



**Kinyanjui v Mangera & another (Environment & Land Case
1169 of 2013) [2024] KEELC 830 (KLR) (15 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 830 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 1169 OF 2013
AA OMOLLO, J
FEBRUARY 15, 2024**

BETWEEN

NYAWIRA KINYANJUI PLAINTIFF

AND

SAMUEL MAYENGA MANGERA 1ST DEFENDANT

**BEATRICE WIRIA ATIENO (AS ADMINISTRATRIX OF THE ESTATE OF
SUPRINA ODIRA) 2ND DEFENDANT**

RULING

1. The 2nd Defendant filed a notice of motion dated 25th July 2023 seeking for the following orders;
 - a. Spent.
 - b. Spent
 - c. That the orders made by this Honourable Court on 3rd July 2023 be reviewed and set aside;
 - d. That the Court does admit the 2nd Defendant' s/Applicant' s defence and counterclaim dated 10th January 2023 which was filed out of time and without leave and the same be deemed to be properly on record;
 - e. That the costs of this application be in the cause; and
 - f. That such further and other relief be granted to the Applicant as this court deems fit and expedient in the circumstances
2. The application was supported by the affidavit of Beatrice Wiria Atieno dated the 25th July 2023 deposing inter alia that the Plaintiff/Respondent has amended its Complaint at least 4 times with the last amendment being made in July 2022. She deposed that for each amendment the adverse party has a



right to file an amended defence and/or counterclaim and that the Plaintiff is at the liberty to make a response to the same.

3. The 2nd Defendant contended that with the last amendment of the plaint dated 18th July 2022, it prompted her to file an amended defence and counter claim dated 10th January 2023. However, the same was filed out of time and without leave of the court. She added that on 3rd July 2023 the Plaintiff/ Respondent made an application to have the said amended defence and counterclaim be struck out and the court granted the said order. The 2nd Defendant contended that the orders granted are prejudicial to her and go against the rules of natural justice and that no man should be condemned unheard.

Plaintiff's Response

4. In opposition of the 2nd Defendant's motion, the Plaintiff filed Preliminary Objection dated 2nd October 2023 and a replying affidavit sworn by Nyawira Kinyanjui on the same date. The Preliminary Objection raised the grounds that the 2nd Defendant's counsel having made an oral application on 3/7/2023 for leave to admit the impugned counter claim out of time and the application having been disallowed, the issue is res judicata and can only be dealt with through appeal and that the 2nd Defendant/Applicant's application dated 25th July 2023, offends the provisions of Order 8 Rule 1 of the *Civil Procedure Rules*.
5. The 2nd Defendant stated that that the application before court is an afterthought for the reason that the 2nd Defendant's Advocate during the hearing on 3/7 /2023 made an oral application for leave to file the impugned counter claim out of time which application was disallowed by the court and the court informed the Advocate for the 2nd Defendant that the room available to them is to appeal on the said ruling disallowing the counter claim. That if the application is allowed, she stands to be greatly prejudiced for the reason that she is introducing new facts and/or evidence after close of the Plaintiff's case and the case by the 1st Defendant.

