



REPUBLIC OF KENYA



KENYA LAW
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**Sambu v National Land Commission & 2 others (Environment & Land
Case 5 of 2017) [2024] KEELC 4256 (KLR) (16 May 2024) (Ruling)**

Neutral citation: [2024] KEELC 4256 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT KERICHO
ENVIRONMENT & LAND CASE 5 OF 2017**

MC OUNDO, J

MAY 16, 2024

BETWEEN

THOMAS KIMAGUT SAMBU PLAINTIFF

AND

NATIONAL LAND COMMISSION 1ST DEFENDANT

KENYA NATIONAL HIGHWAYS AUTHORITY 2ND DEFENDANT

THE HON ATTORNEY GENERAL 3RD DEFENDANT

RULING

1. Vide a Notice of Motion dated 30th June, 2023, brought pursuant to the provisions of Section 100 of the *Civil Procedure Act* and Order 8 Rule 3 and 51 (1) of the Civil Procedure Rules 2010 and all enabling provisions of the law, the Applicant sought leave to further amend his Complaint dated 20th April, 2018 and that the Further Amended Draft Complaint be deemed as duly filed upon payment of the requisite fee. He also sought that the costs of the instant application be provided for.
2. The Application was supported by the grounds on its face and the Supporting Affidavit of equal date sworn by Thomas Kimagut Sambu, the Plaintiff herein who deponed that by Kenya Gazette Notices No. 1821, 10642 and 2029, the 1st and 2nd Defendants had compulsorily acquired a portion of his land measuring a total of 1.33 acres comprised in L.R No. Kericho/Kipchimchim/656 wherein in or about the year 2018, they had encroached on the remainder of the land measuring 2.14 acres but had failed to factor the same during the compensation.
3. That he had since valued the additional land for which he now sought to amend his Complaint dated 20th April, 2018, to claim compensation of Kshs. 85,000,000/= being the value of the additional 2.14 acres which the Defendant's had acquired but had not compensated him for. That the amendment would enable the court to efficiently determine the matter and avoid multiplicity of similar suits. Further,



that since the matter had not taken off, the Defendants would not suffer any prejudice and or injustice from the proposed amendments.

4. In response, the 2nd Defendant filed Grounds of Opposition dated 30th October, 2023 to the effect that the instant application was incompetent, misconceived, and was an abuse of the court process aimed at wasting judicial time and resources, the proceedings between the parties herein having been spent and a Decree issued by the court on 4th October, 2019. That the court was now functus officio.
5. The application was canvassed by way of written submissions to which I shall herein summarize as follows:

Plaintiff/Applicant's Submissions.

6. The Applicant framed one issue for determination to wit; Whether or not the amendments sought herein should be granted wherein he proceeded to submit that the ruling that had been delivered on 29th August, 2018 had been in respect of the third acquisition of portions of his lands namely 0.267 hectares comprised in L.R No. Kericho/Kipchimchim/656 and 0.267 hectares comprised in L.R No. Kericho/Kipchimchim/3027 which portions the 1st and 2nd Defendants had further acquired pursuant to a Kenya Gazette Notice No. 2029 dated 2nd March, 2018, while the instant suit was pending hearing and determination. That the said ruling had been obtained in the interim wherein the main suit had not been heard and determined hence the ruling did not amount to the decree of the court, but an interim order for the amount of compensation in respect to the third acquisition.
7. The Plaintiff hinged his reliance on the provisions of Order 8 Rule 3 of the Civil Procedure Rules as well as a combination of the decisions in the case of Josiah Magena vWakenya Pamoja Sacco Society Ltd [2017] eKLR and Institute for Social Accountability & Another v Parliament of Kenya & 3 others [2014] eKLR to submit that he had presented a credible case for further amendment of the Plaint.

2nd Defendant/Respondent's Submissions.

