



Bett & 9 others v Koech & 6 others (Environment & Land Case 1 of 2023) [2024] KEELC 4109 (KLR) (21 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4109 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAROK
ENVIRONMENT & LAND CASE 1 OF 2023**

CG MBOGO, J

MAY 21, 2024

BETWEEN

- REUBEN BETT 1ST PLAINTIFF**
- JOSEPH SAMBAI 2ND PLAINTIFF**
- SAMWEL KORIR 3RD PLAINTIFF**
- JOSHUA NG'ENO 4TH PLAINTIFF**
- RICHARD CHEPKWONY 5TH PLAINTIFF**
- SAMWEL CHERUIYOT 6TH PLAINTIFF**
- PETER YEGON 7TH PLAINTIFF**
- PAUL SANG 8TH PLAINTIFF**
- DAVID SIGILAI 9TH PLAINTIFF**
- JOHNSTONE TESOT 10TH PLAINTIFF**

AND

- JOHN KIPNGETICH KOECH 1ST DEFENDANT**
- REUBEN CHERUIYOT YEGON 2ND DEFENDANT**
- EZEKIEL K. RONO 3RD DEFENDANT**
- WILLY LOIGERO 4TH DEFENDANT**
- JOSEPH TUMPES OLOIGERO 5TH DEFENDANT**
- SIMAT OLOLOIGERO 6TH DEFENDANT**
- RAEN OLOLOIGERO 7TH DEFENDANT**



RULING

1. Before this court for determination is the Notice of Motion Application dated 22nd November, 2023, filed by the plaintiffs/applicants and expressed to be brought under Order 8 Rule 3 of the *Civil Procedure Rules* and Section 3A of the *Civil Procedure Act* seeking the following orders: -
 1. That this honourable court be pleased to grant leave to the plaintiffs/applicants to file their amended plaint within 21 days from the grant of this order.
 2. That the defendants be at liberty to amend their statements of defence and counterclaims if they so wish within a period to be fixed by this honourable court.
 3. That the costs of this application and suit be provided for.
2. The application is premised on the grounds inter alia that the plaintiffs'/applicants' advocates came on record through a notice of change of advocates dated 17th November, 2022, that it has become clear that the amended plaint as filed does not properly bring the out the real issues and the dispute the between the parties, that it is prudent the plaintiffs/applicants be allowed to amend the plaint to properly bring the real issues in controversy and that unless they are allowed to amend the plaint, their legal position in the suit will be undermined.
3. The application is supported by the affidavit of the 6th plaintiff/ applicant sworn on even date. The 6th plaintiff/ applicant deposed their advocates now on record, advised them, that the pleadings as filed does not bring out the real issues in controversy and the dispute between the parties. It was further deposed that having perused the pleadings, and in the circumstances, it is prudent that they be allowed to amend the plaint so that their legal position is not undermined. It was also deposed that the proposed amendments are intended to bring out the main controversy between the parties so that the same can be determined on their true and substantive merit with finality.
4. The 4th, 5th, 6th and 7th defendants/respondents filed grounds of opposition dated 5th March, 2024, challenging the application on the following grounds: -
 1. That the application is fatally incompetent and incurably defective hence the same ought to be struck out by this honourable court with no reliefs granted to the plaintiffs/applicants.
 2. That the proposed amendment is intended to delay the hearing of the suit.
 3. That the plaintiffs/applicants have been guilty of prolonged, inordinate and inexcusable delay in prosecuting this matter.
 4. That a draft amended plaint ought to reflect the amendments and/or issues to be raised, however, the plaintiffs' have not annexed the same to the instant application.
 5. That as a result, the defendants'/respondents are unable to effectively respond to the new issues to be raised and/or amendments.
 6. That further, the application comes more than 11 years after the suit was instituted and is therefore an afterthought and an attempt to stifle the defendants/respondents' effective representation and defence in this suit.
 7. That allowing the application will have the effect of setting aside previous proceedings and have the matter start afresh after more than eleven (11) years since the suit was instituted.



