



Suleiman v Kiunga (Suing as the Administrator of Stephen Michuki Kiunga) (Environment & Land Case 358 of 2009) [2024] KEELC 4271 (KLR) (14 May 2024) (Ruling)

Neutral citation: [2024] KEELC 4271 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 358 OF 2009
LL NAIKUNI, J
MAY 14, 2024**

BETWEEN

KHADIJA ABDALLA SULEIMAN PLAINTIFF

AND

THERESA STEPHEN KIUNGA DEFENDANT

SUING AS THE ADMINISTRATOR OF STEPHEN MICHUKI KIUNGA

RULING

I. Introduction

1. Before the Honourable Court for its determination is the Notice of Motion application dated January 19, 2024 by the by the Plaintiff/Applicant herein. It was brought under the provision of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Cap. 21, Order 8 Rule 3 and Order 51 of the *Civil Procedure Rules, 2010*.
2. Upon service and while opposing the said application, the Defendant filed its 7 Paragraphed Replying Affidavit sworn and dated on February 14, 2024 by Theresa Stephen Kiunga. The Honourable Court will be dealing with all the issues raised thereof at a later stage of this Ruling.

II. The Plaintiff/Applicant's case

3. The Plaintiff/Applicant sought for the following orders:
 - a. That this Honourable court be pleased to grant leave to the Plaintiff to amend the Plaint as set out in the draft Amended Plaint annexed thereto.
 - b. That this honourable court be pleased to order that the Draft amended Plaint attached to the application be deemed as duly filed and served upon payment of requisite court fees.
 - c. That costs be in the cause.



4. The application is based on the grounds, testimonial facts and averments on the 11 Paragraphed of the supporting affidavit of Khadija Abdalla Suleiman sworn and dated on January 19, 2024 together with one annexure marked as “Kas – 1” annexed hereto. She averred as follows:-
 - a. She was the Plaintiff herein well versed with the facts of this suit and hence competent to swear this Affidavit on her own behalf.
 - b. She wished to amend the Plaint dated October 19, 2009 in order to reflect the true set of facts in this matter.
 - c. The Plaint as drafted by the previous advocates had failed to capture the correct facts of the Plaintiff’s case and that these facts were necessary for the court to make an informed decision.
 - d. The errors made by her previous advocates may occasion great prejudice to her claim against the Defendant since some important facts were left out while others were incorrectly pleaded.
 - e. The prayers contained in the Plaint would need to be amended to reflect the proper prayers in respect of the correct set of facts as contained in her Draft Amended Plaint.
 - f. The intended amendments disclose the real cause of action between the parties as per the current circumstances.
 - g. The application was made in the interest of justice, good faith without any undue delay and will not prejudice the Defendant.
 - h. The Plaintiff stood to suffer great losses if the amendment was not allowed.

III. The Replying Affidavit by the Defendant

5. The Defendant filed its 7 Paragraphed Replying Affidavit sworn and dated on February 14, 2024 by Theresa Stephen Kiunga . She averred as follows:-
 - a. She was the Legal Administrator of the estate of Stephen Michuki M’kiunga the deceased party hence competent to swear this affidavit.
 - b. The application was fatally defective and the same could not serve any purpose in the instant case.
 - c. From the reading of the entire intended amendment, it was seeking to have orders against the deceased Stephen Michuki M’kiunga and she was the administrator.
 - d. The name of Stephen Michuki M’kiunga had already been substituted with her name as the Defendant.
 - e. The intended amendment would not serve any purpose in law.
 - f. That as a result of the foregoing it was fair that the application be dismissed with costs.”

IV. Submissions

6. On February 12, 2024 while all parties were present in Court, directions to have the application disposed off by way of written submission. Pursuant to that, only the Plaintiff/Applicant obliged and Court reserved a date on delivering of the Ruling accordingly.



