



REPUBLIC OF KENYA



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Gatimu v Registered Trustees of the Catholic Diocese of Nakuru & 22 others (Environment and Land Case Civil Suit 158 of 2013) [2023] KEELC 756 (KLR) (13 February 2023) (Ruling)

Neutral citation: [2023] KEELC 756 (KLR)

REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAKURU
ENVIRONMENT AND LAND CASE CIVIL SUIT 158 OF 2013
LA OMOLLO, J
FEBRUARY 13, 2023

BETWEEN

JOHN MUIGAI GATIMU PLAINTIFF

AND

**REGISTERED TRUSTEES OF THE CATHOLIC DIOCESE OF NAKURU & 22
OTHERS DEFENDANT**

RULING

1. This ruling is in respect of the Defendants Notice of Motion application dated 2nd September, 2022 which is expressed to be brought under Sections 3A and 100 of the *Civil Procedure Act*, Order 7 Rule 3, Order 8 Rule 3 & 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010 and Article 159 of *the Constitution* of Kenya.
2. The application seeks the following orders:
 - a. Spent
 - b. That the Defendants/Applicants be granted leave to further amend their Amended Defendants Written Statement of Defence and Counterclaim dated 7th July, 2008 to include a prayer for cancellation of Certificate of Lease and the Draft Further Amended Statement of Defence and counterclaim annexed to the supporting (SIC) hereto and its contents be considered as sufficient reasons to allow the present application.
 - c. That costs of the application be provided for.
3. The application is based on the grounds on its face and supported by the affidavit sworn on 2nd September, 2022 by Ven. Cannon Jane Munyui.



FACTUAL BACKGROUND.

4. The Plaintiffs/Respondents commenced this suit vide a Plaint. Regrettably, the copy on record doesn't have the page setting out the prayers sought.
5. The Defendants/Applicants filed their Statements of Defence dated 14th December, 2007 wherein they denied the averments in the Plaint.
6. On 8th July, 2008, the Defendants/Applicants filed an Amended Defendants written Statement of Defence and Counterclaim wherein it seeks judgement against the Plaintiff/Respondent and the Commissioner of Lands as follows:
 - a. A declaration that the parcel of land formerly known as UNSURVEYED RELIGIOUS PLOT NO. A MOLO TOWNSHIP and now ostensibly apparently known as TITLE NO. MOLO TOWNSHIP BLOCK 2/85 a belongs to the 2nd Defendant.
 - b. A declaration that the allotment of the suit land to JOHN KIGEN and the subsequent purported transfer of the same to the Plaintiff is illegal and subject to the 2nd Defendant's interest's thereto.
 - c. A perpetual injunction restraining the Plaintiff by-himself and/or his servants from entering, selling, using, occupying or in any other manner howsoever interfering with the suit parcel of land as to defeat the 4th Defendant's interest thereto.
 - d. An order compelling the Commissioner of Lands to issue the relevant title documents for the suit parcel of land to the 2nd Defendant (the Anglican Church of Kenya).
 - e. Costs
 - f. Any other or further relief as this honourable court may deem fit and just to grant.
7. On 4th April, 2016, the Plaintiff/Respondent filed an Amended Plaint and sought the following prayers against the Defendants/Applicants:
 - a. A declaration that the plaintiff is the lawful owner of all that parcel of land known as Uns Residential Plot A Molo Township Aka Molo Township Block 2/85.
 - b. Permanent injunction restraining the defendants by themselves, their agents, servants, employees and/or workers from remaining on, entering or renting into, carrying on any developments and or in any way dealing with and or interfering with the plaintiff's possession use and enjoyment of all that piece or parcel of land known as Uns Residential Plot a Molo Township.
 - c. Damages as aforesaid.
 - d. Interest
 - e. Costs
 - f. Any other or further relief as many seem fit to this Honourable court Grant.
8. The court record also contains another Amended Statement of Defence filed by the 2nd, 4th 21st and 23rd Defendants on 25th April, 2016 where they deny all the averments in the Amended Plaint.



THE DEFENDANTS/APPLICANTS CONTENTION.