8. The 2nd Defendant/Respondent vide its submissions dated 6th February, 2024 reiterated the orders that the Plaintiff had sought in his amended Plaint dated 3rd May, 2017 to submit that the court had become functus officio since the matter herein had finally been determined and settled through the decree of the court that was issued on 4th October, 2019.
9. That the Plaintiff had been awarded Kshs. 14,927,000/= as compensation for the portion of land Kericho/Kipchimchim/1656, Kshs.3,473,000/= as compensation in respect of 0.0770 hectares comprised in land parcel No. Kericho/Kipchimchim/3017 which was to be paid within 30 days, and exemplary damages in the sum of Kshs. 200,000/= to be paid by the Respondents.
10. That a comparison of the orders of the court and the orders that the Plaintiff had sought for in its Amended Plain dated 3rd May, 2017, indicated that the court had pronounced itself with finality on each of the prayers that he had sought therein. That it was also clear from the said decree that no issue had remained outstanding after an award was made on all of the Plaintiff's prayers hence the proceedings herein had been spent. Reliance was placed in the decided case of Telkom Kenya Limited v John Ochanda (Suing on His own behalf and on behalf of 996 former employees of Telkom Kenya Limited) [2014] eKLR.
11. Further reliance was placed on the provisions of Section 2 of the Civil Procedure Act to submit that a decree was deemed to be final when an adjudicating body conclusively determined the rights of the parties with regard to all or any of the matters in controversy in the suit.



12. The Defendant/Respondent also placed reliance on the provisions of Order 3 Rule 4 of the Civil Procedure Rules to submit that the Plaintiff intended to re-open the instant matter through amendment of pleadings so as to sneak in a portion of his claim which he had omitted to bring at the appropriate time. That the Plaintiff had an opportunity to amend his claim before the decree was issued in the year 2019 since the cause of action he was intending to bring through the amendment had arisen in the year 2018. That the Plaintiff had sufficient time and if he had exercised reasonable diligence, all the issues that he sought to introduce would have been resolved before the court had issued the decree of 4th October, 2019.
13. That from the reading of the Plaintiff's Supporting Affidavit, he had admitted that the Defendant had encroached on the remaining portions of the suit property and it was the said claim that he was now seeking to introduce in his fresh amendments. That the Plaintiff had taken no action since the year 2018 until June, 2022 when he had engaged a surveyor and valuer. That further, the Plaintiff had inordinately delayed in filing the instant application having filed the same 5 years after his discovery and 4 years after the decree had been issued.
14. That the Plaintiff had an opportunity to file a response to the 2nd Defendant's Statement of Defence but he had omitted to do so. It was thus its submission that the Plaintiff was estopped from bringing further claims to the court over the same subject matter wherein he had omitted to do so in the first instance.

Determination.

15. I have considered the Plaintiff/Applicant's application and the responses and the ground of opposition by the 2nd Defendant/Respondents. I have equally considered the Parties written submissions.
16. It is not in dispute that via an application by a Notice of Motion dated 30th June, 2023, the Applicant moved the court seeking orders to further amend his Plaint for reason that pursuant to the 1st and 2nd Defendants having had compulsorily acquired a portion of his land measuring a total of 1.33 acres comprised in L.R No. Kericho/Kipchimchim/656, they had further encroached and acquired 2.14 acres more on the remainder of the land without compensating him. That he had since valued the land and therefore sought to amend his Plaint dated 20th April, 2018 to claim compensation of Kshs. 85,000,000/= being the value of the additional 2.14 acres.
17. The 2nd Defendant put in their grounds of opposition to the application stating that by virtue of a Decree issued by the court on 4th October, 2019, the proceedings between the parties herein had been spent and therefore the Court was functus officio. That the application was incompetent, misconceived, and was an abuse of the court process aimed at wasting judicial time and resources.
18. I have considered the proceedings herein to the effect that the Applicant in his amended Plaint of 3rd May 2017 had filed suit against the 2nd Respondent for reasons that he had not been adequately compensated after compulsory acquisition of his property land parcel No. Kericho/Kipchimchim/656 and No. Kericho/Kipchimchim/3027. Vide an application dated the 29th March 2018, he had sought leave to further amend his amended Plaint dated 3rd May 2017 for the same reasons given in the present application, to wit that 1st and 2nd Respondents had compulsorily acquired portion of his land and therefore he sought that they be directed to deposit the amount of Kshs.48,620,000/= being compensation for the said portion of land.



