



Lelakwen Self Help Group v Simel (Being the administrator of the Estate of the Late Simel Ole Naimodu) & 8 others (Environment & Land Case 35 of 2020) [2024] KEELC 1235 (KLR) (7 March 2024) (Ruling)

Neutral citation: [2024] KEELC 1235 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 35 OF 2020
CG MBOGO, J
MARCH 7, 2024**

BETWEEN

LELAKWEN SELF HELP GROUP PLAINTIFF

AND

ALFRED KOILEL SIMEL (BEING THE ADMINISTRATOR OF THE ESTATE OF THE LATE SIMEL OLE NAIMODU) 1ST RESPONDENT

MIKE PARMALEU PAINGONI 2ND RESPONDENT

TABITHA WAMBUI WANJIRU (BEING THE ADMINISTRATORS OF THE ESTATE OF THE LATE KISHOYIAN GEOFFREY SILAS) 3RD RESPONDENT

MONICA WANJIKU KIMANI 4TH RESPONDENT

PAUL MUIGAI 5TH RESPONDENT

JOSEPH MUHIA 6TH RESPONDENT

DISTRICT SURVEYOR NAROK 7TH RESPONDENT

DISTRICT LAND REGISTRAR NAROK 8TH RESPONDENT

DEPUTY COUNTY COMMISSIONER OLOLULUNGA SUB COUNTY 9TH RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated 20th November, 2023 filed by the plaintiff/applicant and expressed to be brought under Articles 159(1) & 159(2)(a) of the Constitution, Order 8 Rule 3, Order 8 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules* and Sections 1A and 3A of the Civil Procedure Act seeking the following orders: -



1. Spent.
 2. That this honourable court be pleased to grant leave to the plaintiff/applicant to file its amended plaint and supplementary list of documents within 7 days from the grant of this order.
 3. That the defendants/respondents be at liberty to amend their statements of defence if they so wish within a period to be fixed by this honourable court.
 4. That the costs of this application and suit be provided for.
2. The application is premised on the grounds inter alia that having had the opportunity to critically examine all the pleadings as filed, it has become clear that the plaint as filed does not properly bring out the real issues and dispute between the parties.
 3. The application is supported by the affidavit of David Kipyegon Ruto, the secretary of the plaintiff/applicant, sworn on even date. The plaintiff/applicant deposed that having had the opportunity to examine all the pleadings as filed, it is clear that the plaint as filed does not properly bring out the real issues in controversy between the parties. Further, that it is prudent to be allowed to amend its plaint and file a supplementary list of documents to properly bring out the real issues in controversy.
 4. The plaintiff/applicant further deposed that unless the applicant is allowed to amend its plaint and file a supplementary list of documents, its legal position in the suit will be undermined. He deposed that the proposed amendments are intended to bring out the real main controversy between the parties so that the same can be determined on their true and substantive merit with finality.
 5. The application was opposed *vide* the replying affidavit of the 1st defendant/respondent sworn on 22nd November, 2023. The 1st defendant/ respondent deposed that for three years, the plaintiff/applicant has been indolent and indifferent about prosecuting this matter because they have been enjoying the benefit of the interim injunctive orders.
 6. The 1st defendant/respondent further deposed that the application is a mischievous and prejudicial attempt to patch up the holes brought out in the plaintiff's case during cross-examination, which intends to wrongfully violate the defendants' right to a fair hearing. Further, that the continued pendency of this matter continues to occasion unwanted costs on the defendants leading to damage and loss.
 7. The plaintiff/applicant filed a further affidavit sworn on 8th December, 2023. While reiterating the contents of his supporting affidavit, the plaintiff/applicant deposed that the amendment sought is meant to correct the capacity in which the plaintiff/applicant sued and to include a document that was inadvertently left out at the pre-trial stage. Further, that the amendment sought will correct a defect/error or mistake in the proceedings and it will not in any way substitute a new cause of action.
 8. The plaintiff deposed that the principle of natural justice thrusts a reasonable expectation that a decision that will affect the rights of a litigant be made fairly, so as not to deprive him or her the opportunity to be heard on a key issue before the final judgment.
 9. The application was canvassed by way of written submissions.
 10. On 8th December, 2023, the plaintiff applicant filed its written submissions dated 1st December, 2023 where it raised two issues for determination as follows: -
 - a. Whether the plaintiff/applicant's application is merited.



