



REPUBLIC OF KENYA



**Khamis & others v Ainushamsi Multiple Agencies Ltd (Environment & Land
Case 241 of 2020) [2023] KEELC 252 (KLR) (24 January 2023) (Ruling)**

Neutral citation: [2023] KEELC 252 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 241 OF 2020**

**NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

JAMAL ABEID KHAMIS & OTHERS PLAINTIFF

AND

AINUSHAMSI MULTIPLE AGENCIES LTD DEFENDANT

RULING

1. The application is dated September 22, 2022 and is brought under Section 3A of the [Civil Procedure Act](#) and Order 8 Rule 2 of the [Civil Procedure Rules](#) seeking the following orders;
 1. That the Defendants be granted leave to amend their defence and that the draft amended defence attached be deemed filed upon payment of requisite court fees.
 2. That costs of this application be provided for.
2. It is based on the grounds that this is a claim based on two conflicting parcels of land - LR 28815/CR 60948 and Kilifi/Kawala 'A' Kadzonzo /32. That it has become necessary to amend the defence and to plead a counterclaim as well. That the case defendant is prejudiced if the hearing planned for the November 8, 2022 continues. That it would be in the interest of justice that the application for amendment is dispensed with before the hearing. In order for the court to address comprehensively all the issues the case, it would be in the interest of the parties that the amendment be allowed. That the application is made in the interest of justice and is allowable
3. The Respondents state that there is another case No ELC No 263 of 2015 in Mombasa Court in respect of CR 60948 plot No 28815 which was against the suit property herein Plot No Kilifi/Kawala'A' Kadzonzo/32 which was dismissed on March 28, 2019. (Annexed is a copy of the Order which has not been appealed or stayed or set aside marked AAK 1). That during the hearing of that case, the Kilifi County Land Registrar wrote a letter and indicated that the Pot No Kilifi/Kawala'a' Kadzonzo/32 was lawful and procedurally issued by the authority. (Annexed is a copy of the letter



marked AAI' 2). That also during the hearing of the ELC No 263 of 2015 the Director of Surveys wrote a letter that the Plot No 28815 CR 60948 does not exist in the registry. (Annexed is a copy of the letter marked AAK 3). That the Defendants herein were parties in that case and or had knowledge of the prosecution of that case and therefore, they had the opportunity to challenge the Registrar's and Surveyor's finding on the illegality of the title No 28815 CR No 60948 in that suit and prove otherwise.

4. That in the instant case, the Counter Claim is intended to introduce title which does not exist and therefore it is an abuse of Court process which should not see the light of the day. That this Court lacks jurisdiction to entertain the intended Counter - Claim on strength of Section 7 of the Civil Procedure Act Cap 21 as the same is res - judicata.

5. This court has considered the application and the submissions therein. In the case of Central Kenya Ltd v 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.”

6. It is the view of this court that, it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable. This is the only way that a court may proceed to determine the matter in controversy so far as the rights and interests of the parties actually before it are concerned. On the issue of amendment of pleadings in the case of AAT Holdings Limited v 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.

7. 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.

8. In Moi University v Visba Builders Limited - Civil Appeal No 296 of 2004 (unreported) this Court said;

The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaintiff the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Kshs 185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As we know even one triable issue would be sufficient – see *HD Hasmani v Banque Du Congo Belge (1938) 5 EACA 89*. We must however hasten to add that a triable issue does not mean one that will



succeed. Indeed, in *Patel v EA Cargo Handling Services Ltd [1974] EA 75 at P 76* Duffus P said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as Sheridan , J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

9. Looking at the circumstances of this case the Defendant/Applicant states that claim is based on two conflicting parcels of land - LR 28815/CR 60948 and Kilifi/Kawala 'A' Kadzonzo /32. That it has become necessary to amend the defence and to plead a counterclaim as well. I have perused the proposed amended defence and I see that no prejudice will be suffered by the parties should the amendment be allowed. The amended defence seeks to introduce a counterclaim challenging the Plaintiffs' title. It is in the interest of justice that all matters ought to be brought before the court in order for the court to make a just and fair decision. The application dated September 22, 2022 is merited and I grant it. Costs of this application to be in the cause.

It is so ordered.

DELIVERED, DATED AND SIGNED AT MOMBASA THIS 24TH DAY OF JANUARY 2023.

N A MATHEKA

JUDGE

