



**Fischer v Fischer & another (Environment & Land Case 186 of 2021)  
[2024] KEELC 5015 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 5015 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 186 OF 2021  
AE DENA, J  
FEBRUARY 15, 2024**

**BETWEEN**

**FELIX FISCHER ..... PLAINTIFF**

**AND**

**DAVID ADRIAN FISCHER ..... 1<sup>ST</sup> DEFENDANT**

**KEZIAH WANGUI FISCHER ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

**The Application**

1. The 2<sup>nd</sup> Defendant/Applicant Keziah Wangui Fischer on 30/5/23 filed a Notice of Motion dated 22/5/2023. The application is premised upon the provisions of Order 2 rule 55, Order 8 Rule 3[1] & 3,5 & 7, Rule 3,8 & 12 and Order 51 Rule 1 of the [Civil Procedure Rules](#) 2010, Section 3A and all other enabling provisions of the law. The Applicant seeks for orders;
  1. That the 2<sup>nd</sup> Defendant/Applicant be granted leave to amend her defence dated 22<sup>nd</sup> June 2020 and filed on 20<sup>th</sup> July 2020 herein as per the annexed amended defence and counterclaim attached hereto.
  2. That the amended defence and counterclaim annexed hereto be treated as the 2<sup>nd</sup> Defendant/Applicants defence and counterclaim and the same be deemed as having been duly filed and served.
  3. That the Respondents be at liberty to file a reply and/or defence to the amended defence and counterclaim if they so please.
  4. That leave be granted to the 2<sup>nd</sup> Defendant/Applicant to serve the amended defence and counterclaim to the Respondents.



5. That costs of this application be in the cause.
2. The 5 grounds in support of the application have been listed on its face and the application is further supported by an affidavit sworn by the Applicant herein. It is averred that the Applicant had filed a suit being Kwale CM ELC No 047 of 2022 but the same was dismissed on a preliminary objection raised by the 1<sup>st</sup> Defendant for being concurrent with the suit herein. That it is her belief the counterclaim can be canvassed with the suit herein to avoid multiplicity of suits.
3. The Applicant states that the proposed amendments will not be prejudicial to the Respondents and that it is in the interest of justice that the same be allowed.

### **Response**

4. The Plaintiff/1<sup>st</sup> Respondent filed a Notice of Preliminary Objection in opposing the application. The Plaintiff sought to have the application struck out or dismissed with costs on the following grounds;
  - a. The application offends Order 7 Rule 5 and Order 11 Rule 7[1][c] of the *Civil Procedure Rules* 2010, which requires amendment of pleadings to be conducted at least 14 days prior to the hearing date at the trial conference.
  - b. That the counterclaim is incurably defective and a sham and the Plaintiff shall apply to the court for an order to exclude the counterclaim
  - c. Pleadings have closed, further the Plaintiff and the 1<sup>st</sup> defendant have closed their cases. The 2<sup>nd</sup> Defendants move to introduce a counterclaim is an afterthought.
  - d. The application is offensive, frivolous, vexatious and or is an abuse of the honourable courts process.
5. The Plaintiff also filed grounds of opposition before court on 23/6/2023 and raised the following grounds;
  1. That the application has been filed after inordinate delay. Pleadings have closed, further that the Plaintiff and the 1<sup>st</sup> Defendant have closed their cases. The application has therefore been overtaken by events.
  2. That 2<sup>nd</sup> Defendant/Applicant is trying to cause side shows by coming up with a pseudo suit which is neither here nor there. The instant application is an attempt to steal a match with the intention of circumventing the due process of the law.
  3. That the pretrial conference contemplated in Order 11 Rule 7, requires parties to supply each other documents at least 15 days before pre-trial conference. This is meant to curb trials by ambush as the objective is to make clear to the other party the nature of evidence that he/she will face at the trial.
  4. That the court has a constitutional mandate to ensure that a trial will be fair and therefore retains the power to disallow one party from tabling evidence that was not provided to the other party as contemplated by the rules.
  5. That the function of the discovery of documents is to provide the parties with relevant documentary material before the trial so as to assist them in appraising the strength or weakness of their relevant cases and thus provide the basis for the fair disposal of the proceedings before or at the trial.