A. The Written Submissions by the Plaintiff/Applicant

7. While in support of the application, the Learned Counsel for the Plaintiff/Applicant the Law firm of Messrs. Githi Gathu & Company Advocates filed their written submissions dated March 15, 2024. Mr. Gitahi Advocate commenced his submission by stating that what was before the Honourable by the Plaintiff dated January 19, 2024 seeking leave amend her Complaint dated October 19, 2009. It is on the grounds that the facts pleaded in the Complaint dated October 19, 2009 were incorrect due to errors made by her previous Advocate.
8. The application opposed through a Replying Affidavit dated February 14, 2024 sworn by Theresa Stephen Kiunga as the Defendant. It had only one ground that the Draft Amended Complaint indicated that the Defendant was the Defendant was Stephen Michuki M'kiunga (Deceased) instead of Theresa Stephen Kiunga who was the Administrator of the deceased's estate.
9. The Learned Counsel averred that it appeared the Respondents were not opposed to the amendment of the facts contained in the draft Complaint nor were they opposed to the proposed amendment of the prayers sought therein. As such, he asserted that the Court is tasked to make the following two determinations. These are:- Firstly, whether the Plaintiff's application for leave to amend her Complaint was meritorious. He held that the power to amend Pleadings was contained under the provision of Order 8 Rule 3 of the [Civil Procedure Rules, 2010](#). The provision granted Court with authority to allow amendment of pleadings at any stage of the proceedings subject to Order 1 Rules 9, 10 and Order 24 Rules 3, 4,5 and 6 of the [Civil Procedure Rules, 2010](#). Accordingly, the Learned Counsel relied on the provision of Order 8 Rule 5 of the [Civil Procedure Rules, 2010](#) which authorizes the court to grant amendments for the purpose of determining the real question in controversy. To buttress on that point, the Learned Counsel referred Court to the case of:- "[Institute for Social Accountability & Another – versus - Parliament of Kenya & 3 Others](#) (2014) eKLR where the Court held as follows:-

“The object of amendments of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of the amendments makes the function of the court more effective in determination the substantive merits of the case rather than holding it captive to form of the action or proceedings... The court will normally allow parties to make such amendments as be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal rights is affected and that the amendment can be allowed an injustice to the other side,”
10. The Learned Counsel referred to “The [Bullen and Leake and Jacobs Precedents](#), 12 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 amendments may be allowed before or at trial or after trial or even after judgement 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.”



In this matter, there was no evidence from the Defendant/Respondent that the Plaintiff/Applicant had introduced a new cause of action or that the Defendant/Respondent would suffer any prejudice whatsoever.

The only basis upon which the Defendant/Respondent had opposed the application to amend was failure to substitute the name of the deceased Defendant Stephen Michuki M'kiunga with that of his Legal Administrator Theresa Stephen Kiunga.

11. The Learned Counsel averred that that was an error in the form of pleading and could be cured by simply substituting the name of the Defendant/Respondent upon such leave being granted to the Plaintiff/Applicant. The said error could not be a sufficient basis upon which this honorable court could deny the Plaintiff/Applicant leave to amend her Plaintiff. He stated that the Plaintiff/Applicant would also wish to invoke the provision under Article 159 (2) (d) which provides that:- "Justice shall be administered without undue regard to procedural technicalities." Be it as it may, despite the Respondent being granted orders to substitute the deceased Defendant/Respondent sometimes on the May 30, 2013, she never amended the title of their amended defence filed on June 10, 2013 to reflect the name of Theresa Stephen Kiunga as the Defendant/. As such it would be unfair to deny the Plaintiff/Applicant application on such a technical ground.

He submitted that it would only be interests of justice to grant the Plaintiff/Applicant leave to amend her Plaintiff as prayed in order to have this matter determined on the true set of facts without any undue delay.

12. Secondly, whether the Plaintiff's application should be allowed.

The Counsel for the Plaintiff/Applicant averred that the Defendant/Respondent had not produced evidence that she had introduced a new cause of action or that the Defendant/Respondent would suffer prejudice. The Learned Counsel also relied on the famous provision of Article 159 (2) (d) of the Constitution of Kenya, 2010. Furthermore, the Learned Counsel reminded the court that the Defendant/Respondent never amended her defence despite being issued with orders on May 30, 2013, she never amended the defence and thus it would be unfair to allow the Plaintiff/Applicant's application on the technical ground that the Plaintiff/Applicant never added her name - Theresa Stephen Kiunga.

