



Bathawab Investment Limited v Abdulhafedh aka Zubedi & 4 others (Environment & Land Case 330 of 2015) [2025] KEELC 3597 (KLR) (20 February 2025) (Ruling)

Neutral citation: [2025] KEELC 3597 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE 330 OF 2015**

JG KEMEI, J

FEBRUARY 20, 2025

BETWEEN

BATHAWAB INVESTMENT LIMITED PLAINTIFF

AND

ABDULHAFEDH AKA HASSAN AHMED ZUBEDI 1ST DEFENDANT

DUBAI BANK KENYA LIMITED 2ND DEFENDANT

AHMED HASSAN AHMED ABDULHAFEDH 3RD DEFENDANT

UKAMBA AGRICULTURAL INSTITUTE 4TH DEFENDANT

KENYA DEPOSIT INSURANCE CORPORATION 5TH DEFENDANT

RULING

(in respect to the Plaintiff's application dated 1/5/24 seeking orders to amend the plaint)

1. The Plaintiff moved this Court under Order 8 Rules 3, 5, 7 and 8 of the CPR and sought the following orders; leave to amend its plaint in terms of the proposed reamended plaint annexed; that the proposed amended plaint be adopted as properly filed; the Defendants be at liberty to file their amended pleadings within 15 days and that any injunctive orders subsisting be extended or deemed to continue in force against all the Defendants pending the hearing and determination of the suit.
2. The application is premised on the grounds annexed thereto as well as the supporting affidavit of Amin Saleh Bathawab sworn on 2/5/24.
3. The deponent avowed that he is a Director of the Plaintiff and authorized to swear as such.
4. That the need to amend the plaint has been necessitated by the email of 11/4/24 from the law firm of Andrew Ombwayo & Co Advocates that enclosed a judgement in ELC 136 of 2009 – Ukamba Agricultural Institute Limited Vs South Eastern University College & City Council of Nairobi. That



the officials of the proposed 6th Defendant admitted in the said case that they are aware of the sale of the suit land to the Plaintiff and the part payment of consideration thereof. That the proposed 6th Defendant claims to be a separate entity from the 4th Defendant and further that it is the owner of parcel LR NO 209/10350 hence the need for its joinder for purposes of determining the real question in controversy between the parties; correcting defects and errors in the proceedings; affording the 6th Defendant the opportunity to be heard and thereafter be bound by the judgement of this Court in the instant suit.

5. He faulted the 6th Defendant for refusing to initiate the joinder into the suit despite knowledge of the existence of the current suit and the claims therein. That unless the 6th proposed Defendant is enjoined there will be multiplicity of suits. That for the effective and complete adjudication of the dispute it is apt that the 6th proposed Defendant be enjoined and be bound by all the orders including injunctive orders subsisting on record.
6. In opposing the application the 1st and 3rd Defendants filed grounds of opposition dated 25/9/24 expressed as; no specific order to reopen the part heard suit has been sought; the plaintiffs cause of action against the proposed 6th Defendant is statute barred by dint of Section 4 of the Limitation of Actions Act (LAA), the Plaintiffs cause of action having been extinguished in November 2011; the Plaintiff was or ought to have been aware of the existence of the suit in ELC 136 of 2009 yet did nothing to seek joinder; the 1st and 3rd Defendants stand to be prejudiced if the case is reopened for pretrial being a part heard; the plaintiff failed to annexed the email alleged hence the application is a roving glib.
7. Equally the 2nd and 5th Defendants opposed the application vide its grounds of opposition dated the 24/9/24 that; the alleged real question and defects in the proceedings have not been disclosed; the email, the source of the applicants information is not enclosed; the determination of the Court in ELC 136 OF 2009 was not enclosed for the Courts consideration; no evidence to demonstrate that the 6th proposed Defendant exists under the auspices of the 4th defendant; the proposed amendment is neither dated or signed;
8. Not to be left behind, the 4th Defendant in its grounds of opposition dated the 1/10/24 stated that; the application is but scandalous and an abuse of the process of the Court; the proposed amendment alters the cause of action by raising new facts contrary to Order 2 Rule 6(1) of the CPR and Order 8 rule 7 of the CPR; allowing the application will prolong litigation unnecessarily and the amendment is aimed at defeating the efficient determination of the suit; the prejudice that will visit the 4th Defendant cannot be compensated by way of costs; application is made in bad faith hence deserves dismissal with costs.
9. In his supplementary affidavit dated the 7/10/24 Amin Saleh Bathawab brought to the Court's attention that the grounds of opposition by the 1st & 3rd and 2nd & 5th Defendants were filed out of time and without the leave of the Court. Further he annexed the email of 11/4/2024 among other pleadings in support of the application. That the cause of action is not time barred and that no party will suffer any prejudice on account of the proposed joinder.
10. Hassan Ahmed Zubedi in his further affidavit sworn on 11/11/24 impugned the emails produced by the Plaintiff via the supplementary affidavit of 7/10/24 on the ground that no certificate of electronic evidence was annexed as required under Section 106B (4) of the Evidence Act. Inter alia, that the Plaintiffs application for joinder is tainted with inordinate delay since the case having been filed in 2015 and urged the Court to disallow it.



