



Coast Development Authority v Nzamba & 49 others (Environment & Land Case 76 of 2011) [2023] KEELC 12 (KLR) (11 January 2023) (Ruling)

Neutral citation: [2023] KEELC 12 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MALINDI
ENVIRONMENT & LAND CASE 76 OF 2011**

**MAO ODENY, J
JANUARY 11, 2023**

BETWEEN

COAST DEVELOPMENT AUTHORITY PLAINTIFF

AND

ADAM KAZUNGU NZAMBA & 49 OTHERS DEFENDANT

RULING

1. This ruling is in respect of a notice of motion dated March 17, 2022 by the defendant/applicants seeking the following orders; -
 - a. Spent.
 - b. That there be a stay of the hearing of the main suit pending the hearing and determination of this application for amendment of the defendants' counterclaim.
 - c. That leave be granted to the defendants to amend the counterclaim dated October 21, 2019 to join the National Land Commission & the Land Registrar as defendants in the counterclaim.
 - d. That costs of this application be in the cause.
2. Counsel agreed to canvas the application vide written submissions which were duly filed.

Defendant/applicants' submissions

3. The application was supported by the affidavit of Hassan Unda Kombesworn on the March 17, 2022 where he deponed the defendants filed a counterclaim dated October 21, 2019 where they pleaded that the Ministry of Lands and the government did not follow proper procedures in allocating the suit land before granting the lease.



4. The deponent further averred that they are seeking for orders for cancellation of the registration of the plaintiff as a lessee of the suit property and register the same in their favour and that upon instructing the present advocates, they have since learnt that the previous advocates inadvertently failed to join in their counterclaim the National Land Commission, the successor to the Commissioner of Lands and the Land Registrar who participated in the impugned allocation and registration of the suit property in favour of the plaintiff.
5. He also deponed that after the issuance of the Grant by the Commissioner of Lands, the predecessor of the National Land Commission, on February 22, 2002 the Land Registrar proceeded to register the plaintiff as lessee of the suit property on August 20, 2002.
6. Further, that the presence of the National Land Commission and the Land Registrar as defendants in the counterclaim is necessary in order to effectually and completely adjudicate all questions involved in this dispute and also avoid the need to institute a separate suit against the omitted parties. He further asserted that the intended amendment will not add or substitute any new cause of action but is intended to join parties who were omitted.
7. Counsel submitted that counsel for the plaintiff raised an issue of Limitation of Actions but counsel for the defendant stated that there are no new claims or issues in the counterclaim as the defendants had already pleaded for cancellation of the plaintiff's title and issuance of title in favour of the defendants therefore the proposed amendment is intended to add parties that were omitted in the counterclaim and whose presence in the suit is necessary to enable the court effectually adjudicate upon and settle all questions in the suit.
8. Mr Shujaa cited the provisions of Order 1 rule 10(2) of the *Civil Procedure Rules*, and submitted that the court has wide and unfettered discretion to allow amendments of pleadings to add new parties. Counsel also relied on Order 1 Rule 3 of the *Civil Procedure Rules* on the law governing joinder of defendants and stated that the draft amended counterclaim and the counterclaim dated October 17, 2019 shows that common questions of law and fact would arise if separate suits were filed by the defendants against the proposed parties.
9. Counsel relied on the case of *St Patrick's Hill School Limited v Bank of Africa Limited* HCCC No 7 of 2017 and the case of *Ahmed Subeil Mohamed Mafudhi vs Kabindi Chengo Kadenge & 9 others* ELC Case No 36 of 2019.
10. On the issue on whether the plaintiff would suffer prejudice if the amendment is allowed, counsel submitted that since the suit is yet to be heard and the plaintiff shall be entitled to file a defence to the amended counterclaim and as such no prejudice shall be occasioned to the plaintiff in any way and urged the court to allow the application as prayed.

Plaintiff's Submissions

11. Counsel filed grounds of opposition dated May 12, 2022 and submitted that the application lacks merit since it offends the provisions of Section 7 of the *Limitation of Actions Act* which provides that actions to recover land may not be brought by any person to recover land after the end of twelve years from the date on which the right of action accrued.
12. According counsel, the application seeks to amend the statement of defence to include a counter claim for the recovery of land which was allocated to the respondent in 1995.
13. Counsel submitted that this suit was filed in 2011 after the applicants trespassed into the defendants' land in 2008 and as such, at the time of filing the suit, 16 years had already lapsed rendering the



applicant's cause of action against the respondent time barred and relied on the cases of [Harith Ali El-Busaidy v Kenya Commercial Bank](#) (2008) eKLR and [Josiah Magena v Wakenya Pamoja Sacco Society Ltd](#) (2017) eKLR.