Submissions

6. The Plaintiff filed her submissions dated 13th November 2023 and the 2nd Defendant filed her submissions dated 23rd October 2023. The 2nd Defendant/Applicant submitted that its application is brought under the provisions of Order 45 of the *Civil Procedure Rules* because there are sufficient reasons to have the Court set aside it's earlier orders. In support of her application, she cited the cases of *Sbanzu Investments Limited v Commissioner for Lands* (Civil Appeal No 100 of 1993) and *Patrick's Hill School Ltd v Bank of Africa Ken a Ltd* (2018) eKLR among others. She added that Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 (1) of the *Civil Procedure Rules*, 2010 gives this court power to amend pleadings. It is her submission that Court has power to allow amendment of pleadings at any stage of the proceedings in order to determine the true substantive merits of the case.
7. The Applicant averred that the application is informed by the need to do justice by introducing the issues raised in the amended statement of Defence and counterclaim which amendment was done as a matter of right albeit late after the Plaintiff amended her Plaint. She cited the case of *K K Lodgit Limited v Geminia Insurance Company Ltd & Another* [2021] eKLR which stated that courts will readily grant leave to amend pleadings in order to determine the real issue (s) in dispute and the only caveat is that a proposed amendment should not cause prejudice or an injustice to the opposing party.
8. The 2nd Defendant added that the delay in filing amended defence and counter claim wasn't inordinate and relied on the decision in *Ocean Foods limited v Osoipa Company Limited & 2 Others* (2020) eKLR while urging the Court to take judicial notice that the 2nd Defendant is deceased. That the matter was taken over by her administratrix whereby at first didn't have concrete information to instruct her



advocates accordingly and that the deceased estate stands to suffer irreparable harm if the issues raised in the amended defence and counterclaim aren't ventilated herein since bringing up another suit will amount to res judicata.

9. In her submission, the Plaintiff stated that she closed her case on 21st June, 2021 and the 1st Defendant closed her case on 8th December, 2022. She expounded that on 8/12/2022 when the matter came up for hearing, Advocate for the 2nd Defendant informed court that they had been served with an amended Plaintiff and indicated that the case can proceed but the court give them 30 days to file any response and/or documents if they needed to. Instead, they filed their impugned documents dated 10/1 /2023 on 24/1 /2023 outside the time allowed by the court which they failed to serve and only referred to them on 3/7/2023 after they were objected to by Mr. Ali learned counsel for the Plaintiff.
10. Also, they submitted that the court granted leave to the 2nd Defendant to file a response to the Plaintiff's amended Plaintiff amended on 18/7/2022 but no leave was sought to file a counter claim. The Plaintiff submitted that the oral application made in court by counsel of the 2nd Defendant on 3rd July, 2023 to admit the Counter Claim filed without leave of court and not served but was dismissed. Thus, they should have appealed the said order and that the approach by the 2nd Defendant making an application to set aside an order/ruling is un-procedural and unheard of and the same amounts to res judicata. In support this argument, she cited the case of *Nicholas Nieru v the Attorney General and 8 Others* Civil Appeal No. 110 of 2011 [2013] eKLR and *Independent Electoral & Boundaries Commission v Maina Kiai & 5 Others* [2017] eKLR.
11. Further, the Plaintiff submitted that the 2nd Defendant has introduced new facts and/or evidence after close of her case and parties even taking directions on filing of written submissions to await judgment. The effect would be that she will have no chance to stand in the witness box and controvert the 2nd Defendant's new evidence and in any case the application flaunts the known cardinal rules on hearing of civil cases. In submitting that the application is not merited, the Respondent relied on the case of *Gladys Nduku Nthuki v Letshego Kenya Limited; Mueni Charles Maingi (Intended Plaintiff)* [2022] eKLR

Analysis and determination:

12. The 2nd Defendant's application is seeking for orders of review and/or setting aside of the orders this court issued on 3rd July 2023. In response, the Plaintiff filed a preliminary objection that the orders sought are res judicata. On the face of the application, it is stated that it is brought under the provisions of section 1A and 1B of the *Civil Procedure Act* and order 45 of the *Civil Procedure Rules*. Order 45(1) provides thus;
Any person considering himself aggrieved—
 - (a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or
 - (b) by a decree or order from which no appeal is hereby allowed
13. The said provisions which is also captured under section 80 of the *Civil Procedure Act* allows a party who has the option to appeal to move the court for review. Consequently, the objection raised by the Plaintiff/Respondent that the orders sought are res judicata does not lie.
14. The question for determination is whether the 2nd Defendant/Applicant has demonstrated sufficient cause to merit the orders of review. Some of the reasons proffered in support of the application is that striking out her defence is a draconian remedy which will take them out of the seat of justice. In their



