



REPUBLIC OF KENYA



KENYA LAW
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**Maruti & 8 others v Wanyonyi & 4 others (Civil Suit 8A of 2020)
[2024] KEHC 757 (KLR) (31 January 2024) (Ruling)**

Neutral citation: [2024] KEHC 757 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT BUNGOMA
CIVIL SUIT 8A OF 2020
DK KEMEL, J
JANUARY 31, 2024**

BETWEEN

**ERASTUS W MARUTI 1ST PLAINTIFF
ABEL MACHENJE 2ND PLAINTIFF
JENEFFER MULEMI (SUING ON BEHALF OF CHWELE INTEGRATED
DISPLACED PERSONS IDPS) 3RD PLAINTIFF
FRED W KITUI 4TH PLAINTIFF
ELIUD CHEGE 5TH PLAINTIFF
DAVID N SARATUKI (SUING ON BEHALF OF MUKUYUNI INTEGRATED
DISPLACED PERSONS IDPS) 6TH PLAINTIFF
HENRY SIMIYU 7TH PLAINTIFF
VINCENT WESWA 8TH PLAINTIFF
JOTHAM WANGATIA (SUING ON BEHALF OF MAYANJA INTEGRATED
DISPLACED PERSONS IDPS) 9TH PLAINTIFF**

AND

**HUDSON KITUYI WANYONYI 1ST DEFENDANT
KENYA COMMERCIAL BANK LTD 2ND DEFENDANT
COUNTY COMMISSIONER BUNGOMA 3RD DEFENDANT
THE ATTORNEY GENERAL 4TH DEFENDANT
PRINCIPAL SECRETARY FOR MINISTRY OF INTERIOR &
COORDINATION OF NATIONAL GOVERNMENT 5TH DEFENDANT**



RULING

1. The application before me is a notice of motion brought under certificate of urgency dated 13th day of April, 2023 under section 1A, 1B, 3,3A, and 100 of the Civil Procedure Rules 2010; *Prevention, Protection And Assistance To Internally Displaced Persons And affected Communities Act, Fair Administrative Actions Act*; Articles 25,27,28,29,39,40,42,43,45,46,50,53,54,57,159 of *the Constitution* and all other enabling provisions of law seeking the following orders:-
 - i. Spent
 - ii. That the plaintiff/Applicants do amend the Plaintiff as per the draft attached hereto.
 - iii. That any other orders that meet the ends of justice do issue.
 - iv. That costs of this Application be provided.
2. The application is premised upon grounds stated on the face of it and averments contained in the supporting affidavit sworn on 13th day of April, 2024, by the 4th Applicant Fred W. Kitui who averred inter alia; that the plaintiff/applicants are internally displaced persons (IDPs) that had been earlier listed and even received the initial batch of compensation and were awaiting the balance of the due compensation; that they were however taken back to learn that when a further batch of compensation was released, the Defendant/Respondents left them out and instead paid a fraudulent group fronted by the 1st Defence/Respondent; that the plaintiff/applicant wishes to amend the plaintiff to add an alternative prayer that defendant/Respondents more so National Consultative Coordination Committee on Internally Displaced Persons (NCCC) does include them in the updated list of IDPs out of time; that the said National Consultative Coordination Committee on Internally Displaced Persons (NCCC) is mandated to identify and create a list of IDPs which they had earlier carried out vide delegating to the County Officials who in turn delegated to the representatives of the IDPs culminating in the list from which the IDPs consisting the plaintiff/applicants had received the initial batch of compensation of Kes. 25,000.00/- and second one of Kes.10,000/-; that he further wishes to include a prayer on the issue of damages for the injustices, loss and damages meted out by the most unfair administrative action by the Defendant/Respondents; that the intended amendments shall enable the court determine the real issues disputed once and for all further preventing a multiplicity of suits; that no new or inconsistent cause of action is introduced and joinder arises substantially from the same facts already on record as per the attached copy of draft amended plaintiff marked FWK1; that the orders sought shall enable the timeous, just and expeditious disposal of the issue between parties without regard to technicalities; that unless the prayers herewith are issued, the plaintiff will suffer prejudice and irreparable harm and that the prejudice or injustice shall not befall the defendant/ Respondents.
3. The 1st, 3rd, 4th and 5th Respondents did not oppose the application and that it is only the 2nd defendant who opposed the same by filing a replying affidavit sworn on 15th day of June, 2023 wherein it claimed that the application is a mere afterthought since the matter had already been fixed for hearing upon this court confirming that parties had complied with pre-trial requirements; that since this matter was fixed for hearing in the month of February 2023, the same had not proceeded due to the applicant's requests for adjournments; that the intended amendment is only geared towards mutating the cause of action to introduce new issues and is not meant to enable the court determine the real issues in controversy; that the alternative prayer to include the plaintiffs in the updated list of IDPs out of time sought to be introduced by the applicants is an afterthought and have come too late in the day with the aim



