



Dodhia & another v County Government of Trans Nzoia & another (Land Case 11 of 2019) [2024] KEELC 728 (KLR) (19 February 2024) (Ruling)

Neutral citation: [2024] KEELC 728 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KITALE
LAND CASE 11 OF 2019
FO NYAGAKA, J
FEBRUARY 19, 2024**

BETWEEN

VIPUL RATILAL DODHIA 1ST PLAINTIFF

AVIR KANTI SHAH 2ND PLAINTIFF

AND

THE COUNTY GOVERNMENT OF TRANS NZOIA 1ST DEFENDANT

ERIC WAFULA 2ND DEFENDANT

RULING

(An Application to strike out amended pleadings and file amended ones)

The Application

1. The 2nd Defendant/Applicant moved this Court by a Notice of Motion dated 12/07/2023. He brought the Motion under Order 2 Rule 15(1)(c) and (d) and Order 8 Rules 3(1) and (5) of the Civil Procedure Rules, 2010. He prayed that:
 - a. this Honourable Court be pleased to issue orders striking out the Plaintiffs' Amended Plaintiff dated 9th November, 2022 and filed on 10th November, 2022.
 - b. leave be granted to the 2nd Defendant/ Applicant to amend his Statement of Defence by introducing a Counterclaim as per the Draft Amended Statement of Defence for the 2nd Defendant and Counterclaim.
 - c. Costs of this Application be provided for.
2. The Application was grounded on a number of simple straight forward points which are that this suit was initially in respect of Land Reference No. 6624 (Original Number 1792/4) which the original



- Plaintiff, without the due process of conversion caused to be registered as Kitale Municipality Block 32/2; on 25/03/2019 the then issued orders of status quo to be maintained by all parties; while the orders subsisted the 2nd Defendant caused the subdivision of parcel No. Kitale Municipality Block 32/2 into about 112 parcels, being Kitale Municipality Block 32/3-114; the Plaintiff amended the Plaintiff on 09/11/2022 but the same was never attached to the Application dated 14/12/2021; the amended Plaintiff changed the entire Claim other than what the parties consented to the Plaintiffs disobeyed the orders of the Court by surveying the original and subdividing it leading to the issuance of new title deeds.
3. The Application was supported by the Affidavit of Eric Wafula which he swore on 12/07/2023. In it he repeated the contents of the grounds of the application. Further, he deponed that he was an elected member of the County Assembly of Trans Nzoia County. That the 1st Plaintiff, without any valid agreement of purchase changed the parcel or converted it to be registered in the new number as stated in the grounds yet it had been sold to a third party. He annexed and marked EW-1A, EW-1B and EW-1C copies of the Grant and title deeds. He annexed and marked as EW-2 a copy of the order of status quo issued by the learned trial judge on 25/03/2019. That despite the existence of the orders of status quo the 2nd Defendant went ahead and subdivided the newly registered parcel into 112 plots. He annexed and marked as EW-4 a copy of the Green Card for Kitale Municipality Block 32/2. He repeated that the amended plaintiff was never attached to the Application dated 14/12/2021. That the Application was for joinder of the 2nd Plaintiff in the suit and not the drastic change of the subject matter. That when his lawyers were served with the Amended Plaintiff they discovered that the original suit land had been subdivided into about 112 parcels and all of them registered in the 2nd Plaintiff's name. He annexed as EW-4A, 4B, 4C, 4D, 4E, 4F and 4G copies of the green cards for some of the subdivisions. He averred that the Plaintiffs actions amounted to contempt of Court and a blatant abuse of the process of the Court. That the leave to amend was only to enjoin the 2nd Plaintiff and which application was granted but it was not to mischievously alter the character of the suit.
 4. The Application was opposed through the Replying Affidavit of one Vipul Ratilal Dodhia. He deponed that the suit was filed against the Defendants on 06/02/2029. He annexed a copy of the Plaintiff. That the 2nd Defendant entered appearance 5 months later and a defence on 10/07/2019. He annexed a copy of the Memorandum of Appearance and Defence.
 5. That later the Plaintiff filed an application to enjoin the 2nd Plaintiff and the same was compromised by way of a consent on 14/10/2022. He annexed a copy of the Application. That the leave was to incorporate the new party and the prayer was granted on 13/10/2022. The Amended Plaintiff was filed and served. He annexed as VRD-4 a copy of the Plaintiff. He filed an Affidavit of service to evidence the service. That the Defendant filed their amended Defence on 31/10/2023. That the Defendants were now "scape-goating" the Plaintiffs for failure to attach the amended Plaintiff. That on 07/03/2023 the Plaintiff's filed a reply to defence.
 6. He deponed further that the information in the Affidavit in support of the application was false and misleading since the applicant had always been indolent. That even upon being served with the Amended Plaintiff the Defendants took three months to file an Amended Defence. That it was misleading that the Applicant states that the Respondent did not attach a copy of their Amended Defence yet it continued to be part of the court records. That it was untrue that the Plaintiffs subdivided the suit land after amending the Plaintiff yet from the documentary evidence the subdivision occurred...(sic).
 7. That the Applicant could not claim that the Respondent had disregarded court orders without any proof since the Defendants had been indolent hence disentitling them of the Court's unfettered