- b. Who should bear the costs of the application.
11. On the first issue, the plaintiff/applicant submitted that though statute provides that this application may be made at any time, even before judgment, the one placed before this court has been made without unreasonable delay and before the hearing of the plaintiff's case could proceed any further. The plaintiff submitted that the amendment sought will correct a defect/error or mistake in the proceedings as provided under Order 8 Rule 5 of the Civil Procedure Rules.
12. The plaintiff/applicant further submitted that the amendment sought is intended to bring out the real issues in the dispute for effective adjudication and determination by the court. Further, that its blunder in failing to amend its plaint and include a supplementary list of documents was not deliberate and it should not suffer the penalty of not having its case heard on merit. The plaintiff/applicant relied on the cases of *Phillip Chemwolo & Another versus Augustine Kubende* [1986] eKLR, *Reg versus Gaming Board Ex. Benalim* [1970] 2 QB, *St Patrick's Hill School Limited versus Bank of Africa Kenya Limited* [2018] eKLR, *Peter Ogecha versus Kenyatta University* [2021] eKLR and *Eunice Chepkorir Soi versus Bomet Water Company Limited* [2017] eKLR.
13. On the second issue, the plaintiff/applicant submitted on an issue that is not before this court as it relates to a preliminary objection.
14. The defendants/respondents did not file his written submissions. Be that as it may, I have considered the application, the replying affidavit thereof and the written submissions filed by the plaintiff/applicant. In my view, the issue for determination is whether the application is merited.
15. Order 8 Rule 3 of the *Civil Procedure Rules* provides for amendment of pleadings with leave of court 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.”
16. Order 8 Rule 5 of the *Civil Procedure Rules* on amendment of pleadings 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.
- (2) This rule shall not have effect in relation to a judgment or order.”
17. The power of the court to allow or refuse a party to amend pleadings is discretionary as it was held in the case of *Andrew Wabuyeke Biketi versus Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others* [2015] eKLR, where the court in disallowing an application for amendment stated as follows;
- “...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done *mala fide*, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.
18. It has also been stated by the courts severally that the discretionary power of the court in granting or refusing an application for amendment of pleadings should be exercised judiciously and in



consideration of the facts of the case in particular. The court in *Bosire Ogero versus Royal Media Services* [2015] eKLR, held:

“In *Bullen Leak and Jacobs Precedents of Pleadings*, 12th Edition page 127 titled “amendment with leave –time to amend” it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise”

19. In ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, I place in the case of *Daniel Ngetich & Anor versus K-Rep Bank Limited* [2013] eKLR where it was stated that:

“...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

20. The plaintiff/applicant contended that amendment sought is meant to correct the capacity in which the plaintiff/applicant sued, and to include a document that was inadvertently left out at the pre-trial stage. Further, that the amendment sought will correct a defect/error or mistake in the proceedings and it will not in any way substitute a new cause of action.
21. However, the plaintiff/applicant has failed to disclose exactly the supposed correct capacity in which it intends to sue. Also, the plaintiff/applicant does not disclose the document said to have been inadvertently left out at the pre-trial stage. There is no draft amended plaint attached to the application to enable this court ascertain the averments of the plaintiff/ applicant. The absence of such information would only mean that the defendant/respondent would be ambushed by the new developments sought to be included in the amended plaint.
22. In my view, the plaintiff/applicant wants this court to speculate on the capacity in which it intends to sue, and to allow a document which is also not disclosed. It should also be noted that the plaintiff’s case commenced its hearing on 1st November, 2023 and having had time to critically examine its case since the time of filing, it has now dawned on it that there is need to amend its plaint.
23. I am aware that the right to a fair hearing is non derogable as it is enshrined in the *Constitution* but even then, the court ought to be cautious as to what limits a party can be allowed to exercise such a right.



24. In the absence of a draft amended plaint, this court is unable to ascertain the intent and purpose of the amendment sought in order to exercise its discretion in favour of the plaintiff/ applicant.
25. This court, therefore, finds no merit in the notice of motion dated 20th November, 2023 and the same is hereby dismissed.
26. Costs abide the outcome of the pending suit. Further mention on 18th March, 2024 for further directions. It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 7TH DAY OF MARCH, 2024.

HON. MBOGO C.G.

JUDGE

7/03/2024.

In the presence:

Mr. Meyoki – C.A