of deliberately delaying the hearing of this matter; that the prayers sought are likely to fundamentally change the character of the suit and will affect persons who are not parties to the suit and that the introduction of the new prayers at this stage is highly prejudicial to the respondents and the said parties; that the additional prayer for issue of damages for the unjust loss sought is an afterthought aimed at frustrating the timely conclusion of this matter bearing in mind the age of the matter which was filed in the year 2021 and the claim having arisen after the 2007/2008 post- election violence; that the claim for compensation coming up in 2023 almost 15 years after the fateful events cannot be free from infiltration by joy riders seeking to reap from the state even though they may have not been affected by the displacement; that just like in any other case where a calamity strikes humanity however painful or grave there comes a time when the affected parties have to rise up, shake off the dust and move on with their lives and as such prayers for damages must have its limits and time frame; that the 2nd Respondent is advised that in the event the application is allowed as prayed this court will be denied the opportunity to determine the real issues in controversy between the parties in view of the fact that the monies received from the 5th defendant has already been paid out in accordance with its instructions.

4. *Vide* Court directions dated 23rd October, 2023, the application as between the Plaintiffs and 2nd Defendant was canvassed by way of written submissions. Both parties duly filed and exchanged their submissions.
5. The Plaintiffs filed submissions dated 11th day of October, 2023. It was the Applicant's submissions that this Honourable Court should consider whether the plaintiff's /applicants are deserving leave to amend their pleadings. The plaintiff relied on the provisions of section 100 of the *Civil Procedure Act* which is on general Power to amend and states 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 proceedings 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 proceedings.

6. The plaintiff relied on Order 8 particularly rules 3 and 5 of the *Civil Procedure Rules* which grants parties the right to amend pleadings; Order 8 rule 5 of the *Civil Procedure Rules* stipulates 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”
7. The plaintiffs also submitted that in order for the court to allow the amendment, it must look into the intent and purpose of the amendment and whether any prejudice will be suffered by other parties herein in dispute and whether prejudice can be compensated by way of costs. Further, it was submitted that the amendment will enable this honourable court to determine the real issues in controversy and avoid multiplicity of suits. Reliance was placed in the Court of Appeal case of *Elija Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013) eKLR. In conclusion, the Plaintiffs urged the court to allow the application.
8. The 2nd Respondent filed its submissions dated 17th day of November, 2023. It was submitted that the court's discretionary power on amendment should be refused in instances where the proposed amendment introduces a new and or inconsistent cause of action, prejudice the other party's vested interest or accrued legal rights. Reliance was placed in the case of *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365. It was also submitted that the amendment has been brought with undue delay and intended to defeat the expeditious determination of the suit. It was also submitted that the application



seeks to introduce new and/or inconsistent issues and that the amendment will cause injustice and prejudice to the 2nd Defendant.