discretion in their favour. That the Applicants had come to the Court with unclean hands and they concealed material and relevant information from the Court.

8. He deponed that the Applicants had realized they did not have an arguable case and now sought to prolong the suit further for ulterior motives and to the Detriment of the Plaintiffs. He prayed for the Court, in the interest of justice, to refuse the orders sought. He stated that the Applicant was on a fishing expedition and the grounds he relied on were wild, poorly drawn and incoherent. He swore that the statements in the Affidavit were inadmissible hearsay because since at paragraph 3 and 4 he did not disclose information he received and there was no proof of such communication; further that contrary to paragraph 5 the applicant has not proven that the file had gone missing in the registry; that having realized that the matter had been dismissed on 07/07/2022 the applicant had not demonstrated or shown why it took him so long to bring the application which was more than two years since.
9. He deponed that the issues lacked merit, it was bad in law, incompetent, premature and abuse of the process of the Court, misconceived and merely actuated by grave prejudice and malice with utmost intent and should be dismissed.
10. The Applicant submitted, on 19/10/2023 vide submissions dated the same date that Order 2 Rule 15(1) of the Civil Procedure Rules, provided for striking out or amendment of pleadings at any stage of the proceedings. That the provision gives out four grounds for striking out, which they reproduced. They relied on the case of Simon Kirima Muraguri & another v. Equity Bank (Kenya) Limited & another CC No. E004 of 2020. He applied the law to the facts of the instant case where the Court issued an order of status quo but it was disobeyed. They cited Section 5 of the [Contempt of Court Act](#) (sic).
11. On the contempt of court, he relied on the case of Econet Wireless Kenya Limited vs. Minister for Information & Communication of Kenya Authority [2005] eKLR which dealt with the issue of disobedience of Court orders. He also relied on the case of T. N. Gadavarma Thiru Mulpad v Ashok Khot & another [2005] 5 SCC where the Supreme Court of India dealt with disobedience of court orders, the case of Gulabchand Popatlal Shah & another Civil Application No. 39 of 1990 (unreported) where the Court of Appeal emphasized the importance of the Rule of Law and the case of Hadkinson v. Kadkinson (1952) 2 All ER, 567. He summed it that the Amended Complaint dated 09/11/2022 filed by the 2nd Plaintiff was to introduce new subject matters not acquired from the first title and the actions of both Plaintiffs were in contempt of Court.
12. The 1st Respondent submitted in support of the Applicant through submissions dated 26/10/2023 but filed on 08/11/2023. It summed up the contents of the application and went on to argue that the amendment introduced new issues after the Plaintiffs in utter disregard of the orders of the Court went ahead and subdivided that suit land into 114 plot. It argued that the amended complaint was the “fruit of a poisonous tree and should be struck out.” It relied on the case of Ephraim Miano Thanmani v Nancy Wanjiru Wangai & 2 others [2022] eKLR which relied on the case of Muchanga Investment Limited v Safaris Unlimited (Africa) Ltd & 2 others Civil Appeal No 25 of 2002 (2009) eKLR 229 which defined abuse of the process of the Court. They argued that the amendment was an abuse of the process of the Court and should be struck out.
13. On their part, the Respondents began their submissions by summarizing the Application. Then they argued on whether the application was merited or not. In their view the Applicant’s application was for leave to file an amended Defence out of time. Order 8 Rule 3 (1) and 5 of the Civil Procedure gives the court a wide discretion as far as amendment of pleadings was concerned, and was for determining the real issues in controversy. Further that the discretion may be exercised at any stage of the proceedings, whether before or at the trial, after the trial or judgment or even on appeal.



