



Muhoro v Nairobi City County (Environment & Land Case E141 of 2021) [2024] KEELC 5380 (KLR) (18 July 2024) (Ruling)

Neutral citation: [2024] KEELC 5380 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E141 OF 2021**

**JO MBOYA, J
JULY 18, 2024**

BETWEEN

JOSEPH KAMAU MUHORO PLAINTIFF

AND

NAIROBI CITY COUNTY DEFENDANT

RULING

Introduction and Background

1. The Plaintiff/Applicant herein has filed two [2] sets of Applications and in respect of which same [Plaintiff/Applicant] essentially seeks leave to file and serve a Further Amended Plaint with a view to [sic] altering the details of the suit property.
2. Owing to the fact that there are two [2] Applications, whose purport relate to and concerns amendment of the Plaint by the Plaintiff/Applicant, it suffices to reproduce the various reliefs sought at the foot of each of the named Applications.
3. To this end, the various reliefs sought at the foot of the Applications are reproduced in the subsequent paragraphs.
4. Vide Application dated 5th June 2024, the Applicant herein has sought the following reliefs [verbatim]:
 - i.[spent]
 - ii. That the Honourable Court may be pleased to discharge the earlier order, fixing the matter for Judgement and allow the Plaintiff to amend his pleadings to base the pleadings on land original L.R No. 209/1840/PT, Pangani Off Desai Road [Commercial] Nairobi as opposed to the new Deed Plan No. 432832 subsequently issued and registered without complying with the proper form [procedure] this not valid.



- iii. The Agreement for Lease for original L.R No. 209/1840/PT, Pangani Off Desai Road [Commercial] was produced during the hearing by PW2 and the amendment will not introduce a new cause of action.
 - iv. That during the hearing the Defendant failed to produce vital documents and to comply with Notice to Produce necessitating the filing of this Application.
 - v. That the costs of this Application be in the cause.
5. The instant Application is anchored and premised on various grounds which have been enumerated in the body thereon. Furthermore, the Application under reference is supported by the Affidavit of the Plaintiff/Applicant [Deponent] sworn on 5th June 2024 and wherein the Deponent has alluded to the need and necessity to be granted liberty to amend the Plaint beforehand and thereafter to implead the original L.R No. 209/1840/PT, as the suit property in lieu of the property that was hitherto highlighted in the body of the previous pleadings.
 6. Upon being served with the subject Application, the Defendant/Respondent filed a Replying Affidavit sworn on 20th June 2024 and in respect of which same has contended inter alia that the new property, whose details are being alluded to by the Plaintiff/Applicant, does not exist and hence the intended amendment would be an exercise in futility.
 7. Other than the foregoing Application [details in terms of the preceding paragraphs], the Plaintiff/Applicant also filed yet another Application dated 27th June 2024 and in respect of which the Plaintiff/Applicant has sought the following reliefs:
 - i. That the Honourable Court may be pleased to allow the Plaintiff to further amend the Plaint as per the draft annexed hereto.
 - ii. That the Defendant be at liberty to file a Defence to the Amended Plaint.
 - iii. Costs be in the cause.
 8. The latter Application is anchored and premised on the grounds which have been enumerated in the body thereof and same is further supported by the Affidavit of the Plaintiff/Applicant sworn on even date. For coherence, the Deponent has similarly annexed thereto a copy of the Draft Further Amended Plaint, which is sought to be filed albeit subject leave of the court.
 9. Suffice to point out, that the Application dated 5th June 2024 came up for hearing on 11th June 2024 and whereupon the Advocates for the respective parties covenanted to canvass and dispose of same [Application] by way of written submissions. In this regard, the court ventured forward and circumscribed the timelines for the filing and exchange of the written submissions.
 10. Arising from the foregoing, the Plaintiff/Applicant duly filed written submissions dated 20th June 2024 whereas the Defendant/Respondent filed written submissions dated 26th June 2024.
 11. Be that as it may, while preparing to craft the subject ruling, the court came across yet another Application dated 27th June 2024 and which essentially sought leave to amend the Plaint.
 12. Owing to the fact that the latter Application also seeks leave to amend the Plaint and is thus related to the previous Application, it became necessary and appropriate that the two [2] Application[s] be disposed of together.
 13. Consequently, and in the premises, the subject Ruling shall address and dispose of the two [2] named Applications, whose purport touches on and concerns leave to file a Further Amended Plaint.



