against the 2nd Defendant in the amended plaint. The 2nd Defendant did not oppose the proposed amendments and neither did the 1st Defendant demonstrate that he would be prejudiced by the said amendments.
14. Further, bearing in mind that Judgment was entered in this matter on 27.4. 2023 and subsequently set aside on 13.7.2023, the instant application has been brought without delay as the case is yet to take off.
15. There is also need to ensure that the whole case is determined on merits and the parties have an opportunity to amend their respective statements of defences.
16. In finding merit in the application, I'm guided by the decision of the court in GIn *Diamond Trust Bank Kenya Limited v John Wakaba Joseph & another* [2013] eKLR, where the court stated that;

“My view of the matter is as follows. Order 8 Rules 3 and 5 of the *Civil Procedure Rules* gives the court discretion to allow amendments at any stage of the proceedings in order to bring forth all issues in dispute between the parties for exhaustive and conclusive determination. The significant and guiding principle is to do justice between the parties. This can only be achieved by having all issues in dispute being brought forth for the Court to determine them. The law is clear that amendments will be freely allowed at any stage of proceedings provided no injustice is caused to the opposite party.”



17. In the end, the application dated 7.8.2023 is allowed. The amended plaint is to be filed and served within 14 days otherwise the orders given herein shall lapse. Costs there of shall abide the outcome of the suit.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF FEBRUARY, 2024
THROUGH MICROSOFT TEAMS.**

LUCY N. MBUGUA

JUDGE

In the presence of:-

Lukoye for Plaintiff

M/s Swaka holding brief for Kirimi for 1st Defendant

Mutua holding brief for Macharia Gakua for 2nd Defendant

Court assistant: Eddel