6. That pre-trial disclosure is not just a procedural edict it is anchored in Article 50 of *the constitution* and is therefore a cardinal requirement that ought not to be taken lightly as Counsel for the 2<sup>nd</sup> Defendant appears to do. The issue here is about fairness, a level playing field and equality of arms.
  7. That it would go against all these tenets of natural justice to let the Plaintiff grope in the dark and presume that the evidence to be presented by the 2<sup>nd</sup> Defendant will not be put of ordinary; particularly in this instance in which no justification at all was given for non-compliance to order 11.
  8. That the said application is ill-conceived and it is otherwise unsustainable in law and ought to be accordingly dismissed with costs.
6. The application is further opposed vide a replying affidavit sworn by the 1<sup>st</sup> Defendant David Adrian Fischer. He avers that the application is mischievous, misleading, a mere red herring and utterly devoid of merit. That the same has been crafted to waste the courts time and to further delay the matter. The deponent states that the Applicant is economical with the truth as the application does not raise any new matters as alleged. Further that the application is in contravention of Order 7 Rule 5 and Order 1 Rule 7[1][c] of the *Civil Procedure Rules* 2020. That as per the courts record, both the Plaintiffs and defence cases have been closed. That the Applicant has had sufficient time to amend her pleadings and put in her counterclaim since 2020. That the other parties having already closed their cases and the 2<sup>nd</sup> Defendant/Applicant ought to proceed with the hearing of her defence. That upon the matter coming up for notice to show cause on 23/11/2022 the Applicant did not bring to the courts attention that they intended to put in any further documents and hence the matter was set down for hearing on 16/3/2023. The court is urged to dismiss the application.

### **Submissions**

7. The application was canvassed by written submissions. The Applicant's submissions were filed in court on 4/10/2023, the 2<sup>nd</sup> Respondents on 21/9/2023 and the Plaintiffs on 31/8/2023. The court has duly considered all the submissions on record.

### **Determination**

8. I will first address the preliminary objection and if it is properly before court. The rule on what amounts to a preliminary objection was stated in the case of *Mukhisa Biscuits Manufacturers Ltd -vs- West End Distributors Ltd* [1969] EA 696 where the Court of Appeal said: -

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

9. It is clear from the above excerpts that a preliminary objection may only be raised on a ‘pure question of law’. In order to discern such a point of law, the Court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed. From the application filed before court it is clear that neither of the parties has contested the facts. The preliminary objection states that the application offends the provisions of Order 7 Rule 5 and Order 11[7]1 [c] of the *Civil Procedure Rules*. These are issues of law, as such the preliminary objection is properly before court. Having established this, the court will now embark on making a finding on whether the application is merited based on the response opposing the same which is the preliminary objection.



10. The guideline on amending pleadings with the leave of court are outlined under Order 8 Rule 3 of the [Civil Procedure Rules](#) which 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.
11. Order 8 rule 5 of the [Civil Procedure Rules](#) provides as follows: -