Parties' submissions:

Applicant's Submissions:

14. The Applicant filed written submissions dated 20th June 2024 and in respect of which same [Applicant] has adopted the grounds contained at the foot of the Application dated 5th June 2024 and thereafter reiterated the averments in the body of the Supporting Affidavit and also the Further Affidavit sworn on 20th June 2024.
15. Furthermore, learned counsel for the Applicant has thereafter raised, highlighted and canvassed one [1] pertinent issue for due consideration and determination by the court.
16. It is the Applicant's submission that same [Applicant] has placed before the court sufficient basis to warrant leave being granted to the Applicant to file and serve a Further Amended Plaintiff. In particular, learned counsel for the Applicant has submitted that leave to amend ought to be freely granted by the court and hence, the court should proceed and allow the amendment beforehand to enable the Applicant to bring forth and canvass the real issues in controversy.
17. Additionally, learned counsel for the Applicant has submitted that the intended amendment shall not bring forth any new cause of action, either as contended by the Defendant/Respondent or at all.
18. Other than the foregoing, learned counsel for the Applicant has submitted that the Defendant/Respondent has also not disclosed the nature of prejudice, if any, that same [Defendant/Respondent] shall be disposed to suffer if leave to amend is granted to and in favour of the Plaintiff/Applicant.
19. In a nutshell, learned counsel for the Applicant has implored the court to find and hold that the Application seeking for leave to file a Further Amended Plaintiff is meritorious and thus same [Application] ought to be granted.

Respondent's Submissions:

20. The Defendant/Respondent filed written submissions dated 26th June 2024; and in respect of which the Respondent herein has adopted and reiterated the contents of the Replying Affidavit sworn on 18th June 2024 and thereafter proceeded to highlight two salient issues for consideration by the court.
21. First and foremost, the learned counsel for the Respondent has submitted that the Application beforehand and in respect of which the Applicant seeks leave to file a further amended Plaintiff has been filed with unreasonable and inordinate delay. In any event, learned counsel has added that despite the unreasonable delay, the Applicant herein has not found it fit and/or expedient to account for the delay.
22. Secondly, learned for the Defendant/Respondent has submitted that even though the Plaintiff now desires to file a Further Amended Plaintiff and implead L.R No. 209/1840/PT, the Plaintiff's own witness [PW2], intimated to the court during her testimony that the property which the Plaintiff now wishes to introduce vide the intended amendment does not exist.
23. To the extent that the Plaintiff's own witness confirmed and conceded that L.R No. 209/1840/PT does not exist, learned counsel for the Defendant/Respondent has posited that the intended amendment would therefore not serve any meaningful purpose or at all.
24. Furthermore, learned counsel for the Respondent has submitted that the intended amendment, whose tenor is to implead and bring forth a non-existent property would thus be an act in vanity and futility. Instructively, learned counsel for the Respondent has submitted that a court of law cannot be invited to issue and/or grant an order in vanity.



25. Simply put, learned counsel for the Respondent has therefore contended that the Application beforehand [which essentially seeks leave to amend] is therefore premature, misconceived and otherwise an abuse of the due process of the court. In this regard, counsel has invited the court to dismiss same with costs to the Respondent.

Issues for Determination:

26. Having appraised and considered the two [2] Application [whose details were highlighted in the introductory section hereinbefore] and upon taking into account the written submissions filed by and on behalf of the respective parties, the following issues have crystallized and are thus worthy of determination:
- i. Whether the Application beforehand has been made timeously and without unreasonable/inordinate delay or otherwise; and whether the delay, if any, has been accounted for.
 - ii. Whether the intended amendment, if allowed, will culminate into introduction of a new cause of action or otherwise.

Analysis and Determination:

Issue Number One (1)

Whether the Application beforehand has been made timeously and without unreasonable/inordinate delay or otherwise; and whether the delay, if any, has been accounted for.