14. Regarding the prayer to strike off the Amended Plaintiff they submitted that the court allowed the said prayer upon being fully satisfied that Order 8 Rule 1 was properly complied with. Hence the Plaintiffs amended their Plaintiff and had accordingly as summarized in the Application and Response. They argued that the Applicants did not object to the same at that juncture because they knew too well that the Plaintiff had duly complied with the law and that no harm/and prejudice would befall them in the event the said prayer was allowed. They argued that the application was an afterthought, and brought close to one year later without explanation but for reason of delaying the suit. They urged the Court not to strike out the pleadings. They relied on the case of the Chairman, Secretary and Treasurer, School Management Committee of Sir Ali Bin Salim Primary School & Another vs. Francis Bahati Diwani & 2 others; D.T. Dobie & Company (Kenya) Limited vs Joseph Mbaria Muchina & another [1980] eKLR; Nicholas Kiptoo Arap Korir Salat vs. Independent Electoral and Boundaries Commission & others (2013) eKLR; and Almond Resort Limited vs. Mohamed Mahat Kuno [2019] EKLR.
15. On whether the Court should grant leave to the 2nd applicant to amend his statement of defence by introducing a counter-claim as per the draft amended statement of defence they submitted that it was three years since the suit was filed. Again that when the Plaintiff was granted leave to amend the Plaintiff the Defendant had corresponding leave or why he did not seek leave at that early opportunity. They submitted that the delay was prolonged and unreasonable and the Applicant was guilty of the doctrine of laches. They asked the Court to dismiss the application. They relied on the case of D.Manji Construction Limited v Farmers Industry Limited [2020] eKLR.
16. Then they argued that the supporting affidavit was made up of inadmissible hearsay statements and inaccurate because paragraph 5 was extremely misleading since it did not contain proof of communication between the Plaintiff and the registry inquiring over the matter after having realised that the file had gone missing. Lastly, that the Applicant having realized the matter had been dismissed on 07/07/2022, he did not demonstrate and/or show the court why it took him so long in order to bring the application. He urged for dismissal of the application.

Issues, Analysis and Determination

17. I have considered the Application before me, the response thereto, the law and the submissions of the rival parties. I am of the view that the issues herein are simple, and they are three. The first one is whether or not the prayer for striking out the Amended Plaintiff dated 09/10/2022 and filed on 11/10/2022 is merited. The second one is whether the prayer for amendment of the of the Second Defendant's Statement of Defence is merited. Three who to bear the costs of the Application.
18. I now analyze each of the issues herein using the step-by-step process of Issue, Rule, Application and Conclusion by beginning with the first one.
19. Regarding the issue whether or not the prayer for striking out the Amended Plaintiff dated 09/10/2022 and filed on 11/10/2022 is merited the bone of contention is that the Amended Plaintiff filed by the Plaintiff did not accord with the order this Court granted and as a result it should be struck out. The Rule of law and principle of striking out of pleadings is now settled. Striking out of pleadings is a draconian step which should be exercised cautiously and only in the rarest and most clear cases that it is deserved. One of the reasons why a case can be deserving is when the amendment made does not accord with an order of the Court. Herein what the Court states is that amendments of pleadings must be made for a specific purpose and the amendments must accord with the order of the Court. It therefore goes without saying that once a Court has issued an order for amendment it should be done pursuant to the order and in terms of the prayers sought and granted.