9. Learned counsel for the 2nd Defendant submitted that litigation must come to an end and that parties should be held on a leash lest they prolong the trial by amending pleadings to the prejudice of the other parties. It was submitted that due to the delay in filing the present application then the court should decline the same as it is an abuse of the court process. Reliance was placed in the case of *Eustace N. Paul & 3 Others v James Paul Njeru Kangicu* [2021] eKLR.
10. It was also submitted that the amendment attempts to introduce new matters which will substantially change the character of the suit to the prejudice of the 2nd Defendant.
11. I have given due consideration to the rival affidavits and submissions tendered. It is not in dispute that the 1st, 3rd, 4th and 5th defendants have no objection to the application. It is also not in dispute that the suit was lodged in 2020 with the cause of action reported to have taken place in 2007/2008. It is also not in dispute that the 2nd Defendant being a financial institution, was responsible for disbursing funds to the beneficiaries of those funds (IDPs) as directed by the 5th and 3rd Defendants. That being the position, I find the issue for determination is whether the application has merit.
12. Amendments of pleading is provided for in section 100 of the *Civil Procedure Act* and Order 8 Rules 3 and 5 of the *Civil Procedure Rules*. Section 100 of the *Civil Procedure Act* 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 purposes of determining the real question or issue raised by or depending on the proceeding.”

Order 8 Rule 5 of the *Civil Procedure Rules* provides thus:

“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.”

13. From the foregoing provisions, it is clear that a court is vested with power to allow parties to amend their pleadings on such terms as are just or deems fit for the sole reason namely the determination of the real questions in controversy between the parties and thereafter resolve the dispute with finality. If the court ends up determining the issue in controversy with finality, then there will be no further suits as the issue will have been resolved substantially. I have perused the draft amended plaint and note that the two new prayers if resolved in this suit, will prevent further suits in the future. As noted above, no prejudice will be suffered by the 2nd Defendant if the amendment is allowed since the two prayers are mainly targeted at the other defendants and not the 2nd defendant. Further, the 2nd Defendant, being only a custodian of funds on behalf of the 5th Defendant, stands no prejudice at all. The court when faced with applications for amendment of pleadings will consider factors such as whether the applications have been lodged without undue delay, whether any prejudice will be suffered by other parties and whether the prejudice so occasioned can be compensated by an award of costs. In the case of *Eastern Bakery v Castelino* [1958] 1EA 461 the court held thus:

“...it will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs....the court will not refuse to allow an amendment simply because it introduces a new case...but



there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character... or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.”

14. The 2nd Defendant has contended that it stands to be prejudiced if the amendment is allowed since the application has been made too late in the day and that the Plaintiffs intend to bring in other joy riders with a view to getting a benefit from the compensation monies set to be disbursed by the 5th Defendant and supervised by the 3rd Defendant and further that the suit will be prolonged unnecessarily. I have looked at the draft amended plaint and note that the plaintiffs are seeking to introduce two prayers namely; additional IDPs and a prayer for general damages. Obviously, once the request is allowed, the 2nd Defendant will be given an opportunity to file a reply to the amended plaint as appropriate. The rest of the Defendants apparently are not opposed to the application. Since the 2nd Defendant is a financial institution and custodian of funds on behalf of the 5th Defendant whose role was only to handle and disburse funds to the beneficiaries (IDPs), i do not see how they stand to be prejudiced by the proposed amendment. It is instructive that the battle is between the plaintiffs and the 1st, 3rd, 4th and 5th Defendants while the 2nd Defendant has been roped in on the ground that of holding the compensation monies. If the said Defendants have indicated that they do not oppose the amendment, then the 2nd Defendant whose role is minimal in the tussle ought not to raise objections. In any case, any prejudice caused can comfortably be compensated by an award of costs. Iam not persuaded by the objections raised by the 2nd Defendant since there is need to ensure all the issues in controversy are brought on board so that the court can determine them with finality and to prevent the filing of other suits on similar grounds.
15. In view of the foregoing observations, it is my finding that the plaintiffs’ application dated 13.4.2023 has merit. The same is allowed in the following terms:
- a. The plaintiffs are granted leave to file and serve an amended plaint within seven (7) days and thereafter file a further reply if need be within three (3) days upon service of reply to amended plaint.
 - b. The 2nd Defendant to file reply to amended plaint within seven (7) days of service of the amended plaint.
 - c. The costs of the application are awarded to the 2nd Defendant.

DATED AND DELIVERED AT BUNGOMA THIS 31ST DAY OF JANUARY 2024

D.KEMEI

JUDGE

In the presence of :

No appearance Amya Kalwa for the Plaintiffs/Applicants

No appearance 1st Defendant/Respondent

Miss Baraka for the 2nd Defendant/Respondent

No appearance Were for 3rd, 4th and 5th Defendants/Respondents