27. The Application beforehand essentially seeks leave to amend the Amended Plaintiff and thereafter to introduce a Further Amended Plaintiff. For coherence, the purport of the Further Amended Plaintiff is to introduce a new property which the Plaintiff seeks to canvass before the court.
28. Being an application for leave to amend, it is important to point out and underscore that Amendment of Pleadings can be sought for and procured at any stage of the proceedings. Furthermore, amendment of pleadings ought to be freely granted provided that the purpose of the intended amendment is to clarify the issues in controversy and thereafter enable the court to determine the dispute beforehand once and for all.
29. Nevertheless, and despite the general rule that amendment of pleadings can be granted at any stage of proceedings, it is common ground that any party who seeks and/or desires to procure leave of the court to file an amended pleading must do so timeously and without an unreasonable/inordinate delay.
30. Further and at any rate, it suffices to underscore that whenever there is any degree and or scintilla of delay, then it behoves the Applicant to account for the delay and/or place before the court plausible and cogent explanation, explaining the reasons why the amendment which is sought to be introduced, was not taken without delay.
31. To buttress the foregoing exposition of the law, and in particular, that where there is delay, the Applicant is called upon to account for the delay, it suffices to take cognizance of the holding in the case of Andrew Kiplagat Chemaringo vs Paul Kipkorir Kibet [2018] eKLR the Court of Appeal addressed the question of delay and held that:

“....The law does not set out any minimum or maximum period of delay. All it states is that any delay should be satisfactorily explained. A plausible and satisfactory explanation for delay is the key that unlocks the court’s flow of discretionary favour. There has to be valid and clear reasons, upon which discretion can be favourably exercisable.”



32. Other than the foregoing decision, the necessity to file an application for leave to amend without unreasonable and undue delay was also underscored by the Court of Appeal in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR where the Court stated thus:

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.”

33. Having taken into account the foregoing position of the law, it is now appropriate to revert to the matter before hand and to consider whether the subject Application, which seeks leave to file a Further Amended Plaint, has been filed timeously and with due promptitude.
34. To start with, the instant suit was commenced vide Plaint dated 22nd April 2021 and which Plaint was thereafter amended on 7th March 2022. Furthermore, the Plaintiff/Applicant sought for and obtained leave to file a Re-Amended Plaint and which leave was duly granted culminating into the filing of the Re-Amended Plaint dated 18th November 2022.
35. Subsequently, the instant matter proceeded for hearing, whereupon the Plaintiff testified and thereafter summoned one witness, namely Cecilia Koigu [PW2]. Additionally, it is worth pointing out that upon the close of the Plaintiff's case, the Defendant herein opened her case and thereafter called one witness. Suffice it to point out that the defence case was subsequently closed.
36. Furthermore, it is common ground that upon the close of the defence case, the counsel for the respective parties sought and obtained liberty to file and exchange written submissions, which liberty was duly granted by the court. Instructively, the parties thereafter proceeded to and filed their respective submissions, which submissions are on record.
37. Nevertheless, when the matter was pending delivery of Judgement, the Plaintiff/Applicant filed the two [2] Applications which form the basis of the subject ruling and now seeks to be granted leave to file and serve a Further Amended Plaint.
38. To my mind, the Application for leave to file and serve a Further Amended Plaint, which has been filed long after the parties had closed their respective cases and even ventured forward to file final submissions, has been filed with unreasonable and inordinate delay. To this end, it cannot be said that the Application beforehand has been timeously filed or at all.



