



Thuo v Rambiti Farm Saw Mill Limited (Environment & Land Case E010 of 2022) [2024] KEELC 4457 (KLR) (5 June 2024) (Ruling)

Neutral citation: [2024] KEELC 4457 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE E010 OF 2022**

SM KIBUNJA, J

JUNE 5, 2024

BETWEEN

LOIS WAMBUI THUO PLAINTIFF

AND

RAMBITI FARM SAW MILL LIMITED DEFENDANT

RULING

1. The plaintiff filed the application dated the September 19, 2023 seeking for inter alia leave to amend the plaint dated the January 31, 2022; leave to file a further list and bundle of document, and further witness statements. The application is based on the fifteen (15) grounds on its face, and supported by the affidavit of Denis Seko, advocate, sworn on the September 19, 2023. The plaintiff's case is that her previous advocate did not file some documents that had been handed to them and the plaintiff's has also discovered other important documents evidencing the payment of a 30% stake with defendant. That it is therefore necessary that she be granted leave to amend the plaint as proposed, file the additional documents and witness statements. That the defendant will not be prejudiced, as they will have corresponding leave and may be compensated, with an award of costs.
2. The defendant has opposed the application through the grounds of opposition dated the November 6, 2023 stating that;
 - a. The application is fatally defective, incompetent and an abuse of court process.
 - b. That the supporting affidavit to the application is by counsel and contains contentious matters and ought to be struck out.
 - c. The plaintiff is seeking to introduce a prayer for mandatory injunction to restrain the defendant while such order is meant to compel a party to act.



- d. That the intended amendment of the plaint to include a 30% claim of the suit land is amorphous and will prejudice the fair hearing of the suit.
 - e. The prayer for injunction was considered at the interim stage, and dismissed.
3. The court issued directions on the November 7, 2013 on filing and exchanging submissions. The learned counsel for the plaintiff and defendant filed their submissions dated the December 20, 2023 and February 16, 2024 respectively which the court has considered.
 4. The issues for the court's determinations are as follows:
 - a. Whether the plaintiff has made a case for leave to amend, file additional statements, list and bundle of documents.
 - b. Whether the amendment and filing of additional statements and documents will cause prejudice to the defendant's defence.
 - c. Who pays the costs?
 5. The court has carefully considered the grounds on the application and opposition, affidavit evidence, submissions by the learned counsel, superior courts decisions cited and come to the following determinations:
 - a. That though the pleadings in this suit had closed, and it had been set down for hearing on the March 1, 2024, the plaintiff moved the court through the instant application invoking among order 8 rule 3 & 5 of *Civil Procedure Rules*, section 100 of *Civil Procedure Act* chapter 21 of Laws of Kenya and article 159(2)(d) of the *Constitution*, 2010. It is not disputed that the court has jurisdiction or powers in appropriate cases to order or grant leave to amend pleadings. Section 100 of the *Civil Procedure Act* provides that:

“The court may at any time, and on such terms as to costs, or otherwise as it 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.

Order 8 rule 3(5) of the *Civil Procedure Rules* states that:

“An amendment may be allowed under subrule (2) notwithstanding that its effect will add or substitute a new cause of action if the new cause of action arises out of the same fact or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

Order 8 rule 5(1) of the *Civil Procedure Rules* provides that:

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either in 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.”

Article 159(2)(d) of the *Constitution* provides that:

159.

“(2) In exercising judicial authority, the courts and tribunals shall be guided by the following principles-



(d) justice shall be administered without undue regard to procedural technicalities;”

The plaintiff commenced this suit through the plaint dated the January 31, 2022, seeking for declaratory order that she is entitled to 3000 hectares of land or 30% of all amounts realised from the sale of the land; order for defendant to transfer 3000 hectares to her and costs. In the draft amended plaint, annexed to the supporting affidavit, the plaintiff *inter alia* proposes to join the Land Registrar, Mombasa as 2nd defendant, replacing paragraph 6 with one averring that plaintiff made payments to the directors of the defendant, pursuant to the agreements that she would be entitled to 30 % of the suit property, and adding a mandatory injunction prayer.

b. The defendant has opposed the application primarily pointing out that it would convolute this matter, delay the fair hearing of the suit and prejudice it if allowed. The counsel has relied on the decision of this court in the case of *Julius Njiraini Nyamu v Henry Mburu Marungo & others* [2021] eKLR, where an application to inter alia amend was declined in a partly heard matter. The counsel for the plaintiff has cited several superior courts decisions, including those of the Court of Appeal in the cases of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* [2014] eKLR, and *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013]eKLR, which I understand to set the guiding principles to consider in applications for amendments as follows:

- i. Amendments should be freely allowed if they can be made without causing injustice on the other party;
- ii. That there is no injustice if the other party can be compensated with costs;
- iii. That amendment should not be declined merely because it introduces a new cause of action or defence within the same facts or substantially the same facts as the existing cause of action or defence;
- iv. Amendment should be timeously applied for;
- v. Amendment should not be allowed if it is immaterial or useless or merely technical;
- vi. Amendment should not be allowed for plaintiff to reframe his claim if doing so will deprive the defendant of his right to the defence of limitation.

It appears apparent that the statutory law and superior courts decisions are clear that amendment may be allowed at any stage of proceedings, if necessary for the determination of the real questions in dispute between the parties, and to avoid a multiplicity of suits. That other than the adding of the new party as the 2nd defendant, which I take is for ease of execution in case the plaintiff is successful, I find the proposed amendments herein to be in tandem with the already pleaded facts.

c. That the hearing in this suit has not commenced. The existing defendant and the new one being added or joined will get their opportunity to file and serve their pleadings or amended pleadings, further documents and statements as may be necessary in rebuttal to what the plaintiff will file and serve them. That the defendant’s apprehension that his defence will be prejudiced or delay occasioned, and fair hearing compromised, is without basis and I am of the view an award of costs will suffice.

6. That having come to the foregoing determinations, the court finds and orders as follows:

a. That the plaintiff notice of motion dated the September 19, 2023 has merit and is granted in terms of prayers (a) and (c).



- b. The plaintiff to file and serve the amended plaint, further witness statements, further list and documents and a properly bound, paginated and consolidated bundle of documents, consisting of all documents and statements within the next fifteen (15) days.
- c. That upon service the defendants will be at liberty to file and serve their amended defence/ defence, statements and documents. That in addition, they will also file a properly bound, paginated and consolidated bundle of documents, consisting of all documents and statements within thirty (30) days.
- d. The plaintiff will pay the defendant's costs in the application notwithstanding the provision of section 27 of the Civil Procedure Act.

It is so ordered.

DATED, SIGNED AND VIRTUALLY DELIVERED ON THIS 5TH DAY OF JUNE 2024.

S. M. Kibunja, J.

ELC MOMBASA.

IN THE PRESENCE OF:

PLAINTIFF

DEFENDANT

LEAKEY – COURT ASSISTANT.

S. M. Kibunja, J.

ELC MOMBASA.

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