



Ismail & 2 others v Kenya Railways Corporation & 3 others; County Government of Mombasa (Proposed Interested Party); Mainga, Managing Director Kenya Railways Corporation & 2 others (Affected Party) (Environment & Land Case 232 of 2016) [2024] KEELC 13886 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13886 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 232 OF 2016**

**NA MATHEKA, J
DECEMBER 18, 2024**

BETWEEN

**ABDISALIM HASSAN ISMAIL 1ST PLAINTIFF
MOHAMED ISMAIL ADEN 2ND PLAINTIFF
HALWA ABDULAHI MOAMED 3RD PLAINTIFF**

AND

**KENYA RAILWAYS CORPORATION 1ST DEFENDANT
NDUVA MULI 2ND DEFENDANT
STANLEY GITARU 3RD DEFENDANT
GAPCP KENYA LIMITED 4TH DEFENDANT**

AND

COUNTY GOVERNMENT OF MOMBASA .. PROPOSED INTERESTED PARTY

AND

**PHILIP J MAINGA, MANAGING DIRECTOR KENYA RAILWAYS CORPORATION AFFECTED PARTY
ABDIRAHMAN MOHAMED AFFECTED PARTY
ABDI GULED AFFECTED PARTY**



RULING

1. The application is dated 8th May 2024 and is brought under Section 3A and 100 of the *Civil Procedure Act*, 21 Laws of Kenya, Order 8 Rules 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Article 159 of *the Constitution* of Kenya (2010) seeking the following orders;
 1. That the Honourable Court be pleased to grant the Plaintiffs/Petitioners leave to amend their Petition in terms of the annexed Draft Amended Petition.
 2. That the annexed Draft Amended Petition be deemed as duly filed and served upon payment of the requisite Court fees.
 3. That costs of this Application be in the cause.
2. It is based on the grounds that it is necessary to amend the Petition to comprehensively and articulately capture all the real issue on controversy and all the remedies to being sought by the Petitioners/Plaintiffs in the Amended Petition as to have this matter adjudicated upon and determined once and for all. The amendments sought by the Plaintiffs/Petitioners simply seek to cover and address all issues in controversy and which issues are directly and substantially relevant to their claim and Petition. The amendment sought arise out of the same facts or substantially the same facts, hence no prejudice shall be visited upon the Respondents and/or other affected parties or interested parties. The issue and/or facts sought to be introduced by the intended amendment are already covered by the evidence filed by the parties herein and are well known to all the parties herein.
3. That this Application has been made in a timely-fashion, pretrial directions having not been issued and the suit has not been fixed for hearing. This Application has been made in good faith and with the sole intention of all real issues in controversy. In the event that this Application is not allowed the Plaintiffs shall be occasioned substantial loss and hardship thereby suffering grave injustice. It is the interest of justice and fairness that the Plaintiffs be granted leave to amend their Petition so as to plead the whole of their claim they are entitled to make in respect to their cause. The 1st Respondent states that the original cause of action pleaded in the Petition dated 11th December 2014 was alleged unconstitutional sale/disposal of the suit properties and abuse of office. That the Draft Amended Petition seeks to introduces a totally new cause of action for alleged unlawful demolition/ destruction of office buildings and/or structures. That the Petitioners seek to amend the Petition after an inordinate delay of about 10 years since, the Petitioners instituted this suit in 2014 vide the Original Petition dated 11th December 2014. That the Petitioners have not given any or any plausible explanation for the inordinate un-timeous delay of 10 years in seeking the amendment. That if the Court allows the amendment, the Respondents shall suffer great prejudice and hardship because, the original Petition did not seek any monetary award, yet the Draft Amended Petition now proposes to seek a monetary award of over Kshs. 500,000,000/= . The Respondents would have to adjust their accounts to make provision for the new claim of Kshs. 500,000,000/= and incur heavy unforeseen legal costs for defending the claim. It would be unjust to ask the 1st Respondent, a public corporation, to make provision for such colossal costs, about 10 years after the suit was initially filed.
4. This Court has considered the application and the submissions therein. Order 8 Rule 3 of the *Civil Procedure Rules* 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.
5. Further, Order 8, rule 5 gives the court the general power to amend
 5.
 - (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.
6. Be that as it may, Section 1A of the [Civil Procedure Act](#) provides for the overriding objective of the [Civil Procedure Act](#) and the rules made thereunder and provides as follows:
 - 1A
 - (1) The overriding objective of this Act and the rules made hereunder is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act.
 - (2) The Court shall, in the exercise of its powers under this Act or the interpretation of any of its provisions, seek to give effect to the overriding objective specified in subsection (1).
 - (3) A party to civil proceedings or an advocate for such a party is under a duty to assist the Court to further the overriding objective of the Act and, to that effect, to participate in the processes of the Court and to comply with the directions and orders of the Court.Section 1B of the same Act, on the other hand provides for the duty of court and states:
 - (1) For the purpose of furthering the overriding objective specified in section 1A, the Court shall handle all matters presented before it for the purpose of attaining the following aims —
 - (a) the just determination of the proceedings;
 - (b) the efficient disposal of the business of the Court;
 - (c) the efficient use of the available judicial and administrative resources;
 - (d) the timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - (e) the use of suitable technology.
7. In the case of [Central Kenya Ltd vs Trust Bank & 4 Others, CA No. 222 of 1998](#), the court stated that, the guiding principle in amendment of pleadings and joinder of parties 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.”
8. On the issue of amendment of pleadings in the case of [AAT Holdings Limited vs Diamond Shields International Ltd](#) (2014) eKLR, the court cited the principles as set out by the Court of Appeal in Central Kenya Ltd Case No. 222 OF 1998 as shown below;



- (i) That are necessary for determining the real question in controversy.
 - (ii) To avoid multiplicity of suits provided there has been no undue delay.
 - (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
 - (iv) That no vested interest or accrued legal rights is affected; and
 - (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.
9. It is quite clear from decided cases that the discretion of a trial court to allow amendments of a pleadings is wide and unfettered except it should be exercised judicially upon the foregoing defined principles.
10. Be that as it may, I have also perused the proposed amended Petition and I find it introduces new facts in the pleading are that;
- 11A. That on or about 11/12/2023 the Respondents brought a bulldozer to demolish my office/ buildings and or structures and indeed the Respondents, interested parties and or affected parties proceeded and completely demolished all the structures that we were using as our offices together with all other office furniture, equipment and related items.
- 11B That I had to engage the services of a registered Valuer that is Messrs Musyoki & Associates who on 15th December 2023 prepared their report showed that we lost lost property worth Ksh. 469,899,430/- plus loss of business of Ksh. 500, 000/— per day since 12/12/2023.
- 11C. That the Plaintiffs claim the Respondents, Interested Parties and Affected Parties jointly is for Ksh. 469,899,430/being value of damages/ lost goods plus loss of business at Ksh. 500, 000/ = per day from 12/11/2023.”
12. I find that, the new cause of action sought to be introduced by the Draft Amended Petition is substantially different from the original cause of action initially pleaded in the Original Petition dated 11th December 2014 because, the new claim for unlawful demolition/ destruction of office buildings and/or structures is of a substantially different and foreign character from the original claim for unconstitutional sale/ disposal of the suit properties and abuse of office. Consequently, I find that this application is not merited and is dismissed with costs.
13. It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 1{{T}} DAY OF DECEMBER 2024

N.A. MATHEK

JUDGE