20. The rule in striking out of pleadings is Order 2 Rule 15(1) of the Civil Procedure Rules. It stipulates:
- “At any stage of the proceedings the court may order to be struck out or amended any pleading on the ground that—
- (a) it discloses no reasonable cause of action or defence in law; or
 - (b) it is scandalous, frivolous or vexatious; or
 - (c) it may prejudice, embarrass or delay the fair trial of the action; or
 - (d) it is otherwise an abuse of the process of the court, and may order the suit to be stayed or dismissed or judgment to be entered accordingly, as the case may be.”
21. Under the Rule the Application was brought, only sub-rule (d) applies and fits the Applicant’s argument. An understanding of the meaning of the sub-rule is important. Thus, what is abuse of the process of Court? There are numerous cases that define “abuse of the process of Court”. I need not repeat them here suffice it to say that when a party uses the process of the Court in a manner that is not proper or for a purpose other than a just determination of a dispute it amounts to abuse of the process thereof. In *Muchanga Investments Limited (supra)* cited in the case of *Ephraim Miano (supra)* the Court of appeal held that when a party uses the judicial process to the annoyance and irritation of his opponent and the effective administration of justice it results in abuse of the process.
22. Additionally, I have carefully considered all the authorities that the parties cited. I find them relevant to the extent that each buttresses the point they were cited on. However, the merits of this application point to the finding that I now make below and that is why in relation to the ones cited by the Respondents, I still find as I do hereinafter.
23. Thus, in the instant case the Applicant argues that the Amended Plaintiff dated 09/11/2022 filed on 10/11/2022 is an abuse of the process of the Court, was filed against the orders of the Court issued when the Application dated 14/12/2021 was allowed by consent and in disobedience of the order thereof. Further, he argues that the Respondent did not annex the now Amended Plaintiff to the Application and the filed document completely changed the substance or character of the suit herein. That the Application was to introduce the 2nd Plaintiff as a party but the amendments introduced completely changed the character of the suit. The 1st Defendant supported this argument.
24. On their part the Plaintiffs think otherwise. They argue that the amendment was in line with the order sought and granted and that the Applicant did not object to the amendment soon after or early enough, that he was indolent, has made the application with extreme bad faith, the supporting affidavit had falsehoods, among others. Further, they argued that the Applicant had, though late, filed an Amended Defence and they had filed a Reply thereto and that they had not disregarded Court orders.
25. Having convinced the adverse parties to agree to the grant of the prayers sought in the application dated 14/12/2021 did the Plaintiffs use the process of the Court for the proper purpose it was designed? This Court can only get the answer to the above by looking at the prayers sought in the application dated 14/12/2021 and the ones granted vide the consent orders following the adoption of the consent dated 19/09/2023 and filed on 12/10/2023 and adopted on 13/10/2023. The prayers in the Application were:
1. ...Spent
 2. That this Honourable Court be pleased to join the applicant Vipul Ratilal Dodhia as the of the 2nd Plaintiff in the matter.



3. Costs of the Application be in the cause.
26. Following an agreement reached by the parties, the consent adopted by the Court was that “the notice of motion application dated 14th December 2021 be compromised in the following terms:-
 - a. That the applicant, Vipul Ratilal Dodhia be and is hereby enjoined as the 2nd Plaintiff in the suit herein;
 - b. That the costs of the application be in the cause.
27. It was upon that consent that the Amended Plaintiff was filed. As I turn to the contents thereof in order to consider whether the amendments introduced accorded with the prayers sought and granted through the consent, one issue or fact raised by the applicant ought to be clarified. The Applicant argues that the Applicant in the said application did not annex a copy of the amended Plaintiff. In essence he argues that had the said then intended amendments been shown to him or parties by way of annexing a draft amended Plaintiff, he would have noted that the Applicant wanted, in the instant applicant’s view, to change the character of the suit and that would have made him not give the consent, perhaps.
28. The Respondent herein argues that the Applicant’s affidavit contains falsehoods on this issue and that the Amended Plaintiff was in the Court file and has always been there and continues to be part of the record of the Applicant.
29. A clarification of the above issue can only be made using the Court record, particularly documents that were annexed to the supporting affidavit of the application dated 14/12/2021. I have carefully looked at the application, which was supported by the affidavit of Vipul Ratilal Dodhia sworn on the same date. The affidavit, at paragraph 4 referred to five annexures, being VD-1, VD-2, VD-3, VD-4 and VD-5, which were certified copies of official searches of parcel number Kitale Municipality Block 32/68,69, 70, 71 and 88. Those were the only documents he referred to and argued that not all the subdivisions of the suit land are encroached by the road hence he wanted to be enjoined so as to defend his interest.
30. It is clear as noon-day that there was no reference to a (draft) Amended Plaintiff and none was annexed even by error. Therefore, the argument by the Respondent that the Amended Plaintiff was part of the record before it was filed and continues to be is a white lie and the said Vipul Dodhia has committed perjury by so swearing when he knows it is untrue. The Amended Plaintiff only found its way into the Court record after the consent allowing the application was filed and adopted as the order of the Court.
31. That said, I now turn to the content of the Amended Plaintiff impugned. I have carefully scrutinized the Amended Plaintiff filed on 11/11/2022. I am mesmerized by the extent of the amendments introduced by the said Plaintiff. It did not stop at enjoining the 2nd Plaintiff as a party. It introduced paragraph 4A that states that the 2nd Plaintiff is the owner of all the parcels of land known as Kitale Municipality Block 32/ 3-114. It completely removed the land Reference No. 662 (Original No. 1792/4) which the 1st Plaintiff who brought the suit as the owner alleged to have owned and in respect of which the learned judge had issued an order of status quo on 25/03/2019. It almost completely removed the 1st Plaintiff (the original Plaintiff) from the pleadings. In the prayers, apart from starting with the phrase that “the plaintiffs pray for judgment...” the reliefs sought, if granted, were to be in favour of only the 2nd Plaintiff.
32. Where did the 1st Plaintiff’s case go? How did it go away by enjoining the 2nd Plaintiff? Only the Plaintiffs know.
33. In my view this is the most mischievous way of parties seeking to alter the character of a suit by withholding information and sneaking a completely new claim into an existing one. This is still in shock as to how ingenious the designers of this trick were. First, they kept away the intended amended