39. At any rate, it is also not lost on this court, that even though the Applicant is aware that the Application has been filed with unreasonable and undue delay, same [Plaintiff/Applicant] has not found it fit, apposite and/or expedient to account for the delay or even to explain why the subject Application was not filed earlier or at all.
40. Surely, a party, the Applicant not excepted, who seeks to partake of and/or benefit from the equitable discretion [Jurisdiction] of the court is called upon to place before the court some justification to warrant the exercise of discretion in his/her favour.
41. However, as pertains to the instant matter, the Applicant herein seeks to accrue and/or benefit from discretion, albeit, without any basis, let alone sufficient basis being tendered and/or demonstrated.
42. Nevertheless and in my humble view, the discretion of the court or better still the equitable jurisdiction of the court cannot be invoked and/or otherwise be granted in vacuum.
43. Finally, and before departing from this issue, it is also imperative to underscore that litigation, including application for amendment, must be conducted with due diligence and parties, including their legal counsel, must not indulge in actions and/or omissions, whose purport is to delay, obstruct and/or better still defeat the due process of the court; as well as to defeat the expeditious disposal of Disputes.
44. In any event, it is common knowledge that justice delayed is justice denied and hence it behoves the parties to ensure that court process is undertaken in a manner that gives meaning to and breathes Life into the provisions of Article 159 (2) (b) of *the Constitution*, 2010.
45. In the case of Said Sweilem Gheithan Saanum v Commissioner of Lands (being sued through Attorney General) & 5 Others [2015] eKLR the Court of Appeal stated and held as hereunder:

“Justice shall not be delayed” is no longer a mere legal maxim in Kenya but a constitutional principle that emphasizes the duty of the advocates, litigants and other court users to assist the court to ensure the timely and efficient disposal of cases.

The principles which are reiterated by sections 1A and 1B of the *Civil Procedure Act* are intended to facilitate the just, expeditious, proportionate and affordable resolution of disputes. The principle cannot therefore be a panacea which heals every sore in litigation, neither is it a licence to parties to ignore or contravene the law and rules of procedure. We agree, with respect, with the learned Judge’s conclusion that the suit in the High Court was not properly handled by the appellant’s advocate. The court cannot be invited to turn a blind eye in the face of such inordinate delay and in the absence of sufficient explanation. Likewise, it cannot be fashionable for parties to blame their advocate and disclaim that the mistakes made by their advocates, who they have themselves appointed cannot be visited upon them.

46. Arising from the foregoing, my answer to issue number one [1] is to the effect that the Application beforehand and which seeks leave to file a Further Amended Plaint long after the close of the hearing and furthermore, after the filing of final submissions, has been filed with unreasonable and inordinate delay, which has neither been accounted for nor suitably explained.
47. Consequently and in this regard, the subject Application is defeated by the doctrine of laches. [see the holding of the Court of Appeal in the case of Chief Land Registrar & 4 others v Nathan Tirop Koech & 4 Others [2018] eKLR].



Issues Number Two:

Whether the intended amendment, if allowed, will culminate into introduction of a new cause of action or otherwise.

48. Other than the question of the delay in the filing of the Application for leave to file a Further Amended Plaintiff [which has been discussed in the preceding paragraphs] there is also the question of the extent and scope of the intended amendment.
49. To understand the nature and extent of the intended Amendment, it is worthy to take into account the contents of paragraphs 4, 5, 7, 10, and 13 of the proposed Further Amended Plaintiff. Instructively, the Applicant herein now seeks to anchor and premise his claim on L.R No. 209/8240/PT, which is completely separate and distinct from the details of the suit property that had hitherto been canvassed in the proceedings.
50. On the other hand, it is also worthy to recall, that the Plaintiff/Applicant herein had previously held and adopted the position that the property which is now alluded to, namely L.R No. 209/8240/PT, had long been subdivided and thus ceased to exist.
51. Additionally, during and in the course of the proceedings, the Plaintiff herein called one Cecilia Koigo [PW2], who testified that the property now known as L.R No. 209/8240/PT ceased to exist and is therefore non-existent.
52. Notwithstanding the foregoing, the Plaintiff is now beseeching the court to grant unto him leave to file a Further Amended Plaintiff and, in particular, to implead the property known as L.R No. 209/8240/PT which is evidently different from the property which was the subject of the proceedings.
53. To my mind, the Plaintiff/Applicant is seeking to change the character of the entire suit before the court and essentially, to bring forth a new cause of action premised on the new property beforehand.
54. In the premises, the question that does arise and which the court must grapple with; is whether a party, the Plaintiff herein not excepted, can be allowed to alter and/or change the character of the suit beforehand in the name of [sic] amendments.
55. Be that as it may, it my humble view that a party cannot be allowed to alter the character of his/her suit by way of an amendment and thereby bring forth a completely new suit. For clarity, such an endeavour is bound to defeat the due process of the court and has a likelihood of occasioning undue prejudice and grave injustice to the adverse parties, in this case, the Defendant/Respondent.
56. Pertinently, the amendment sought if allowed, would have the effect of negating all the proceedings that have hitherto been undertaken by the court and the time spent thus far. Notably, the import of the current Application is contrary to and in contravention of the tenor and purport of the provisions of Section 1A of the *Civil Procedure Act*, Cap 21 Laws of Kenya.
57. Other than the foregoing, it is also worth pointing out, that the amendment sought if granted would have a ripple [domino] effect, such that the Defendant would be called upon to take further instructions and to file new pleadings, including an Amended Statement of Defence, where appropriate.
58. In sum, the Plaintiff/Applicant herein [sic] appears to have discovered that his claim premised and anchored on the previous suit property, was still born and same is now keen to change tune and implead a new suit property, perhaps, in the hope that the new claim may have some semblance of chances.