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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
12. The court of appeal in [St. Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd](#) (2018) eKLR set out the principles governing amendment of pleadings as follows: -
  - a. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
  - b. The amendments should be timeously applied for;
  - c. Power to amend can be exercised by the court at any stage of the proceedings;
  - d. 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.
  - e. 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
13. The preliminary objection is to the effect that the application offends the provisions of Order 7 of the [Civil Procedure Rules](#) on documents to accompany a defence or counterclaim, while order 11 is on pretrial conference and which stipulates the time within which parties should convene a trial conference to address issues of evidence to be adduced and other documentation which ought to be exchanged by both parties in good time and before a matter commences its hearing.
14. In the present suit, it is noteworthy that the Plaintiffs case was heard and closed on 16/3/2023, the defence case is yet to commence. It was after the close of the Plaintiffs case that the 2<sup>nd</sup> Defendant intimated to court of their intention to file the instant application. This suit was commenced vide a plaint dated 27/2/2020. The 2<sup>nd</sup> Defendant entered appearance on 15/5/2020 and have since then participated in the suit. For the 2<sup>nd</sup> Defendant to make an application to amend her pleadings 3 years later and after the close of the Plaintiff’s case is in my opinion an afterthought and an attempt to counter whatever evidence was presented by the said Plaintiff. In essence the 2<sup>nd</sup> Defendant is trying to steal a match which actions are prejudicial to the Plaintiff. With all fairness, 3 years is a lengthy period of time and inordinate. To me this would be to allow litigation by instalments which would protract litigation, diminish predictability and defeat the very essence of litigation based on the pleadings that are binding and anticipate the litigant’s cases. The totality of this would be to go against the very objectives of the Civil Procedure Act which are echoed in section 3 of the [Environment and Land Court Act](#). It will also be tantamount to condoning abuse of the court process. I do not think the application has been made in good faith.



15. I find support and persuaded by the court decision in *Joshua Kimani Vs Kiso Enterprises Ltd & 3 Others* (2020) eKLR where Justice J. O. Olola stated thus; -

7. In the matter before me, the Plaintiff avers that he has realized there is need to broaden the prayers sought from the Court in order to cover all eventualities and that the Defendants would not be prejudiced in any way by the amendments. I have looked at the draft amended Plaintiff. While the Plaintiff avers that he merely intends to broaden the prayers, a perusal thereof reveals that the Plaintiff intends to literally amend the entire Plaintiff and to introduce a completely new version of Paragraphs 8 to 13 as well as an additional paragraphs 16 to 19.

8. While it is true that the said amendments are based on facts arising from the same circumstances leading to the filing of this suit, the Plaintiff does not state why the said amendments were not brought earlier in the day. This suit was filed on 3rd June 2016, some three years before this application was filed. As it were, the parties went for pre-trial directions and thereafter the Plaintiff testified at the trial and closed his case a month before this application was filed. (Emphasis is mine)

9. Considering the record and the material placed before me, it is evident that by this application, the Plaintiff seeks to fill the gaps that were raised by the defence during the cross-examination of the Plaintiff. That fact is indeed confirmed by the Plaintiff himself who in his submissions before this Court filed on 29th November 2019 states at page 2 thereof as follows: -

The amendment sought has been brought after the hearing of the Plaintiff's claim due to the fact that certain factors were revealed during the hearing. However, it is brought in good faith and the defendants will not in any way be prejudiced since the amendment is only seeking to make the prayers sought clearer."

11. In the premises, I am in agreement with the Defendants that the intended amendments are intended to advance new grounds of defence and have been brought too late in the day....'

16. The 2<sup>nd</sup> Defendant alleges that she had filed a suit in the lower court and which was dismissed as sub judice given that the issues raised therein were similar to the ones in this suit and hence both suits could not be actively running in two separate courts. However, the Applicant did not annex any evidence in confirmation of the allegation that indeed a suit had previously been lodged at the lower court. The court cannot therefore blindly make the presumption that the issues at the lower court have not been canvassed in the counterclaim. In any event I would still decline the amendment for the reasons already cited.

17. The upshot of the foregoing is I find no merit in the application dated 22/5/2023, the same is hereby dismissed with costs to the Plaintiff and the 1<sup>st</sup> Defendant/Respondent.

It is so ordered.

**RULING DATED, AND DELIVERED THIS 15<sup>TH</sup> DAY OF FEBRUARY 2024.**

.....

**A.E DENA**

**JUDGE**

**Ruling delivered virtually through Microsoft teams Video Conferencing Platform in the presence of: -**

Ms. Wanjiku holding brief for Obonyo for the Plaintiff/Respondent



No appearance for the 1<sup>st</sup> Defendant/Applicant

Ms. Kamau for the 2<sup>nd</sup> Defendant/Applicant

Mr. Daniel Disii – Court Assistant