VI. Analysis & Determination.

13. I have meticulously read and considered the application by the Plaintiff/Applicant, the replies by the Defendant/Respondent, the written submissions and the cited authorities by the Plaintiff/Applicant, the relevant provision of the Constitution of Kenya, 2010 and the statutes.
14. In order to arrive at an informed, reasonable and Equitable decision on the subject matter, the Honourable Court has framed three (3) salient issues for its for determination. These are:-
 - a. Whether the Notice of Motion application dated January 19, 2024 by the Plaintiff/Applicant herein has any merit?
 - b. Whether the parties herein are entitled to the orders sought.
 - c. Who will bear the costs of the application.



Issue No. a). Whether the Notice of Motion Application dated January 19, 2024 by the Plaintiff/Applicant herein has any Merit?

15. Under this sub – heading and the main substratum of this application is pertaining to being granted leave to amend pleadings. The general power for amendment is governed by several provision of the law. These include the provision of Section 100 of the Civil Procedure Act, Cap. 21 which states as follows:

“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.”

16. Additionally, the other provision of law in matters of amendment is Order 8 Rule 3 of the Civil Procedure Rules, 2010 which 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.”

17. Further, Order 8, rule 5 (1) gives the court the general power to amend 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.”

18. Further to the provisions of the law, the Courts have in the past years arrived at a myriad of decisions on this subject matter. They include the case of:- “Elijah Kipngeno Arap Bii – versus - Kenya Commercial Bank Limited [2013] eKLR the Court of Appeal held 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 plaint the defendant would be deprived of his right to rely on Limitation Acts.”

19. Another important case is that of: “*St Patrick’s Hill School Ltd – versus - Bank of Africa Kenya Ltd* [2018] eKLR the Court of Appeal set out the principles governing amendment of pleadings as follows:

- “ a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings.
- d) 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.
- e) 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 limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

20. From the face value, and the afore going decisions, an amendment may be made at anytime of the proceedings. It is at the discretion of the Court to grant leave. Therefore, from the adduced facts, the Honourable Court is persuaded that that the application has all the validity and hence it is meritorious.

Issue No. b). Whether the parties herein are entitled to the orders sought.

20. Although the Honourable Court has in principles allowed the application by the Plaintiff/Applicant herein, it is not without a rider and disclaimer. It is apparent that the instant application has been brought under undue delay for the simple reason that the suit was filed in the year 2009. The application is being brought before court in the year 2024. However, the above case held that amendment of pleadings is possible even when there is undue delay. By all means, the instant application was inordinately late. Despite all odds, the Plaintiff/Applicant has failed to provide proper or sufficient reason as to why the Plaint was not amended since the year 2009 while this knowledge was in the grasp of the Plaintiff. It is in the nature of practice for a Plaintiff to go over his/her pleadings before filing. What I suspect here is malice as the current Defendant may probably not be aware of the facts as she is just a representative. However, be that as it may, in the interest of justice, equity and conscience, I have looked at the amendments in the draft Plaint and I recognized that the new set of facts paint a clearer picture for the court to determine.
21. Furthermore, the Defendant/Respondent has not been denied any rights due under the limitations of actions, but as I said above I suspect that there was no good faith. The facts are well known by the previous Defendant/Respondent who died on November 21, 2018. From the proceedings on record, the matter was stood over generally from October 23, 2012 to March 5, 2022. The current Advocates the Law firm of Messrs. Gitahi Gathu & Co. Advocates were not on record then. I see there was a brief appearance by the firm of A.O Hamza who were requesting for this file.
22. In order to sustain a balance of the interest of all parties, the Plaintiff/Applicant will be made to pay the Defendant/Applicant some thrown away costs while the Defendant/Respondent will be accorded



corresponding leave to amend the Defence at will within a stipulated duration. In saying so, I am guided by the case of: “*Kassam – versus - Bank of Baroda (Kenya) Limited* [2002] eKLR where the court stated:

“In some of these instances there is no practical way to allow the amendment and at the same time avoid the prejudice. In others an adjournment may be necessitated. In its turn this may, however, bring with it other evils, such as further delay of the case and concomitant expense, disruption of the court calendar, and so on. The problem may call for the balancing of several factors. In the exercise of the court’s discretion one or more of the following factors may be considered.