9. The Defendants/Applicants contend that the Plaintiff commenced action against them vide a Plaint dated 27th November, 2007.
10. It is their contention that they filed their Statement of Defence on 14 December, 2007 and that upon considering issues raised by the Plaintiff and the additional documents thereto, the Defendants on 3rd June, 2008 sought to amend their Statement of Defence and by leave granted on the same day, they filed an Amended Statement of Defence and Counterclaim dated 7th July, 2008.
11. It is also their contention that on 28 October, 2019, the court directed the parties to file their trial documents and any other documents they would wish to rely on during the trial.
12. It is further their contention that the Plaintiffs filed a Comprehensive List of Documents on 9th November, 2020 together with a Certificate of Lease dated 16th May, 2016.
13. The Defendants/Applicants contend that a scrutiny of the said Certificate of Lease reveals that John Kigen is the registered proprietor and that the said Certificate was issued on 16 May, 2016 during the pendency of this suit.
14. The Defendants/Applicants also contend that the said Certificate of Lease was issued at a time when there was in place an order of status quo issued by Justice D. Maraga (as he then was) on 9th July, 2008 and 23rd July, 2008.
15. The Defendants/Applicants further contend that they are challenging the process of allotment and transfer of the property between the Plaintiff/Respondent and the said John Kigen and that they be allowed to challenge the issuance of the Certificate of Lease and seek that the same be cancelled.
16. It is their contention that considering that the substratum of this suit is in respect to ownership of the parcel of land known as Title No. Molo Township Block 2/85 it is prudent that they be allowed to include a prayer for cancellation of the Certificate of Lease issued.
17. It is also their contention the acquisition of the Certificate of Lease during the pendency of this suit and an order of status quo is contemptuous, illegal, fraudulent and unprocedural and this Court ought to determine the validity of that certificate and prospects of having it cancelled.
18. It is further their contention that the intended amendments are sacrosanct to their case and it is trite that they are allowed to fully lay out their case and their prayers so that this Court can determine the issues in the suit, once and for all.
19. They concluded their deposition by stating that the amendments sought are meant to ensure that the dispute between the parties herein is fully determined.

PLAINTIFF'S RESPONSE.

20. In response to the Defendants Application, the Plaintiff filed his Grounds of Opposition dated 19th September, 2022 on 4th October, 2022 as follows:
 - a. That the said application is incompetent, an abuse of the due process of the law and should be dismissed forth with.



- b. That the application offends the express and mandatory provision of order 51 rule 13 of the civil procedure rules.
- c. That the application is an afterthought and aimed at frustrating the expeditious hearing of this matter.
- d. That the amendments sought serves no purpose for it is a mere repetition.
- e. That the application is brought late in the day since the Applicant was aware of the interest vested in the 2nd Defendant to the counterclaim.
- f. That the Applicant is guilty of in ordinate Laches and cannot be aided such a slate.
- g. That the application is brought in bad faith and ill will.

THE 2ND DEFENDANT/RESPONDENT’S RESPONSE.

21. In response to the Defendants/Applicants application, the 2nd Defendant filed Grounds of Opposition dated 20th September, 2022. Th grounds are as follows:
- a. The Application as drawn and filed is incompetent, frivolous, bad in law, misconceived and a gross abuse of the process of Court.
 - b. The Application does not set out a legally valid claim and is aimed at aiding a negligent pleader to defeat an actual defence.
 - c. The information on the issuance of the Certificate of lease dated 16th May, 2016 was all along within the knowledge and possession of the Applicants even as at the date of filing and service of the Plaintiff’s Further List of Documents dated 17th June, 2016 on the Applicants on 21st June, 2016.
 - d. The failure by the Applicants to incorporate a prayer in their Defence seeking the cancellation of the Certificate of Lease of the suit property was not an oversight but a calculated move by the Applicants to litigate by instalments the various issues raised in the sunt after getting the gist of the opposite side’s case.
 - e. The Application for leave to amend is belated and if allowed it would offend the provisions of Article 159 (2)(b) of *the Constitution* and Section 3(2) of the *Judicature Act* both of which enact that justice shall not be delayed and civil proceedings should be conducted without unreasonable delay.
 - f. The Application was brought in malafides and is meant to delay the expeditious finalization of the suit.
 - g. The Applicants have not demonstrated sufficient cause or grounds upon which the Court can or should grant the order sought.
 - h. There has been unexplained delay in making the application.

ISSUES FOR DETERMINATION.

22. The Defendants/Applicants filed their submissions dated 26th September, 2022 on 27th September, 2022 and identified the following issues for determination:
- a. Whether it is in the interests of justice and finality of suits to allow the amendments.



