



Ekatera Tea Kenya PLC v Mokal Investment Limited & another (Environment & Land Case E014 of 2022) [2024] KEELC 4352 (KLR) (30 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4352 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE E014 OF 2022**

MC OUNDO, J

MAY 30, 2024

BETWEEN

EKATERA TEA KENYA PLC APPLICANT

AND

MOKAL INVESTMENT LIMITED 1ST RESPONDENT

CHIEF LAND REGISTRAR 2ND RESPONDENT

RULING

1. Coming up for determination is a Notice of Motion dated 9th November, 2023, brought pursuant to the provisions of Order 1 Rule 10; Order 8 rules 3 and 5; Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A and 100 of the Civil Procedure Act and all enabling provisions of the law, wherein the Applicant seeks leave to amend its Plaintiff in terms of the Draft Amended Plaintiff annexed to its Application as well as for costs.
2. The Application was supported by the grounds on its face and a Supporting Affidavit dated 16th November, 2023 sworn by Tumaini Kimone, the Applicant's Counsel who deponed that the Plaintiff herein had been filed on 13th October, 2022 and served upon the 1st and 2nd Respondents on or about the 17th October, 2022 in which they had filed their respective Statements of Defence dated 26th October, 2022 and 8th February, 2023 respectively.
3. That pursuant to the hearing to the hearing of interlocutory applications and whilst in preparation of pre-trial conference, wherein the matter had been certified ready for hearing for the 20th November, 2023, the Applicant had established that subject property of the suit was being claimed by both the Applicant and the 1st Respondent whereby both of them held a title. That it was therefore important for it to amend its Plaintiff so as to bring to court all the salient facts and issues in controversy for purposes of resolving the question of ownership of the suit property and to succinctly set out the matters in dispute, so as to avoid a multiplicity of suits.



4. That it was in the best interest of justice that all matters necessary be placed on record to enable the court fully, finally and fairly determine all questions and issues arising in the suit. That the Respondents would suffer no prejudice should the application be allowed, in view of the fact that the same was filed before the suit had been set down for hearing.
5. In response and in opposition, the 1st Respondent filed its Replying Affidavit dated 4th December, 2023 sworn by Isaac Kiprono, the 1st Respondent's Director who deponed that the proposed amendments were unnecessary as the Applicant had already expressly pleaded the relief at paragraphs (b) and (d) of the Complaint dated 11th October, 2022. That further, the application had been made over 1 year and 2 months after the institution of the instant suit which period was inordinate.
6. He further deponed that the amendments sought to be made was not bona fide since the information sought to be introduced had arisen from the 1st Respondent's defence in relation to parcel L.R No. 9932/2 while the Applicant had already pleaded relief regarding the suit land parcel L.R No. 9932/7. That no multiplicity of suit could arise in the instant matter as relief had already been expressly pleaded with regard to the 2 land parcels L.R No. 9932/2 and L.R No. 9932/7.
7. That further, the Applicant had confirmed the matter ready for hearing being aware of the state of the pleadings, thus it could not seek to revert to the pretrial compliance. That the matter being raised by the Applicant ought to have been the subject of a Reply to the Defence as opposed to an amendment of the Complaint. The 1st Respondent thus prayed that the instant application be dismissed with costs.
8. The 2nd Respondent was not opposed to the application.
9. The instant application was canvassed by way of written submissions to wit the Applicant placed relied on the decision in the case of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] eKLR to submit on the principles that ought to be considered in determining an application for leave to amend pleadings.
10. That it had satisfied the requirements needed to be granted leave to amend as it intended to clarify all the facts of the matter, which had not been clear at the time of filing of the instant suit. That the documents which had been filed by the parties required to be succinctly presented to enable all the real issues in controversy to be presented. That further, owing to the fact that both it and the 1st Respondent had title to the suit property, wherein both parties contended that the opposite title was illegal and invalid, the amendments would enable the court to address all the relevant facts and issues in contention thus determining the instant matter once and for all.
11. That unless the proposed amendments were allowed and since the 1st Respondent had a title No. L.R 9932/7 while the Applicant had title No. L.R 9932/2 which titles were in relation to the same suit property, there was a real possibility of multiple suits over the same subject matter, for which the amendment sought to cure.
12. That the instant application had been presented timeously before any party had testified and that it was trite law that the power to amend could be exercised at any stage of the proceedings, including at the appeal stage. That the application had been brought in good faith as demonstrated by the filing of all witness statements and bundles of documents wherein costs could compensate the 1st Respondent if need be.
13. That draft amended Complaint would not deprive the 1st Respondent of a defence or any other vested interest and nor had it introduced a new or inconsistent cause of action from the earlier filed Complaint. That in any event, the 1st Respondent had not pointed out the prejudice that it would suffer in the



event that the leave sought was granted and further, it would have corresponding leave to respond to the Amended Plaintiff thus no prejudice would be occasioned to it.