1. Whether the amendment sought embodies a legally valid claim or defence (the situation in the instant case concerns defence). This is because there is not much point in wasting time and effort over a new claim or defence which has no legal merit.
2. The reason why the subject matter of the amendment was not included in the original pleading or offered sooner than it was. These reasons range over a wide field, some good, and some bad. The subject matter may not have been in existence when the original pleading was filed, e.g. the defence of *res judicata* may arise only after judgment in another action after the written statement of defence was filed; other reasons may reveal bad faith, e.g. an intent to obstruct the proceedings by deliberately withholding allegations in order to offer them by amendment at a strategic time. In other cases the reason may be that the applicant did not know or appreciate the new fact when he drafted the original pleading. Such ones depend on the degrees of diligence and the lack of it, and whether amendment would work prejudice to the opponent or disrupt judicial administration.
3. Delay or disruption of judicial administration. If prejudice to the opponent can be prevented only by delay in the progress of the case, the extent of the hardship which this delay imposes upon the opponent and the system of judicial administration is a factor to be considered in deciding whether to allow the amendment.
4. The extent to which the amendment departs from the original claim or, as in our case, defence, or tends to complicate the issues.
5. Whether the amendment is offered by the Plaintiff or Defendant. Thus, if an amendment will necessitate delay in bringing the case for trial, there may be undue hardship to the Plaintiff. Delay more often works against a Plaintiff’s interests than against those of a Defendant.”

23. For these reasons therefore the application by the Plaintiff/Applicant be and is hereby allowed but upon fulfilling the stated out pre – conditions set out herein.

Issue No. c). Who will bear the costs of the application

24. It is now well established that the issue of costs is at the discretion of Courts. Costs mean the award that is granted to a party upon the conclusion of any legal action or proceedings in a litigation. The proviso of Section 27 of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By events it means the result or outcome of the legal action.



25. In the instant case, the Notice of Motion application by the Plaintiff/Applicant has been successful upon fulfilment of certain pre – conditions thereof. Taking that the matter is still progressing on, it is just reasonable that the cost to be in the cause thereof.

VII. Conclusion & Dispositions

26. Consequently, having caused an indepth analysis of the framed issues herein, the Honourable Court on Preponderance of probability and the balance of convenience arrives at the following decision by making these specific orders:-

- a. That the Notice of Motion application dated January 19, 2024 be and is hereby found to be meritorious and thus allowed subject to fulfillment the following Pre – Conditions.
 - i. Considering the period of time that has lapsed since filing of the suit the Plaintiff be ordered to pay thrown away costs of a sum of Kenya Shillings Twenty-Five Thousand (Kshs. 25,000.00/= to the Defendant within the next seven (7) days from the date of the delivery of this Ruling and failure to which the application will automatically stand dismissed.
 - ii. The Plaintiff granted fourteen (14) days to have filed and served the Amended Plaint in terms of the attached Draft Amended Plaint herein.
- b. That thereafter, the Defendants granted 7 days corresponding leave to file and serve Amended Defence and/or Counter – Claim if need be.
- c. That subsequently, the Plaintiff be granted 3 days to file replies to the Amended Defence and Defence to the Amended Counter Claim.
- d. That for expediency sake, the matter be fixed for hearing on October 16, 2024. There shall be a mention on July 15, 2024 for conducting of Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
- e. That the costs of the application shall be in the cause.

It is so ordered accordingly

RULING DELIVERED THROUGH THE MICRO – SOFT TEAMS VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA ON THIS 14TH DAY OF MAY 2024

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HON. MR. JUSTICE LL. NAIKUNI,
ENVIRONMENT & LAND COURT AT
MOMBASA

Ruling delivered in the presence of

- a. M/s. Firdaus Mbula, the Court Assistant.
- b. Mr. Gitahi Advocate Plaintiff/Applicant.
- c. Mr. Attancha Advocate Defendants/Respondent.

