



Ngigi & 4 others v Mbaria & 2 others (Environment & Land Case 115 of 2023) [2024] KEELC 3348 (KLR) (22 April 2024) (Ruling)

Neutral citation: [2024] KEELC 3348 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 115 OF 2023**

**JA MOGENI, J
APRIL 22, 2024**

BETWEEN

GLADWELL WAIRIMU NGIGI 1ST APPLICANT

TERESA WANJIRU MBARIA 2ND APPLICANT

SALOME NDU'TA MBARIA 3RD APPLICANT

AND

MONICA NYAMBURA MBARIA PLAINTIFF

AND

GRACE WAMBUI MBARIA APPLICANT

AND

JAMES MUCHINA MBARIA 1ST RESPONDENT

JACKSON MUCHINA MBARIA 2ND RESPONDENT

ANTONIO GITAU MBARIA 3RD RESPONDENT

RULING

1. The Notice of Motion Application is brought under Order 8 Rule 1 & 3 and 7 of the [Civil Procedure Rules](#), Section 3A of the [Civil Procedure Act](#) and all enabling provisions of the law seeking the following:
 - a. This Honorable Court be pleased to allow the Plaintiff⁷ application to amend the plaint and the draft amended Plaint be deemed as properly filed and served.
 - b. The Honorable Court be pleased to make such further orders as it may deem just and expedient in the circumstances of this case.



2. The grounds upon which the application is based on are reiterated in the sworn affidavit of Gladwell Wairimu Ngigi and there is no need of reproducing the same here.
3. In the affidavit she has deponed that she is one of the guardians managing the accounts and properties of her father who is incapacitated due to dementia and that in consultation with her co-plaintiffs they engaged a forensic specialist to determine how and who effected the land transfer documents.
4. That they realized following the examination that there were aspects of fraud, misrepresentation and forgery of signatures. This according to her is information that goes to the root of the instant suit and will be of assistance to the Honorable Court in adjudicating the matter. She provided as annexure “GWN-1” a copy of the forensic report.
5. Following the above stated discovery the plaintiff is thus seeking to amend the plaint to enable the capturing of the new information and a copy of the draft amended plaint is annexed and marked as “GWN -2” hereto. That the plaintiff has also approached the court without inordinate delay.
6. On 22/01/2024, the defendants/respondents through the law firm of Messrs. Kibanya & Kamau Associates filed their grounds of opposition opposing the filing of the notice of motion application dated 17/11/2023 for amendment of the plaint mainly on grounds that it is defective, unmeritorious and an abuse of the court process. That the plaintiffs have taken a six months to bring the application after going on a fishing expedition to try and build their case. That the issues they would want to include in the plaint are not relevant to the issues in the instant suit.
7. The plaintiff/applicant swore a supplementary affidavit in response to the grounds of opposition and averred that the defendant’s dismissal of the application is a tactic aimed at causing delay and seeking to prejudice the plaintiffs’ suit whereas the application is founded on valid legal grounds.
8. That Order 51 Rule 14 read grants litigants opportunity to amend their pleadings. That the forensic report that the plaintiff/applicant has referred is prepared by an expert on matters of forensics and it shows that the transfer of the property number 36/VII/1023 (originally 36/VII/232) was done fraudulently.
9. That the proposed amendments, contrary to the defendant’s claim are aimed at including additional information in the plaint which will help expedite the fair resolution of the suit at hand. The plaintiff referred to two cases and further stated that the defendant has not rebutted her claims nor the averments made in the application. The cases referred to are *Kennedy Otieno Odiyo & 12 Others vs Kenya Electricity Generating Company Ltd* [2010] eKLR, and *Faustina Njeru Njoka vs Kimunye Tea Factory Limited* [2022] eKLR.
10. The plaintiff/applicant concluded by urging the court to dismiss the grounds of opposition.
11. When the parties attended court on 7/02/2024, they agreed to canvass their application by way of written submissions and directions were issued to the filing of the same. A ruling date was reserved for 18/03/2024.

Analysis and Determination.

12. I have read diligently the filed pleadings, affidavits and submissions of the parties and the only issue for determination is: Is the plaintiff/applicant deserving of the orders sought to amend their plaint?
13. I have considered the application before me and as shown by the detailed analysis, in their affidavits and submissions, the plaintiff/applicant seem to encroach and deal extensively on the merits or otherwise



of the suit 23/03/2023 which is premature and improper in an application solely for leave to amend the plaint. In the circumstances I will deal with only the prayers sought in this application.

14. This application has been brought under Order 8 Rule 1 & 3 and 7 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act. The substantive provision being Order 8 Rule 1 (3) which provides:

“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.”

Order 8 rule 3(5) of the Civil Procedure Rules provides that:-

“An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

15. The legal principles on amendment of pleadings are provided for under order 8 rules 1,2 and 3 of the Civil Procedure 2010. The principles upon which a court acts in an application to amend pleadings before/during trial are well settled and succinctly stated in several cases. These include the cases of Central Kenya Ltd & 4 Others vs Trust Bank Ltd CA Civil Appeal No. 222 of 1998, Eastern Bakery v Castelino (1958) EA 461 (U) at page 462 and civil case No 7 of 2017 and St Patrick's Hills School Limited v Bank of Africa Kenya Limited eKLR (2018) where court held, inter alia:

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice to be if the other side can be compensated by costs....”

16. In Tildesley v Harper (1878) 10 Ch D at pages 296, Bramwell LJ stated as follows:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise...”

17. From the cited authorities and the attendant law, an amendment of pleadings in general should be allowed before the final judgement is delivered. Pursuant to the above position, this court agrees with the plaintiff/applicant. I also note that the power to amend pleadings is discretionary but it must always be exercised judicially within the ambit of the principles of natural justice.

18. I find merit in this application and I grant the orders sought namely: -

- a. That leave be and is hereby granted to the plaintiff to amend its plaint in terms of the draft amended plaint annexed hereto.
- b. That the draft amended plaint to be duly filed and served upon payment of the requisite fees.
- c. That the defendant is granted leave of 21 days from the date of service to file amended defence if need be.



d. The defendant is granted thrown away costs of the application at Ksh, 5,000/= to be paid before the next hearing by the Plaintiff.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI, THIS 22ND DAY OF APRIL 2024

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MOGENI J

JUDGE

In the Virtual Presence of:

Mr. Kemboi holding brief for Mr. Chege for the Plaintiff/Applicants

Mr. Thuku for the Defendant/Respondent

Ms. Caroline Sagina: Court Assistant.

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MOGENI J

JUDGE