Directions

11. Directions were taken on 8/10/24 that the application be canvassed by way of written submissions. As at the time of writing the ruling only the Plaintiff and the 4th Defendant filed written submissions dated the 8/10/24 and 3/2/25 respectively.

The Plaintiff's submissions

12. Counsel for the Plaintiff submitted that the Plaintiff was not aware of the proposed 6th Defendant until receipt of the email of 11/4/24 upon which it acted speedily in filing this application hence the application was filed timeously. That according to ELC Misc No E084 of 2023 the proposed 6th Defendant sought orders for the removal of caveats to pave way for the disposal of the suit land and put it beyond the reach of this Court and the parties in this suit. Put differently, because the Plaintiff was not enjoined in ELC 136 OF 2009, the proposed 6th Defendant and others cunningly filed MISC E084 of 2023 and attempted to obtain orders to enforce the judgement of the Court in ELC 136 of 2009. That it is only upon the insistence of the Court that its Advocate in MISC E084 of 2023 served the Plaintiff via the email dated the 11/4/24. Further that it also confirmed that it is a separate entity from the 4th defendant, a position that was posited by the proposed 6th Defendant in the judgement in ELC 136 OF 2009.
13. Counsel further submitted that Courts have power to amend pleadings at any stage of the proceedings on such terms as to costs or as may be just. Joinder of the proposed 6th Defendant is necessary to correct a genuine mistake of fact that was hitherto unknown to the Plaintiff. No new cause of action will be introduced and none of the Defendants will be prejudiced in any way as all the facts giving rise to the Plaintiffs' claims and reliefs have been placed on record and no new matters are being introduced.
14. In conclusion Counsel stated that the application is neither defective nor an abuse of the process of the Court but meritorious and urged the Court to allow.
15. Counsel for the 4th Defendant, whilst relying on a number of precedents, submitted that the application is brought 4 years post the institution of the suit, matter is part heard and therefore the 4th Defendant stands to suffer prejudice. No explanation has been offered by the Plaintiff for the delay which is inordinate. In any event it was submitted that the proposed amendments seek to introduce an additional party, alter the character of the main claim as well as its defence owing to a negligent pleader. That allowing the application negates the overriding objectives of the of the CPA and runs afoul the public policy as to the expeditious disposal of suits.
16. Relying on the decision in the case of Daniel Otieno Migore Vs South Nyanza Sugar Co Ltd (2018) ECLR, Counsel submitted that equity does not favour the indolent and that parties are not allowed to depart from their pleadings.
17. Counsel stated that the Plaintiff is attempting a cosmetic face lift of its case to prejudice the 4th Defendant. See the case of William Koross Vs Hezekiah Kiptoo Komen & others (2015) where the Court held that litigation must come to an end. That the plaintiffs repeated amendments in the case undermines the principle of a just and fair process. The Court was urged to disallow the application.

Analysis and determination

18. Having carefully considered the application, the rival affidavit evidence and submissions, I am of the view that there is one key issue for determination is whether the application is merited.