Plaint, then they convinced the other parties that the intended amendment was only to introduce a party only to substitute the entire claim. This is the clearest of the cases of abuse of the process of the Court. The Amended Plaintiff dated 09/11/2022 must be struck out as fast as lightning strikes a green tree and it dries up immediately. This ‘tree’ of the Amended Plaintiff must dry completely: it means that the Pleadings which were filed subsequent to and in relation to the said Amended Defence, to be specific, the Amended Statement of Defence dated 20/12/2023 and that dated 07/03/2023 and any Reply to the Defences are of no effect and can only be struck out as they now are. It is unacceptable for parties to misuse the process of the Court in this manner.

34. The Respondents raised issues of a dismissal of 07/07/2022. The court record does not bear anything to that effect.
35. Regarding the second issue on whether the 2nd Defendant should be granted leave to amend his Defence, the contention is this Court can grant leave to him to amend his Statement of Defence in terms of the draft Amended Statement of Defence at this stage. The respondents oppose the prayer arguing that the Applicant is guilty of laches, that it is over three years since the suit was filed and the applicant is indolent and intent on delaying the suit. The Applicant, in his part argues that his step has been necessitated by the conversion of the suit land by the Plaintiff (since the proposed 2nd Plaintiff has been removed from the pleadings by virtue of the order of striking out the Amended Plaintiff that sought to introduce him).
36. The Applicant sought the relief pursuant to Order 8 Rules 3 and 5 of the Civil Procedure Rules. I find that the relief sought was brought under the proper provisions of law. This is because, as at this stage the pleadings closed some time back hence leave of the Court has to be sought and it can be granted as long as the Applicant satisfies the Court on a prayer for it. Besides, Section Section 100 of the [Civil Procedure Act](#) grants the Court the general power to amend any error or defect in its proceedings. It provides:
37. “The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real questions or issue raised by or depending on the proceedings.”
38. On their part, the Respondents were of the view in their submissions that the Applicant’s application was for leave to file an amended Defence out of time. Order 8 Rule 3 (1) and 5 of the Civil Procedure gives the court a wide discretion as far as amendment of pleadings was concerned, and was for determining the real issues in controversy. Further that the discretion may be exercised at any stage of the proceedings, whether before or at the trial, after the trial or judgment or even on appeal. The Applicant and the 1st Defendant did not submit on this issue.
39. I agree with the Plaintiffs/Respondents’ submissions on this issue. The suit herein has not proceeded to hearing. Since amendments are freely allowed in order to determine the real issues in controversy between parties, I grant it. The Amended Statement of Defence should be filed and served within the next ten (10) days of this order. Further, the amendment should factor in the fact that as at this point, one Vipul Ratilal Dodhia is not a party to the suit but is to be enjoined as a Plaintiff by way of Counterclaim.
40. The costs of this Application shall be borne by the Plaintiffs/ Respondents.
41. This matter shall be mentioned on 14/03/2024 to confirm closure of pleadings.
42. It is so ordered.



**RULING DATED, SIGNED AND DELIVERED AT KITALE VIA ELECTRONIC MAIL ON THIS
19TH DAY OF FEBRUARY, 2024.**

HON. DR. IUR FRED NYAGAKA

JUDGE

