



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT OF KENYA**

**AT NYERI**

**ELC NO. 626 OF 2014**

**BARNABAS KARIUKI.....PLAINTIFF/APPLICANT**

**VERSUS**

**NYERI WATER & SEWERAGE COMPANY  
LIMITED.....DEFENDANT/RESPONDENT**

**RULING**

1. On 4<sup>th</sup> December, 2015 Barnabas Kariuki, hereinafter referred to as the applicant), filed the notice of motion dated **5<sup>th</sup> November, 2015** seeking leave to amend his plaint in the manner indicated in the draft amended plaint annexed to the affidavit he swore on 5<sup>th</sup> November, 2015 in support of the application. To be specific, the applicant wants to plead special damages which he allegedly suffered owing to the defendant's alleged illegal occupation of the suit property and which damages he inadvertently failed to plead. The applicant is also desirous of amending the suit so as to claim the current value of the suit property, as an alternative claim.
2. The application is premised on the grounds that the suit is partially heard; that the cause of action arose after the applicant was forcefully evicted from the suit property and that the amendment sought will assist the court address all pertinent issues and comprehensively determine the real issues in controversy between the parties. The applicant contends that no injustice or prejudice will be occasioned on the respondent if the orders sought are granted.
3. The application is supported by the affidavit of the applicant, Barnabas Kariuki, sworn on **5<sup>th</sup> November 2015**. In that affidavit, the applicant has reiterated his contention that arising from the cause of action which is the subject matter of the suit herein, he suffered special damages which were inadvertently not pleaded. The applicant claims that arising from the cause of action herein, he suffered and continues to suffer loss, which loss he needs to recover through the suit herein.
4. The applicant contends that the amendment sought is necessary to enable him lay a claim based on the true damages/loss he suffered and continues to suffer owing to the cause of action herein.
5. The application is opposed through the replying affidavit of the managing directors of the respondent Company, P.M Gichaaga, sworn on **25<sup>th</sup> February, 2016**. Vide that replying affidavit, the respondent, *inter alia*, contends that the applicant's claim for mesne profits is time barred; that there has been unexplained inordinate delay in seeking leave to amend the plaint and that the amendment sought is prejudicial to the respondent as it will allow the applicant to introduce a totally new cause of action and increase costs of the suit (both in monetary terms and in terms of time).

6. Terming the application devoid of merit, the respondent urges the court to dismiss it with costs to it.

7. When the application came up for hearing, counsel for the applicant, **Mr. Kasamani** told the court that the special damages sought arise directly from the respondent's trespass to land. With regard to the respondent's contention that the intended amendment is time barred, based on the decision in the case of **Kuloba v. Oduol** Nairobi High Court Civil Case No. 1 of 2000, counsel for the applicant submitted that time bar is not always a bar to amendment of pleadings, especially where the amended flows from the original cause of action.

8. Counsel for the respondent, **MS Wambui**, maintained that there has been inordinate delay in bringing the application and that the amendment sought is time barred. She contended that if the application is allowed, the respondent will be denied the opportunity to rely on the defence of time bar. She further submitted that no good explanation has been given for the applicant's failure to plead the alleged special damages. In this regard, she stated that the applicant knew about the special damages at the time of filing the suit.

### **Analysis and determination**

9. It cannot be in contention that this court has power to amend pleadings. In this regard see **Section 100** as read with **Order 8 Rule 3** of the Civil Procedure Act and Rules respectively.

10. The principles that guide the court in considering an application for amendment of pleadings were set out by the Court of Appeal in **Central Kenya Limited v Trust Bank limited (2000)2 E.A 365** as follows:-

**"A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side."**  
(Emphasis supplied).

11. In **Institute For Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR** it was observed:

**"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 form of the action or proceedings."**

12. **Bullen and Leake & Jacob's Precedents of Pleading**, 12<sup>th</sup> Edition, provides as follows concerning amendment of pleadings:-

***"...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..."***

13. In **Kuloba v. Oduol** (supra), **Visram J** (as he then was) observed:-

**"...Even if the amendment seeks to set up a new cause of action which is outside the limitation**

**period, I am of the view that it is an amendment which is permissible under Order VIA rule 3 of the Rules as it is a claim emanating from the same set of facts...”**

14. It is quite clear from the above cited provisions of the law, case law and treatises that the discretion of a trial court to allow amendments of pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.

**Application of the foregoing legal principles to the instant case**

15. In the instant case, the applicant seeks leave to amend his plaint to include a cause of action which he claims flows from the pleaded course of action to wit, trespass to land. There is no doubt that there has been inordinate delay in bringing the application for amendment, the same having been brought nearly 8 years after the suit was filed. That notwithstanding, upon perusal of the file, I noted that hearing in the matter is yet to kick off. That being the case, unless it is demonstrated that the amendment cannot be allowed without injustice to the respondent, the delay cannot be a basis of denying the applicant leave to amend the suit. See the case of ***Central Kenya Limited v Trust Bank limited*** (*supra*).

16. On whether allowing the application the defendant/respondent may be subjected to injustice or prejudice that may not be compensated by award of costs, having considered the nature of claim herein, I hold the view that the amendment sought will not introduce a new cause of action or a cause of action inconsistent with the pleaded cause of action, which from the pleading filed on 30<sup>th</sup> November, 2007, I find to be illegal occupation of land (in other words trespass to land). The amendment sought merely seeks to introduce claims related to the alleged illegal entry and occupation of the suit property.

17. Since the suit is fairly fresh (hearing has not kicked off), I hold the view that the defendant will not suffer any prejudice/injustice which incapable of being compensated by award of costs. See the case of ***Eastern Bakery V. Castelino*** [1958] E.A. 461, where **Sir Kenneth O’Conner**, President of the then Court of Appeal for Eastern Africa, said at p. 462 –

***“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”***

The learned Judge concluded by observing, on the same page, that;

***“The main principle is that an amendment should not be allowed if it causes injustice to the other side.”***

18. With regard to the contention by the defendant/respondent that it will be denied an opportunity to plead time bar, my view of the matter is that amendment of pleading cannot take away the respondent’s right to plead time bar on aspects of the claim that are time barred. In this regard see the case of ***Dhanesvar V. Mehta vs Manilal M. Shah (1965)*** EA 321 where it was held that the effect of a limitation enactment is to remove remedies irrespective of the merits of the particular case, but it is not meant to extinguish claims.

19. For the foregoing reasons, I find the application herein to be merited and allow it in terms of prayer 1. To avoid further delay in the matter, the plaintiff is ordered to file and serve his amended plaint within 14 days from the date of delivery of this ruling, failing which the leave shall automatically stand vacated.

20. The respondent shall file an amended statement of defence, if need be, within 14 days of service.

21. The costs of the application are awarded to the defendant/respondent.

**Dated, signed and delivered at Nyeri this 13th day of July, 2016.**

**L N WAITHAKA**

**JUDGE**

In the presence of:

Mr. King'ori h/b for Ms Wambui for defendant

N/A for the plaintiff

Court assistant - Lydia