8. That the application as presented is a wanton abuse of this honourable court's process and should be dismissed with costs.
 9. That should the application herein be allowed, the same would serve as a great injustice to the defendants/respondents.
 10. That in the premises, the defendants/respondents deny that the plaintiffs/applicants are entitled to any of the reliefs sought in the instant application or at all.
5. The 2nd and 3rd defendants/respondents filed their grounds of opposition date 22nd February, 2024 challenging the application on the following grounds: -
- a. That the applicants' application is inept, bad in law, incompetent and otherwise an abuse of the due process of the court.
 - b. That the applicants have brought this application after an excessive delay that has not been sufficiently explained considering that this suit was initially filed in the year 2012 and thus the same is inordinate.
 - c. That the applicants have failed to annex a draft amended plaint to the instant application to indicate the manner and nature of the proposed amendment so that the respondents are not taken by ambush.
 - d. That the grounds in support of the instant application dismally falls short of meeting the legal threshold for this honourable court to grant.
 - e. That in the circumstance, the applicant's application and the prayers sought therein are a monumental procedural and substantive nullity, bad in law, misconceived and discloses no reasonable or arguable grounds thus rendering it fatally and incurably defective.
 - f. That the application is ill conceived and is otherwise unsustainable in law and ought to be dismissed with costs to the 1st and 2nd defendants/respondents.
6. The 6th plaintiff/applicant filed a supplementary affidavit sworn on 5th April, 2024. The 6th plaintiff/applicant deposed that time has lapsed from the time the matter occurred and now, and there has been material change in circumstances as well as material changes on the suit property. He further deposed that it is necessary that the plaintiffs/applicants be allowed to frame their case to correspond with the change in the circumstances. He also deposed that the amendment of the plaint is not a time-wasting venture as it will allow for the prompt conclusion of the case. The 6th plaintiff/applicant annexed a copy of the draft amended plaint to his supplementary affidavit.
7. On 8th April, 2024, this court directed that the application be canvassed by way of written submissions. None of the parties filed their written submissions. Be that as it may, I have considered the application and the grounds of opposition filed, and in my view, the issue for determination is whether the application has merit.
8. 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.”



9. 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.”

10. 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 v 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”

11. In ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, I place in the case of [Daniel Ngetich & Anor v 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”.

12. The plaintiffs/applicants contended that amendment sought is meant to bring out the real issues in controversy for better determination of the dispute in this case. The plaintiffs/applicants in their draft amended plaint annexed to the supplementary affidavit deposed that it is necessary that they be allowed to frame their case to correspond with the changes in circumstance. I have looked at the draft amended plaint and I observe that there are indeed changes that have been made through amendment of the original plaint.



13. 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. This court is called upon to uphold substantive justice and in doing so, ought to ensure that a case is heard on its merits.
14. The plaintiffs/applicants in this case have a right to legal representation of their choice and legal advice as well. It would be thus unfair to deny them a chance to have their matter properly adjudicated, by their counsel on record, who has sought amendment based on the circumstances of the case. I also note that this is an old matter and it is necessary that the case is expedited. In a bid to ensure that justice is done, the 2nd and 3rd defendants/ respondents and the 4th, 5th and 6th and 7th defendants/ respondents can be compensated through an award of costs.
15. The Notice of Motion Application dated 22nd November, 2023 is thus allowed as follows: -
 - i. The draft amended plaint annexed to the supplementary affidavit be deemed as duly filed upon payment of the requisite filing fees within 7 days from the date hereof.
 - ii. That the draft amended plaint be served upon the defendants/respondents within 7 days from the date of filing.
 - iii. The defendants/respondents to file and serve their amended defence, if need be, within 21 days from the date of service of the amended plaint.
 - iv. Costs of Kshs. 25,000/- is hereby awarded to the 2nd and 3rd defendants/respondents.
 - v. Costs of Kshs. 30,000/- is hereby awarded to the 4th, 5th, 6th and 7th defendants/respondents.

It is so ordered.

DATED, SIGNED & DELIVERED VIA EMAIL THIS 21ST DAY OF MAY, 2024.

HON. MBOGO C.G.

JUDGE

21/05/2024.

In the presence of: -

Mr. Meyoki Pere – C.A