59. Nevertheless, in his endeavour to bring forth and implead the new title number, the Plaintiff is geared towards altering and changing not only the character but also the texture of the suit. Pertinently, the golden thread that runs across the intended amendment is a change of the cause of action.
60. In a nutshell, where an amendment is geared towards changing the texture of the suit and introducing a new cause of action, such an amendment must be declined and/or refused, lest the adverse be unduly prejudiced and exposed to suffer a miscarriage of justice.
61. To this end, it is appropriate to adopt and reiterate the holding of the Court of Appeal in the case *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR where the Court stated thus:

The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

"that a party is allowed to make such amendments as maybe 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.

62. Likewise, the legal position that an amendment which is intended to alter and/or change the cause of action ought not to be allowed was also highlighted and amplified by the Court of Appeal in the case of *Catherine Koriko & 3 Others vs Evaline Rosa* [2020] eKLR where it was stated and held thus:

Comparatively, in the South African case of *Robinson -v- Randfontein Estates Gold Mining Company Limited*, 1925 AD 173 Innes CJ, who delivered the judgment with which the majority of the court concurred, declined to interfere with the trial court's refusal to allow an amendment. The trial court had refused to allow the amendment on the ground of prejudice to the defendant. The amendment, if allowed, would have introduced a new factor into the case: it would, almost certainly have involved the calling of a witness who had not been called.

In the instant matter, in dismissing the appellants' application, I note that the learned judge aptly stated that if the amendment were to be allowed, it would change the character of the suit and the respondent would be prejudiced as she had battled claims in the Succession Cause and now in the instant suit. In this context, I am inclined to adopt the dicta by this Court in *Rubina Ahmed & 3 Others v Guardian Bank Ltd, (Sued in its capacity as a successor in Title to First National Finance Bank Ltd)* [2019] eKLR where the Court declined to interfere with the discretion of the trial judge to refuse amendment of pleadings.

63. Without belabouring the point, the subject amendment, would no doubt, have a serious ripple and devastating effects on the administration of justice. Furthermore, same [amendment] would also occasion a miscarriage of justice and thus same is not legally tenable.

Final Disposition:

64. Flowing from the discussion, [details in terms of the preceding paragraph] it must have become crystal clear that the Plaintiff/Applicant herein has neither met nor satisfied the legal threshold to warrant the grant of leave to file a Further Amended Plaintiff.



65. Conversely, what is evident and apparent is that the subject Application has been made with undue and inordinate delay, which were neither accounted for nor explained.
66. Consequently, and in the premises, I am disposed to and do hereby make the following final orders:
- i. The Application dated 5th June 2024 be and is hereby dismissed.
 - ii. The Application dated 27th June 2024 be and is hereby dismissed.
 - iii. Costs of the two (2) Applications be and are hereby awarded to the Defendant/Respondent.
67. It is so ordered.

DATED, SIGNED AND DELIVERED ON THE 18TH DAY OF JULY 2024

OGUTTU MBOYA

JUDGE.

In the presence of:

Benson – Court Assistant:

Mrs. Lucy Njiru for the Plaintiff/Applicant.

Mr. Adawo h/b for Mr. Kwanga Mboya for the Defendant/Respondent.

