



Westmall Supermarkets Limited v Aziz (Suing in her capacity as the administrator of the Estate of Mohamed Bashir Meraj Din Ahmed Bux) & 7 others (Environment & Land Case 275 of 2016) [2023] KEELC 202 (KLR) (24 January 2023) (Ruling)

Neutral citation: [2023] KEELC 202 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
ENVIRONMENT & LAND CASE 275 OF 2016
NA MATHEKA, J
JANUARY 24, 2023**

BETWEEN

WESTMALL SUPERMARKETS LIMITED APPLICANT

AND

SAMERA AZIZ (SUING IN HER CAPACITY AS THE ADMINISTRATOR OF THE ESTATE OF MOHAMED BASHIR MERAJ DIN AHMED BUX) 1ST RESPONDENT
DOUGLAS MWANGI MUTERU AND SAMUEL WACHIRA 2ND RESPONDENT
CHIEF LAND REGISTRAR, MOMBASA 3RD RESPONDENT
ATTORNEY GENERAL 4TH RESPONDENT
ANGELO MORRIS OWINO 5TH RESPONDENT
NATIONAL LAND COMMISSION 6TH RESPONDENT
COUNTY GOVERNMENT OF MOMBASA 7TH RESPONDENT
MOHAMED BASHIR MERAJ DIN AHMED 8TH RESPONDENT

RULING

1. The application is dated July 22, 2022 and is brought under Section 1A, 1B, 3A and 95 of the [Civil Procedure Act](#), Cap 21 and Order 5 Rule 3, Order 51 Rule 1 of the [Civil Procedure Rules, 2010](#), Article 159 (2)(d) and Article 50 of the [Constitution of Kenya](#) seeking the following orders;
 1. That this Application be certified urgent and service of the Application be dispensed with at the first instance and be heard *ex parte* at the first instance and speedily thereafter;



2. That pending hearing and subsequent determination of this application a conservatory order be issued staying of all civil proceedings in ELC No 275 of 2016, Samera Aziz (suing in her capacity as the administrator of the Estate of Mohamed Bashir Meraj Din Ahmed Bux v Douglas Mwangi Muteru & 7 others
 3. That Leave be and is hereby granted to the Applicant/2nd Defendant to file its Defence and counterclaim out of time and within Twenty One (21) days upon service of summons by the Plaintiff.
 4. That consequent to the grant of the prayers above the Honorable Court be pleased to issue such further directions and orders as may be necessary to give effect to the foregoing orders, and Yor favor the cause of justice.
 5. That the parties be at liberty to apply for any other order or direction to enable cause of justice.
 6. That the costs of this application be provided for.
2. It is based on the grounds that the Applicant/2nd Defendant is a corporation established under the [Companies Act, 2015](#) and service of summons upon it was required to be in accordance with Order 5 rule 3 of the [Civil Procedure Rules, 2010](#) which requires that the summons be served on the secretary, director or principal officer of the corporation and none of the principal officers were served nor attempts were made to serve them with the Summons. That no summons were issued and/or returned to the court in accordance with Order 5, rule I and Order 5, rule 15 of the [Civil Procedure Rules, 2010](#). That if the current proceedings were to continue without participation of Applicant/2nd Defendant, any resulting judgment that will have been entered against the 2nd Defendant who has not been served or properly served with summons to enter appearance shall be irregular and the judgment should be set aside ex debito justitiae as a matter of right.
 3. That the court does not even have to be moved by a party once it comes to its notice that the proceedings are irregular and can issue direction for the necessary action being taken for cause of justice. That the reason why the legal proceedings should be halted and the entire proceedings be set aside is as of right, and not as a matter of discretion, because the Applicant/2nd Defendant has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. That the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. That the delay to file the defence and counter-claim was occasioned by the Plaintiffs' counsel failure to obtain summons and serve the same and the same should not be burdened upon the Applicant/2nd Defendant. The property involved in this suit and currently registered in the Applicant's name is a highly valued with the current value being over Kshs 120,000,000 (Kenya Shillings One Hundred and Twenty Million) and this is not an amount to be sneezed at.
 4. The Respondent stated that the 1st Defendant Douglas Mwangi Muteru is a major shareholder and a director of Westmall Supermarket Ltd. (annexed and marked as "SA-I" is the photocopy of the CR form of the West Mall Supermarket Ltd as at 28th September 2016) That the said Applicant Westmall Supermarket Ltd has all along been represented by the firm of M/S Gikandi & Company Advocates and the representation is captured in the Court's proceedings of March 8, 2022. That the Applicant has all along taken part in the proceedings through their then advocates M/S Gikandi and Company Advocates and thus the allegations that the Applicant was not served with summons to enter Appearance does not arise as the Advocates of the 1st Defendant Douglas Mwangi Muteru a major shareholder of Westmall Supermarket Ltd has been accepting Hearing Notices on behalf of Westmall Supermarket Ltd since 2018. (annexed and marked as "SA-2 are the documents filed in the Honourable Court and served upon M/S Gikandi & Company Advocates)



5. That the Applicant Westmall Supermarket Ltd has not annexed in its supporting affidavit any proposed Defence and Counter-Claim for the Honourable Court to see for itself thus making the current application a mere farce. That from the documents presented before the Honourable Court the 1st Defendant being a major shareholder of the Applicant Westmall Supermarket Ltd and whom transferred the suit property to Westmall Supermarket Ltd makes the whole application a smoke screen to further interfere with the hearing of the suit property given that the suit has been in the knowledge of the 1st Defendant all along since 2010 as HCC No373 of 2010 and ELC No275 of 2016 and would have taken any action which he so wishes.

6. 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.”

7. It is the view of this court that, no suit shall be defeated by reason only of the misjoinder or non-joinder of a party; and that the joinder may be done either before, or during the trial; that it can be done even after judgment where execution has to be completed. 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; and that a party can even be added even at the appellate stage. 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.

8. 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 judiciously upon the foregoing defined principles. In *Moi University v Visha Builders Limited* - Civil Appeal No 296 of 2004 (unreported) this Court stated;

“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 Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.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 *H.D Hasmani v Banque Du Congo Belge* [1938] 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in *Patel v E.A. Cargo Handling Services Ltd.* [1974] E.A. 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 Applicant submitted that the reason why the legal proceedings should be halted and the entire proceedings be set aside is as of right, and not as a matter of discretion, because the Applicant/2nd Defendant has been condemned without notice of the allegations against him or an opportunity to be heard in response to those allegations. That the right to be heard before an adverse decision is taken against a person is fundamental and permeates our entire justice system. That the delay to file the defence and counter-claim was occasioned by the Plaintiffs’ counsel failure to obtain summons and serve the same. I have perused the court record and note that the Plaintiff has testified in this matter. Secondly the record indicates that Mr. Gikandi was appearing for the 1st and 2nd Defendant. I also find that the Applicant Westmall Supermarket Ltd has not annexed in its supporting affidavit any proposed Defence and Counter-Claim. The Plaintiff/Respondent submits that the 1st Defendant Douglas Mwangi Muteru a major shareholder of Westmall Supermarket Ltd has been accepting Hearing Notices on behalf of Westmall Supermarket Ltd since 2018. Be that as it may. The 2nd Defendant being a corporate entity should be given a chance to file pleadings in order for the court to be able to determine the real issue in controversy. 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 July 22, 2022 is merited and I grant the following orders;

1. That Leave be and is hereby granted to the Applicant/2nd Defendant to file its Defence and counterclaim out of time and within Twenty One (21) days upon service of summons by the Plaintiff.
2. 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

