



Mbaraka & 8 others v Kenya Electricity Transmission Co Ltd & 2 others; Mogo & another (Interested Parties) (Environment & Land Petition 9 of 2021) [2024] KEELC 4222 (KLR) (15 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4222 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND PETITION 9 OF 2021
FM NJOROGE, J
MAY 15, 2024**

BETWEEN

SAID BUYA MBARAKA & 8 OTHERS & 8 OTHERS & 8 OTHERS & 8 OTHERS PETITIONER

AND

KENYA ELECTRICITY TRANSMISSION CO LTD 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

COUNTY GOVERNMENT OF TANA RIVER 3RD RESPONDENT

AND

ABDI MOGO INTERESTED PARTY

THE GOVERNOR, COUNTY GOVERNMENT OF TANA RIVER INTERESTED PARTY

RULING

1. The application for consideration is the 1st Interested Party’s Notice of Motion dated 19th December 2023 brought under Section 1A, 1B, and 3A of the *Civil Procedure Act*; Order 8 rule 3 and Order 51 rule 1 of the *Civil Procedure Rules*. The 1st Interested Party seeks the following orders: -
 - a. That this honourable court be pleased to grant leave to the 1st Interested Party/applicant to amend the notice of motion dated 26th October 2023 in terms of the annexed amended notice of motion amended on 19th December 2023;
 - b. That the amended notice of motion be deemed as duly filed and served;
 - c. That the costs of this application be provided for.



2. The Application which is founded on the grounds on the face of it, is supported by an Affidavit sworn on the even date by His Excellency Major (Rtd) Dr. Dhadho Gaddae Godhana, who deposed that following this court's directions, the 1st Respondent was required to deposit a certain sum being compensation for loss of land use, into a special interest earning account to be opened and held by the 3rd Respondent. Having failed to comply with the said orders, the 1st Interested Party filed an application for contempt dated 26th October 2023, against the 1st Respondent's Managing Director and General Manager, Finance. That the 1st Interested Party inadvertently failed to mention the 1st Respondent in the orders sought in the said application thus prompting the present application. To the 1st Interested Party, no form of prejudice will be occasioned on the Respondents if the present application is allowed.
3. The application is opposed by the 1st Respondent. They filed grounds of opposition dated 30th January 2023 and a Replying Affidavit sworn by Samwel Rambo on 31st January 2024. The grounds of opposition, which are echoed in the replying affidavit, were tailored as follows: -
 - a. The proposed amendments appear to have been precipitated by the 1st Respondent's replying affidavit dated 28th November 2023, which specifically pointed out that application dated 26th October 2023 had failed to first seek to cite the 1st Respondent as a legal entity, for contempt.
 - b. The proposed amendments are intended to cure the critical loopholes/gaps and issues of law and procedure that the 1st Respondent had raised in its replying affidavit dated 28th November 2023.
 - c. The proposed amendments are intended to frustrate and prejudice the 1st Respondent.

The application was canvassed by way of written submissions.

The 1st Interested Party's Submissions

4. Counsel identified one issue for determination, that is, whether the 1st interested party has met the threshold for being granted the orders sought. It was counsel's submission that the general power to amend pleadings and the requirements to be considered are cast in Section 100 of the Civil Procedure Act, Order 8 Rule 5 (1) of the Civil Procedure Rules and judicial pronouncements in Diamond Trust Bank Kenya Limited v Invesco Assurance Company Limited & another [2021] eKLR; Central Kenya Limited v Trust Bank Limited [2000] 2 EA 365; Ngong Butchers Cooperative Society Limited v Patrick Kabue Muchene [2021] eKLR; Malakwen Arap Chobe (suing as the administrator as litem of the estate of Kipchobe Arap Murgor) v David Mibei [2022] eKLR; Ochieng and Others v National Bank of Chicago Civil Appeal No. 147 of 1991; Tildesley v Harper [1878] 10 Ch.D; and Eastern Bakery v Castelino [1958] E.A 461 (U) at p.462.
5. Counsel argued that the requirements highlighted in the aforementioned cases could be summarized into three- a) whether the amendment seeks to determine the real issue in question and if it introduces a new or inconsistent cause of action, b) whether any prejudice has been occasioned on the 1st Respondent or a vested interest or accrued legal right has been affected, and c) whether the application has been brought without undue delay and is made in good faith.
6. In relation to the first issue, counsel submitted that the real issue in controversy is whether the 1st Respondent is in contempt of the orders issued on 14th March 2023 and that the amendments sought do not introduce any new action or an action inconsistent with the former application. Secondly, it was counsel's submission that no prejudice will be occasioned to the 1st Respondent if the amendment sought is granted. She added that the Civil Procedure Act and Rules thereto and Article 159 (2) of the



Constitution of Kenya envision that judicial authority must be administered without undue regard to technicality but to facilitate the just, expeditious, proportionate and affordable resolution of disputes. To her, there was no right that had accrued to the 1st Respondent that would be prejudiced or greatly affected by the amendments sought.

The 1st Respondent's submissions

7. In their submissions, counsel argued that the purpose of amendments is to allow the court to determine the real question in issue and that a party should be granted such leave provided that the application is not brought too late in the proceedings and that to allow the amendment would cause an injustice to the opponent. Like the 1st Interested Party's counsel, counsel relied on Bullen and Leake's Precedents of Pleadings, 11th edition at page 61; *Eastern Bakery v Castellino* [1958] EA 461 (CA); and *Tildesley v Harper* [1878] 10 Ch. D 393 as quoted in Odunga's Digest on Civil Case Law and Procedure at page 389.
8. To counsel, the present application is brought in bad faith and should it succeed, the costs should be awarded to the 1st Respondent.

Analysis And Determination

9. Aptly submitted by the parties herein, the general power to amend pleadings draws from Section 100 of the Civil Procedure Rules which provides: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.” (emphasis mine)
10. Further, Order 8 rule 5 (1) of the Civil Procedure Rules provides as follows: -

“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.”
11. The Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”
12. The 1st Interested Party seeks leave to amend his notice of motion application dated 26th October 2023 to capture the name of the 1st Respondent in the orders sought and to include an alternative prayer for fine for the alleged contempt. The 1st Respondent has objected to the amendment solely on the



grounds that the amendment will prejudice the 1st Respondent and that they intend to cure loopholes in law and procedure.

13. I have carefully looked at the proposed amendments and the orders said to have been disobeyed by the 1st Respondent, I am convinced that the proposed amendments do not change the cause of action but only seek to repair an omission. The 1st Respondent has not demonstrated any prejudice that the amendment will cause to them. Neither has it stated the alleged loopholes in the law and procedure intended to be cured by the application for amendment. The fact that a claim has been filed does not mean that the court will allow it without it being subjected to procedures and rules regarding rules of evidence or proof. The 1st Interested Party will have to establish to the required standard to this court that the 1st Respondent and or its officials are in contempt before any orders sought can be granted.

Conclusion

14. This court therefore finds that the application dated 19th December 2023 has merit and it is hereby allowed as prayed in prayer no 1 thereof. Consequently, the amended notice of motion shall be filed and served upon the other parties in the suit within 7 days from the date of this order and they shall respond to it if need be within 7 days of service. Only the 1st respondent is awarded costs of the application and those costs shall be borne by the applicant.

RULING DATED, SIGNED AND DELIVERED AT MALINDI VIA ELECTRONIC MAIL ON THIS 15TH DAY OF MAY 2024.

MWANGI NJOROGE

JUDGE, ELC, MALINDI