19. The legal framework governing amendment of pleadings is found in Section 100 of the *Civil Procedure Act* 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.”

20. Order 8 Rule 5 of the Civil Procedure Rules states 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.”

21. From the above provisions of the law, the guiding principle is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment will not result in prejudice or injustice which cannot be compensated with costs. Therefore inordinate delay, introduction of new causes of action, injustice, taking away a vested interest or right arising from Limitations of Actions Act are some of the causes of prejudice or injustice to a party and a Court is called upon to satisfy itself that none will be visited to the parties before allowing the amendment.

22. The rationale for the exercise of the discretionary power of the Court has been aptly captured by the 4th Defendant in the case of *Central Kenya Limited Vs Trust Bank Limited & 5 Others* [200] eKLR which was cited before the Court and where the appellate Court restated the general principles in amendment of pleadings as :

“... that a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

23. Their Lordships went on to state that;

“It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. Otherwise the Court will not later permit him to reopen the same subject of litigation (see O.II rule 1 of the Civil Procedure Rule) only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. (see, *Beoco Ltd v. Alfa Laval Co. Ltd* [1994]4 ALL ER. 464).”

24. In this case the applicant’s application has been challenged on several fronts being; inordinate delay, introduction of a new cause of action; contra the of limitation of actions as it takes away accrued



rights and interests of the 4th Defendant; reopening of the part heard case will prejudice the Defendants inter alia.

25. It is the case of the applicant that the information about the proposed 6th Defendant came to its knowledge vide the email dated 11/4/24 sent to its Advocates by the Counsel of the said party in MISC No E088 of 2023. The Court has read the pleadings in the said cause including the correspondences between the two counsels and is satisfied that the Applicant wasted no time in bringing the application which was filed shortly on the 1/5/2024. The Court has not been given any evidence to show that the application was filed inordinately. The proceedings show that the application was filed after the onset of the hearing of PW1 who is yet to be reexamined by his Counsel.
26. Whether or not the amendment introduces a new cause of action, the Court will turn to the impugned draft plaint for answers. But first in the original plaint which has since been amended, the Plaintiff sued the 4th Defendant, inter alia, for orders of specific performance of the sale agreement, damages for breach of contract in lieu. In the draft amended plaint, the Plaintiff avers that it paid monies to the tune of 1.7 Million US dollars through the 1st and 2nd Defendants to the 4th and or the Proposed 6th defendant, an admission that is averred to have been made by the officials of the proposed 6th Defendant in ELC 136 OF 2009 -Ukamba Agricultural Institute Limited Vs South Eastern University & Anor.
27. The Plaintiff has averred that the 4th and the 6th proposed Defendants are related entities. See para 23 of the draft plaint where it is averred as follows;

“The 6th Defendant is a Limited Liability Company, limited by guarantee without share, duly incorporated under the Companies Act, Chapter 486 of the Laws of Kenya which was incorporated, inter-alia, for the provision of agricultural, scientific training and research facilities under the auspices of the 4th Defendant, UKAMBA AGRICULTURAL INSTITUTE, but claims to be a separate legal entity from the 4th Defendant and further claims to be the lawful owner of the parcel of land known as L R 209/10350 which is the Suit Premises herein.
28. It is also manifestly clear that the cause of action against the proposed 6th Defendant arises from the same series of transactions revolving the alleged joint purchase of the suit land by the Plaintiff, the 1st -3rd Defendants from the 4th and or the proposed 6th Defendant.
29. In my considered view, therefore, I do not find a departure on the cause of action to warrant any party to face any difficulties in prosecuting the same. At least none has been demonstrated.
30. On the question of time bar, I am guided by the Court of Appeal case in James Ochieng Oduor T/ A Ochieng Oduol & Co. Advocates VS Richard Kuloba (2008) eKLR the Court of Appeal held at page 3 thereof that: -

“In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (Barclays Bank D.C.O Vs Shamsudin (1973) EA 451). However, such amendments can only be allowed where peculiar circumstances are present.

