



REPUBLIC OF KENYA



**Manji & another v Zameen Land and Sand Company Limited & 2 others (Environment & Land Case 257 of 2021) [2024] KEELC 4175 (KLR) (20 March 2024) (Ruling)**

Neutral citation: [2024] KEELC 4175 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT KWALE  
ENVIRONMENT & LAND CASE 257 OF 2021**

**AE DENA, J**

**MARCH 20, 2024**

**BETWEEN**

**HARISH RAMJI MANJI ..... 1<sup>ST</sup> PLAINTIFF**

**BHARAT RAMJI MANJI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ZAMEEN LAND AND SAND COMPANY LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**LAND REGISTRAR KWALE ..... 2<sup>ND</sup> DEFENDANT**

**ATTORNEY GENERAL ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. This ruling is the subject of an oral application on the part of Counsel for the Plaintiff Mr. Bwire. The matter was scheduled for hearing physically before the court. Mr. Bwire sought for leave for the Plaintiff to amend their Plaint dated 25/11/20 to join to the proceedings as a Defendant one Hamisi Nassoro Mwakuyeya as a Defendant to these proceedings.
2. The Plaintiff alleges that the said Mwakuyeya is the vendor from whom the Plaintiff purchased the suit property and who has sworn an affidavit within the present proceedings in an application for injunction. Counsel states that this matter has been previously handled by his Associates Mr. Muliro and Mr. Odunga who have since left his law firm but upon his keen perusal of the matter he came across this information and various other documents being green cards, titles all pointing towards double allocation of the suit properties where there are at least two different proprietors. That there are also documents showing the said Mwakuyeya as owner. The Plaintiff states that the joinder is intended for the purpose of seeking a refund from the said Mwakuyeya and this will enable the court to effectually determine the issue of ownership of the suit property.



3. It is further stated that the amendments will present an opportunity for the court to make a determination on the recourse of a litigant who has relied on documents issued at the lands office.
4. The application is opposed by Mr. Oyas counsel for the 1<sup>st</sup> Defendant who states that the application has been brought after close of pretrial protocols when counsel had all the time to produce the documents he wishes to rely on as well as amend its pleadings. That the application is an afterthought since the information has always been in the Plaintiffs knowledge through these proceedings. That the amendment will be prejudicial to the 1<sup>st</sup> Defendant since the said party is a witness in the proceedings having filed an affidavit which is in the court record in support of the 1<sup>st</sup> Defendants case. That since Mwakuyeya is a witness in the proceedings the Plaintiff will have an opportunity to cross examine the witness and extract any information the Plaintiff will require. That the Land Registrar is also a party and will be equally subjected to cross examination. That adding Mr. Nasoro is neither here nor there. That the Plaintiff has no interest in prosecuting the matter and has failed to comply with the orders of the court of an earlier adjournment which they occasioned.
5. Mr. Makuto State Counsel referred the court to the orders made on 21/6/23 as to costs as stated by Mr. Ayisi and urged the court to order immediate compliance. Mr Makuto recognized the right of parties to amend pleadings at any time but proposed that since the plaintiff was in court he should proceed to give his evidence and the amendments effected later.
6. In response Mr. Bwire pointed that both the 1<sup>st</sup> Defendant and the Attorney general had contributed to the delay in prosecuting the matter following their delay by over one year to comply with pretrial requirements. Citing order 8 of the *Civil Procedure rules* it is stated that sufficient reason has been demonstrated for the court to grant the application. That an affidavit in support of an application is not a witness statement except where the same has been converted into a witness following an application and which none had been made. The fact that a party is a witness does not absolve him from liability and his proper place is to be a witness. Counsel committed as a matter of good will to abide by any orders as to the costs as a matter of good will.
7. Mr. Oyas referred the court to the provisions of order 9 in support of his contention that an affidavit is a witness statement.

### **Determination**

8. The main issue for determination is whether the application should be allowed.
9. Order 8 Rule 5 of the *Civil Procedure Rules* is on amendment of pleadings and provides:
  - “(1) 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 document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.
10. Arising from the above it is clear that the power of the Court to allow or refuse a party to amend pleadings is therefore discretionary and this position has been restated in many cases – see *Chepkorir Soi v Bomet Water Company Ltd* [2017] eKLR *Andrew Wabuyele Biketi v Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others* [2015] eKLR. However, it is now trite that discretion must be exercised judiciously.



11. The Court of Appeal set out the principles governing amendment of pleadings in *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 [1995] eKLR as cited with approval in *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR 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 and amendment notwithstanding the expiry of current period of limitation.”
12. It is trite therefore that amendments can be allowed at any stage of the proceedings. It is noteworthy the application has been made before commencement of the hearing of this suit. Is there sufficient reason to allow the amendment at this stage? The reasons for the application have already been outlined elsewhere in this ruling. Of utmost importance is the joinder of Mr. Makuyeya who it is alleged to have sold the suit property to the Plaintiffs. Also see the provisions of Order 1 rule 10 (2) of the *Civil Procedure Rules* as to joinder.
13. The principles for joinder are already established by numerous decisions of the court the proposed party must be a necessary party, must be a proper party and his presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit. See *Laisa Mpyoe & 2 others v Kajiado Central Milk Project “The Board” & 5 others* [2012] eKLR and *Kingori vs Chege & 3 others* [2002] eKLR.
14. Having considered the reasons given for the joinder I think I’m persuaded that the said Hamisi Nassoro Mwakuyeya is a necessary party who has featured substantively in the pleadings and his presence will enable the court to effectually determine the issues of the ownership of the suit property. His being only a witness in my view cannot suffice for purposes of the claim for refund. Moreover if the facts arise from the same set of transactions and the same suit property then these proceedings are the appropriate forum for a determination of all the issues. As a court I do not see any prejudice to the Respondents provided that there will be an opportunity to respond to his pleadings and cross examine him on the same.
15. For the foregoing reasons I find the application has merit and it is in the interest of justice that the Plaintiffs are allowed to fully ventilate their claim. All parties will be accorded a fair hearing in this regard.
16. Having allowed the application above it therefore follows that the matter is taken out of today’s list. The Plaintiff shall pay costs to the Respondents to be agreed between the parties but not later than 14 days of today’s date. At the same time parties shall also agree on costs awarded on 21/6/23. The costs once agreed shall be paid within 7 days of expiry of the 14 days above whichever is earlier.
17. The Plaintiff shall also pay court adjournment fees for today before the next mention date.



18. Accordingly I will re- open pre trials. Let the Plaintiff amend their pleadings and file any further documents and serve within 14 days of today's date and the Respondents shall respond appropriately within 14 days of service and be at liberty to file any further documents in further reply as they may deem necessary.

19. Due to age of the case I will fix it for hearing on priority basis it is already a backlog.

Hearing on 22nd October 2024.

Mention to confirm compliance 21/5/2024 at 8.30 pm.

**RULING DATED SIGNED AND DELIVERED THIS 20TH DAY OF MARCH 2024.**

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**A.E DENA**

**JUDGE**

**Mr. Bwire for the Plaintiffs**

**Mr. Oyas for the 1<sup>st</sup> Defendant**

**Mr. Makuto for the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants**

**Mr. Daniel Disii – Court Assistant**

