



REPUBLIC OF KENYA



**Makau & another v Nzioka (Environment & Land Case
E002 of 2022) [2024] KEELC 4045 (KLR) (20 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4045 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE E002 OF 2022**

CA OCHIENG, J

MAY 20, 2024

BETWEEN

JANET MBOLI MAKAU 1ST PLAINTIFF

NZEMBI MAKAU 2ND PLAINTIFF

AND

JUDITH N'THENYA NZIOKA DEFENDANT

RULING

1. What is before Court for determination is the Defendant's Notice of Motion Application dated the 7th December, 2023 where she seeks the following Orders:-
 1. Spent
 2. That the Honourable Court be pleased to grant leave to the Defendant/Applicant to file her Defence and Counter-claim out of time.
 3. That the costs of this Application be provided for.
2. The Application is premised on the grounds on the face of it and the Supporting Affidavit of Justin Bosire Oyunge, the Defendant's Advocate, where he explains the reasons for delay in filing the Defence to Amended Plaint. He confirms that the Defendant has been ailing and hospitalized. Further, that she went to her rural home to recuperate and he was unable to reach her. He avers that the delay was inadvertent as he did not willfully disobey the court's directions. He reiterated that the Plaintiffs are not likely to suffer any prejudice if the Defendant's Defence including Counter-claim is filed and served. Further, that filing and serving the Defendant's Defence and Counter-claim will enable this Honourable Court arrive at a justiciable decision.
3. The Plaintiffs' opposed the instant Application by filing a Replying Affidavit sworn by Janet Mbolu Makau, where she explains the proceedings in the Court and insisted that she has always complied with



the court's directions. She contends that the Defendant has failed to attach the OB Number of the alleged assault by her husband. She states that, it is the Defendant with goons, who assaulted and caused harm to her and her husband and the same was reported to Nguluni Police Post. Further, following the heinous acts, the Defendant was summoned by the acting area chief, but she ignored the said summons. She reiterates that the Defendant is dishonest, has approached the court with dirty hands and the instant Application is brought in bad faith. Further, that her actions are aimed at delaying this suit. She reaffirms that there is no reasonable cause of delay given, to warrant the extension of time.

4. The Application was canvassed by way of written submissions.

Analysis and Determination

5. Upon consideration of the instant Notice of Motion Application including the respective Affidavits and rivalling submissions, the only issue for determination is whether the Defendant should be granted leave to file her Amended Defence including Counter-claim out of time.
6. The Defendant in her submissions reiterated her averments and insisted that the Plaintiff will not suffer any prejudice, if the leave to file amended Defence including Counter-claim is granted. To support her averments, she relied on the following decisions: Harun Osoro Nyamboki v Peter Mujunga Gathuru (2019) eKLR and *D.T. Dobie & Company Ltd v Joseph Mbaria Muchina & Another (1980)* eKLR.
7. The Plaintiffs' in their submissions relied on their averments and insisted that the Defendant should not be granted leave to file her Defence including Counter-claim out of time. They reiterated that the delay was prolonged and the reasons given for the delay, not plausible. They contended that the Defendant has not met the mandate set out in Order 8 Rule 5 of the Civil Procedure Rules.
8. On amendment of pleadings, Order 8 Rule 3(1) and (2) of the Civil Procedure Rules provides that:-
 - (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.
 - (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do."
9. Further, Order 8 Rule 5 of the Civil Procedure Rules states as follows:-
 - (1) For purposes 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. In the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013]* eKLR, the Court of Appeal while dealing with issues of amendment held inter alia:-

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 vs. 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 plaint the defendant would be deprived of his right to rely on Limitation Acts.”

11. In this instance, the Plaintiffs’ had amended their Plaint and the Court directed the Defendant to amend hers. However, despite the granting of leave, the Defendant failed to amend her Defence in time and explained that she had been unwell, after which, she took time to recuperate. I note the Defendant has annexed a draft Defence including Counter-claim which brings to fore certain explanations in respect to her acquisition of the suit land, that forms the fulcrum of the dispute herein. The Plaintiff has vehemently opposed the amendment sought and insists that the reasons given are not plausible and the delay is not well explained. However, I opine that it is pertinent for all parties to present all facts in respect to the dispute herein to enable the Court make a proper determination on the true and substantive merits of the case. Further, from a reading of the legal provisions cited above, it is clear that the purpose of amendment is to “determine the real question or issue raised by or depending on the proceeding” and it can be done “at any time” which means from the commencement of the suit, until its determination. It is my considered view that since this suit has not been set down for hearing, the Plaintiffs’ cannot suffer any prejudice if the orders sought are granted. I opine that she is entitled to leave to file a response to the Amended Defence and a Defence to Counter-claim.
12. Based on the facts as presented while relying on the legal provisions I have cited as well as associating myself with the decision quoted, I find the instant application merited and will allow it.
13. I grant the Defendant leave of fourteen (14) days to file and serve the Amended Defence including Counter-claim. Upon service, I grant the Plaintiffs’ leave of twenty-one (21) days to file and Serve a reply to Defence and Defence to Counter-claim if need be.
14. Costs will be in the cause.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MACHAKOS THIS 20TH DAY OF MAY, 2024

CHRISTINE OCHIENG

JUDGE

In the presence of;

Oyunge for Defendant

Lucheli holding brief for Mongare for Plaintiff



Court Assistant – Simon/Ashley