A careful reading of order VIA Rule 3 of the Civil Procedure Rules clearly shows that amendment to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances.”
31. My reading of the pleadings filed in this case show that the transaction, the subject of this suit is ownership of the suit land LR No 209/10350 situate in Nairobi. The suit land as I can gather from the



pleadings on record is /was subject to a number of Court cases in the High Court, ELC and even in the Court of Appeal. The central question in all the cases is the ownership of the suit land. The alleged cause of action is said to have arisen in 2011 or thereabouts. The current suit was filed in 2015. This dispute being for recovery of land the statutory bar is 12 years. I find that the exceptional circumstances of this suit is that the proposed 6th Defendant was adjudged as the owner of the land in 2023 and therefore a challenge based on time bar is not maintainable. It has become clear that if the suit proceeds in the absence of the proposed 6th Defendant there is likelihood of prejudice as it will not have been afforded the opportunity to defend itself. Needless to state that there appears to be a nexus between the proposed 4th and proposed 6th Defendant. Also, to avoid the Court issuing an impotent judgement should the 4th Defendant have been dispossessed of the suit land. It is undisputed that the proposed 6th Defendant was adjudged owner of the suit land by a competent Court. It is also evident from the existing suits that the proposed 6th Defendant has enjoined the Plaintiff, inter alia, in MISC No MISC No E088 of 2023 where it is seeking the removal of encumbrances of the suit land including the orders issued by this Court. In my view the issue of time bar is not tenable. It is rejected.

32. In my further view that it is just to enable the parties, to amend their pleadings so as to ensure that litigation between the parties is conducted not on hypothesis but rather on the true state of facts which the parties really and finally intend to rely on. I hasten to state that the power to amend pleadings makes the function of the Court more effective in determining the substantive merits of the case. See *Institute for Social Accountability and Another Vs. Parliament of Kenya & 3 Others* (2014) eKLR.
33. Will any of the parties be prejudiced if the amendment is allowed? As already alluded in the Ruling, a party may be prejudiced if the application is brought with unreasonable and unexplained delay which makes it impossible for the parties to summon witnesses because they may have died or evidence dissipated due to unreasonable delay. A party may also be prejudiced if it becomes impracticable to defend a totally different claim. Areas of prejudice can vary and each depends on the circumstances of each case.
34. In this case, I find that the case has tarried in the corridors of justice for the last decade for one reason or another. The hearing commenced in 2024 and was derailed by the instant application before the first witness concluded his testimony. I believe I have said much but I must add that the prejudice is the delay in hearing the matter and for that reason the same can be ameliorated by award of costs.
35. Differently put, I have asked myself whether justice can still be done for the parties while allowing the amendment. Ultimately, I believe Courts exist for doing justice between the parties and that the Court is empowered to grant an amendment for the greater interest of justice and that the provisions of the law are intended to promote the ends of justice but not to defeat them. I rely on an English case of *Cropper V Smith* where Lord Bowen L J stated that

“I think it is well established principle that the object of the Courts is to decide the rights of the parties and not to punish them for mistakes they make in the conduct of their cases by deciding otherwise than in accordance with their rights”

Disposal orders

36. In the end I allow the application on terms;
 - a. The applicant to file and serve its amended plaint together with its pretrial bundles within 14 days from the date of this Ruling. In default these orders shall lapse automatically.
 - b. The Plaintiff to serve the proposed 6th Defendant with all the pleadings in the suit within the next 14 days.



- c. Upon service, the Defendants will be at liberty to file and serve their defence and or amended defence(s) together with pretrial bundles within 30 days.
- d. In default any pleadings filed out of time will stand expunged.
- e. The Plaintiff to meet the costs of the application.
- f. Thereafter parties to fix the matter for hearing expeditiously.

37. Orders accordingly

DELIVERED, DATED AND SIGNED AT NAIROBI THIS 20TH DAY OF FEBRUARY 2025 VIA MICROSOFT TEAMS.

J. G. KEMEI

JUDGE

Coram

Taib SC for the Applicant/Plaintiff

No appearance for the 1st and 3rd Respondents/Defendants

S N Mwenesi for the 2nd and 5th Respondents/Defendants

Onganya for the 4th Respondent /Defendant

CA- Ms Yvette