19. In a ruling dated the 16th day of April 2018, in Thomas Kimagut Sambu v National Land Commission & 2 others [2018] eKLR, the court had allowed the application with the following orders;

“That the Plaintiff is hereby granted leave to further amend his Amended Plaintiff in terms of the annexed draft Further Amended Plaintiff. The said Further Amended Plaintiff shall be deemed filed and served upon payment of the requisite court fees.

b. The 1st defendant shall conduct a valuation of the Plaintiff’s additional portions of land comprised in L.R No. Kericho/Kipchimchim/656 and Kericho/Kipchimchim/3027 that was compulsorily acquired pursuant to Kenya Gazette Notice No. 2029 dated 2nd March 2018 within 14 days from the date hereof (time being of essence) after which the court shall make further orders regarding the amount payable as compensation to the Plaintiff pending the hearing and determination of the suit herein. Should the 1st defendant fail to conduct the valuation within the prescribed time, the court shall proceed to make an order regarding the amount of compensation payable to the Plaintiff based on the Plaintiff’s valuation report already filed in court.”

20. Pursuant to delivery of this ruling, valuation reports were submitted and the respective valuers cross examined on the same wherein a ruling dated the 29th of August 2018 had been delivered with the following orders;

a. “That the Plaintiff is awarded Ksh. 14,927,000/= being just compensation for a portion of land No. Kericho/Kipchimchim/656 measuring 0.267 hectares together with the developments therein

b. The Plaintiff is awarded Ksh. 3,473,000/- as compensation in respect of 0.0770 hectares comprised in land parcel No. Kericho/Kipchimchim/3027. The said amount shall be paid within 90 days

c. Exemplary damages in the sum of Ksh 200,000/- to be paid by the respondents

d. The cost of this application shall be borne by the respondents”.

21. Pursuant to this ruling, the Applicant filed their Bill of Costs dated 7th March 2019 which came up for taxation on 3rd of July 2019 and a ruling by the Taxing Master delivered on the 2nd October 2019. Thereafter there had been a Notice to show cause against the judgment debtors who had not paid the decretal sum.

22. 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 further be amended further.

23. 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.”

24. 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.
25. 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 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”
26. In Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR it had been held 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. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice



the opposite party beyond monetary compensation in costs. The policy of the law is 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.”

27. And lastly in *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 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 Plaintiff the defendant would be deprived of his right to rely on Limitation Acts.”

28. I have asked myself whether amending the Applicant’s further amended plaint would be for the purpose of determining the real question in controversy between the parties keeping in mind that the court had already pronounced itself in its ruling of 29th of August 2018 wherein the Decree had been issued and the Applicant had taxed their bill of costs, wherein I am not satisfied as to the truth and substantiality of the proposed amendment.

29. The term *functus officio*, has been defined in *Black’s Law Dictionary*, Ninth Edition as follows;

“Having performed his or her office (of an officer or official body) without further authority or legal competence because the duties and functions of the original commission have been fully accomplished.”

30. The Supreme Court of Kenya had also relied on the holding in the case of *Jersey Evening Post Limited vs Al Thani* [2002] JLR 542 at 550 to the effect that:

“A court is *functus* when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.”



31. The orders of 29th of August 2018 having been perfected into an Order/Decree where the parties were now at an execution stage, I thus find that the court is now functus officio, the application dated the 30th June, 2023 is herein dismissed with costs.

DATED AND DELIVERED VIA MICROSOFT TEAMS AT NAIVASHA THIS 16TH DAY OF MAY 2024.

M.C. OUNDO

ENVIRONMENT & LAND – JUDGE