- submissions, they urged the Court to take note of the fact that the 2nd Defendant is deceased and the administratrix was not cognizant of all the facts to enable her instruct counsel accordingly.
15. There are limited conditions as to when a court can intervene to review and set aside its own orders. In *Republic v Public Procurement Administrative Review Board & 2 others* [2018] eKLR it was held: -
- “The rules lay down the jurisdiction and scope of review limiting it to the following grounds; (a) discovery of new and important matter or evidence which after the exercise of due diligence, was not within the knowledge of the applicant or could not be produced by him at the time when the decree was passed or the order made or; (b) on account of some mistake or error apparent on the face of the record, or (c) for any other sufficient reason and whatever the ground there is a requirement that the application has to be made without unreasonable delay.”
16. I have perused the proceedings prior to the date of the impugned order of the 3rd July 2023 and the service of the further amended plaint on the 2nd Defendant. The Applicant intimated to court that she was served with the further amended plaint the morning of the hearing (8th December 2022) when the further amended plaint had been filed on 18th July 2022. The 2nd Defendant was granted 30 days from 8th December 2022, meanwhile the hearing proceeded on that day. The 30 days would therefore lapse on 7th of January, 2023. The delay in filing the amended defence in my view was reasonable taking into consideration of time not running between 21st December to 14th of January of every year under the provisions of order 51 of the *Civil Procedure Rules*.
17. However, there are two mistakes which the Applicant committed which resulted in the striking out of their counter-claim. The first, is that after the filing of their amended pleadings they did not serve the Plaintiff. The second error was the introduction of a counter claim without leave of the court. In dealing with the later issue, I noted that the Plaintiff was on 14th July 2022 granted leave to amend the Plaintiff to effect the substitution of Siprina Odira-deceased who was the then 2nd Defendant. A perusal of the further amended plaint has more than just a change of name of the 2nd Defendant. Despite these changes, the Plaintiff opted not to recall the witness who had testified.
18. The Plaintiff argued that if the application is granted, she will be prejudiced as they will not get an opportunity to respond to the counter-claim. The 2nd Defendant accused the Plaintiff of committing illegalities in the counter-claim and added thus:
- i. The 2nd defendant claims that they are the rightful and legal of the suit properties following a legal sale and purchase of the same.
 - ii. With regard to the foregoing averments in paragraph 16, the 2nd defendant claims against the plaintiff to be stopped from interfering with the quiet and peaceful enjoyment of the suit properties through an order of permanent injunction.
19. The Applicant pleaded that the Plaintiff's suit be dismissed with costs. There is no new cause of action on the face of the counter-claim that would require the recall of the Plaintiff. However, if the Plaintiff deems it just to re-take the stand, it serves the interest of justice to give both parties an opportunity present their claims before judgement. It is my opinion and I so hold that the Applicant has demonstrated sufficient cause including the fact that on 3rd July 2023 when I struck out the counter-claim, I did not have the opportunity to look at the content of the counter-claim and the previous proceedings.



20. The decision in *Gladys Nduku Ntbuki v Letsbego Kenya Limited; Mueni Charles Maingi* cited by the Plaintiff is not application as there is no interested party being introduced by the amendment.
21. In reaching the conclusion to revise the order of 3rd July 2023, I am guided by the case law cited by the parties in addition to the case of *National Bank of Kenya Limited v Ndungu Njau* [1997] eKLR where the Court of Appeal held that:

“A review may be granted whenever the court considers that it is necessary to correct an apparent error or omission on the part of the court. The error or omission must be self-evident and should not require an elaborate argument to be established. It will not be a sufficient ground for review that another Judge could have taken a different view of the matter”.

22. The application dated 25th day July 2023 is allowed in terms of prayer (c) and (d) hereof. Costs of the application awarded to the Plaintiff/Respondent.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 15TH DAY OF FEBRUARY, 2024

A. OMOLLO

JUDGE