14. The Applicant submitted that it had satisfied the requirements for leave to amend the Plaintiff stating that the reasons that had been proffered by the 1st Respondent in opposition of its application were unfounded. That the application was merited and should be allowed as prayed with costs in cause.

1st Respondent/Respondent's Submissions.

15. In response, the 1st Respondent, in opposition to the Applicant's Application maintained that the proposed amendments were unnecessary as the Applicant had already expressly pleaded relief at paragraphs (b) and (d) of the Plaintiff dated 11th October, 2022 in respect of the land parcel L.R No. 9932/7. It also reiterated that the application had been made over 1 year and 2 months after the institution of the instant suit which period was inordinate and placed its reliance on a combination of decisions in the case of *Central Kenya Limited v Trust Bank Limited* (2000) 2 EA 365 and *Tripat Singh Mangat (Suing on his behalf and on behalf of Mangat I.B. Patel (MIBP) Limited) v Manjeet Singh Bhachu & 3 others* [2021] eKLR.
16. The 1st Respondent's submission was to the effect that the matter being raised by the Applicant ought to have been a subject of Reply to the Defence as opposed to an amendment of the Plaintiff and sought for the dismissal of the application with costs.

Determination.

17. I have considered the Applicant's application, the response by the 1st Respondent, the Parties written submissions, the law and the authorities herein cited. The Applicant vide its application by a Notice of Motion dated 9th November, 2023 seeks orders to amend his Plaintiff for reason that since they both held titles to land parcel No. L.R 9932/2 and No. L.R 9932/7 respectively and which titles were in relation to the same suit property, that it was therefore important for it to amend its Plaintiff so as to bring to court all the salient facts and issues in controversy for purposes of resolving the question of ownership of the suit property and to succinctly set out the matters in dispute, so as to avoid a multiplicity of suits.
18. The Application has been opposed by the 1st Respondent while the 2nd Respondent opted out. The reason given by the 1st Respondent for opposing the application was that it was unnecessary, the Applicant having already expressly pleaded relief at paragraphs (b) and (d) of the Plaintiff, that secondly the application had not been made timeously and lastly that the said amendment ought to have been a subject of a Reply to the Defence.
19. Having set out the respective parties' positions as above, the emerging issue for determination is whether on the facts and circumstances of this case, the Plaintiff should be amended.
20. The Courts will normally allow amendment of pleadings at any stage of the proceedings if it can be done without occasioning injustice or prejudice to the other party and which prejudice can be compensated by an award of costs. The general power to amend pleadings is donated by Section 100 of the *Civil Procedure Act* which is the substantive law and its handmaiden Order 8 Rule 5 of the *Civil Procedure Rules* which provide as follows:
 - “(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.”

21. The above provision of the law expressly provides that the court has discretionary power to amend pleadings at any stage before judgment for purposes of determining the real question or issue which has been raised by parties. That discretionary power is exercised so as to do justice to the case. However, the said discretion must be exercised judiciously and not whimsically.
22. The Principles for consideration in an application for amendment of pleadings as was held in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, while referring to Bullen and Leake & Jacob’s Precedents of Pleading 12th Edition is as follows:
- i. that powers of the court to allow amendment is to determine the true, substantive merits of the case;
 - ii. amendments should be timeously applied for;
 - iii. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages);
 - iv. 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;
 - v. that exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court;
 - vi. that adjournment should be given to the other side if necessary if an amendment is to be allowed;
 - vii. that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed;
 - viii. that the proposed amendment must not be immaterial or useless or merely technical;
 - ix. that where the Plaintiff’s claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed;
 - x. if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
 - xi. that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff’s claim the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation;
 - xii. that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment”

23. Indeed in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR, the Court of Appeal further outlined the principles in amendment of pleadings as follows: -

“The law on amendment of pleading in terms of Section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s *Precedents of Pleading - 12th Edition*, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows: -

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaintiff the defendant would be deprived of his right to rely on Limitation Acts.”

24. I have asked myself whether amending the Applicant’s further amended Plaintiff would be for the purpose of determining the real question in controversy between the parties keeping in mind that the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties and that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.
25. I find, that the amendment so sought will not affect any vested interests or any accrued legal rights to the parties and neither will it be prejudicial to the 1st Respondent herein and therefore proceed to allow the Application, and grant the Applicant leave to amend its Plaintiff, in terms of the Draft Amended Plaintiff annexed herein within 14 days of delivery of this Ruling. There shall be no orders to cost.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 30TH DAY OF MAY 2024.

M.C. OUNDO