Analysis And Determination.

14. The only issue for determination is whether the defendants should be granted leave to amend their counter claim as per the draft attached to the application.
15. Amendments of pleadings is governed by section 100 of the [Civil Procedure Act](#) which provides as follows; -

“The court may at any time, and on such terms as to costs or otherwise as it may 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”.
16. It is on record that there is a defence and counterclaim dated October 21, 2019 which the defendants seek to amend to include the National Land Commission and the Land Registrar. The defendants are not seeking to file counterclaim for the first time as submitted by the respondents.
17. Parties to a suit have a right to amend their pleadings at any stage of the proceedings, save that the right is not absolute, for it is dependent upon the discretion of the court.
18. Order 8 rule 5 of the [Civil Procedure Rules](#) provides as follows: -

“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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”
19. In the case of [Civicon Limited v Kivuwatt Limited and 2 Others](#) [2015] eKLR the court held as follows: -

“Again the power given under the Rules is discretionary which discretion must be exercised judicially. The objective of these Rules is to bring on record all the persons who are parties to the dispute relating to the subject matter, so that the dispute may be determined in their presence at the time without any protraction, inconvenience and to avoid multiplicity of proceedings. Thus, any party reasonably affected by the pending litigation is a necessary and proper party, and should be enjoined...from the foregoing, it may be concluded that being a discretionary order, the court may allow the joinder of a party as a defendant in a suit based on the general principles set out in Order I rule 10 (2) bearing in mind the unique circumstances of each case with regard to the necessity of the party in the determination of the subject matter of the suit, any direct prejudice likely to be suffered by the party and the practicability of the execution of the order sought in the suit, in the event that the plaintiff should succeed. We may add that all that a party needs to do is to demonstrate sufficient interest in the suit; and the interest need not be the kind that must succeed at the end of the trial.”
20. The provisions of law and precedent dictates that amendments should be freely allowed any time before judgment if they will not occasion any prejudice to the opposing party. The respondent raised an issue that the application offends the provisions of [Limitation of Actions Act](#) but the record shows



that the applicant had already filed the counterclaim which they just need to amend to effectually deal with all the issues in this case. The applicants are not bringing new causes of action. I have considered the nature of amendment that is being sought by the applicant and I note that no prejudice will be occasioned to the respondent since the applicant only intends to add the National Land Commission, the Land Registrar and the Attorney General who will assist this court in determining the real question in controversy between the parties.

21. In the case of *Joseph Ochieng & 2 others trading as Aquiline Agencies v First National Bank of Chicago* (1995) eKLR the Court of Appeal laid down principles to consider when determining an application for leave to amend pleadings. The court rendered itself as follows; -

“...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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable, an amendment which would leave the claim equally unsupportable will not be allowed; 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.”

22. The above case dealt with amendments of pleadings and the issue of Limitation of Actions. The court stated that if by an amendment of the plaint the defendant would be deprived of his right to rely on *Limitation Actions Act* but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation.
23. I have perused the amended statement of defence and counterclaim as well as the draft amended counterclaim and find that the amendment does not differ from the original statement of defence and counterclaim save for the additional parties who are important in the determination of this suit. The amendment will also not cause any prejudice to the plaintiff as it has a right to file a defence to defence and counterclaim.
24. The upshot is that the application dated March 17, 2022 is hereby allowed in the following terms, the applicants to file an amended counter claim within 14 days from the date of delivery of this ruling and the respondent shall have corresponding leave of 14 days to file and serve a reply to the counterclaim. Costs of the application be in the cause.

DATED, SIGNED AND DELIVERED AT MALINDI THIS 11TH DAY OF JANUARY, 2023.



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M.A. ODENY

JUDGE

NB: In view of the Public Order No. 2 of 2021 and subsequent circular dated 28th March, 2021 from the Office of the Chief Justice on the declarations of measures restricting court operations due to the third wave of Covid-19 pandemic this ruling has been delivered online to the last known email address thereby waiving Order 21 [1] of the Civil Procedure Rules.