- b. Who should bear the costs of the application.
23. On the first issue, the Defendants/Applicants submits that amendments are allowed to enable a party to include all the facts pertaining to the case for the court to consider, investigate and adjudicate on all the issues pertaining to the dispute.
 24. They rely on the case of Institute for Social Accountability & Another Vs Parliament of Kenya & 3 Others [2014] eKLR and submit on 9th July 2008, this court issued orders of status quo.
 25. They also submit that by the year 2008, the Plaintiff/Respondent was yet to be registered as the owner of the suit property and on account of the orders of status quo, the land ought to have remained unregistered.
 26. The Defendants/Applicants further submit that the Plaintiff/Respondent used dubious means to have the property registered in his name and so they seek to amend their pleadings to include an order of cancellation of the said lease.
 27. They cite the decisions in the cases of Harrison C. Kariuki Vs Blueshield Insurance Company Limited [2006] eKLR and Ochieng & Others Vs First National Bank of Chicago Civil Appeal No. 147 of 1991 in support of their arguments.
 28. On the second issue they submit that costs follow the event and so they implore the court to allow their application with costs to them.
 29. The Plaintiff/Respondent filed his submissions on 14th October, 2022.
 30. He submits that the Defendants/Applicants have not demonstrated that they were not aware that he had been issued with the Certificate of Lease dated 16th May, 2016 as it was included in his Further List of Documents dated 17th June, 2016 and served upon the Defendants/Applicants on 21st June, 2016.
 31. The Plaintiff/Respondent also submits that the Defendants/Applicants application is an abuse of the court process and relies on Order 8 Rule 3(1) of the Civil Procedure Rules and the case of Rubina Ahmed & 3 Others Vs Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR.
 32. The Plaintiff/Respondent submits that the amendment sought by the Defendants/Applicants is not necessary but an attempt to delay the hearing and determination of the matter. He relies on the cases of John Nyagaka Osoro Vs Reynold Karisa Charo & 5 Others [2021] eKLR, Ochieng & Others Vs First National Bank of Chicago Civil Appeal No. 147 of 1991 (unreported) and Kassam Vs Bank of Baroda (Kenya) Ltd [2002] eKLR in support of his arguments.
 33. The 2nd Defendant filed his submissions 14th October, 2022.
 34. On the question whether the Application dated 2nd September, 2022 was brought in malafides, is incompetent, frivolous, bad in law, misconceived and a gross abuse of the process of the court, the 2nd Defendant submits that the Defendants/Applicants application is an abuse of the court process as the failure to incorporate a prayer in their Statement of Defence seeking cancellation of the Certificate of Lease of the suit property was not an oversight but a calculated move to litigate in installments.
 35. He relies on Order 8 Rule 3(1) of the Civil Procedure Rules and the cases of Rubina Ahmed & 3 Others Vs Guardian Bank Ltd (Sued in its capacity as a successor in Title to First National Finance Bank Limited) (Supra) and John Nyagaka Osoro Vs Reynold Karisa Charo & 5 Others (Supra) among other cases in support of his arguments.



36. He concludes his submissions by praying that the Defendants application dated 2nd September, 2022 be dismissed with costs.
37. After considering the Application, Grounds of Opposition and the rival submissions, the following issues arise for determination:
 - a. Whether the Defendants/Applicants should be granted leave to further amend their Amended Written Statement of Defence and Counterclaim dated 7th July, 2008.
 - b. Which party shall bear the cost of the application?

ANALYSIS AND DETERMINATION.

SUBPARA - A. Whether the Defendants/Applicants should be granted leave to further amend their Amended Defendants Written Statement of Defence and Counterclaim dated 7th July, 2008.

38. Order 8 Rule 3(1) of the Civil Procedure Rules provides 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.
39. In *Elijah Kipngeno Arap Bii Vs Kenya Commercial Bank Limited* [2013] eKLR; the court of appeal restated the law relating to amendment of pleadings as stated in *Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition* and captured in the Court of Appeal decision in *Joseph Ochieng & 2 others Vs First National Bank of Chicago (supra)* thus:

“The ratio that emerges out of what was quoted from the said book is that 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 the proposed amendment must not be immaterial or useless or merely technical; 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.”

40. In the case of *David Jonathan Grantham & Another vs National Social Security Fund* [2007] eKLR the court held as follows:

“The court’s power to allow amendments is donated under Order VIA Rules 3, 5 and 8 (now Order 8 under the 2010 Civil Procedure Rules). The court can allow amendments at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the Defendant/Respondent and whether the amendment is material and not merely technical.”

41. The court in the case of *Eastern Bakery Vs Castelino* [1958] E. A 461 set out the principles the court has to consider in determining whether or not to allow an application for amendment as follows:



- (a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.
- (b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.
42. The Defendants/Applicants are seeking leave to further amend their Amended Statement of Defence and Counterclaim dated 7th July, 2008 to include a prayer for cancellation of the Certificate of Lease dated 16th May, 2016.
43. The Defendants/Applicants allege that it was after the court had directed the parties to file their bundle of documents
that they realized that during the pendency of the suit, a Certificate of Lease had been issued in the name of John Kigen.
44. They further allege that the said Certificate of Lease was issued when there was in place an order of status quo issued by this court.
45. They are therefore seeking leave to amend their Amended Statement of Defence and Counterclaim to include a prayer for the said Certificate of Lease to be cancelled.
46. The Plaintiff/Respondent and the 2nd Defendant oppose the said amendments and they allege that the Defendants were aware of the existence of the said Certificate of Lease long before they filed the present application (the year 2016 to be precise) and therefore the Defendants/Applicants are only seeking to delay the matter.
47. It is clear from the principles set out in the cases quoted above that the court can allow amendments of pleadings at any stage of proceedings.
48. In the present matter, the Defendants/Applicants have annexed to their application a Certificate of Lease issued on 16th May, 2016 of land parcel No. Molo Township Block 2/85- the suit property. The same is in the name of John Chepkien Kigen. John Chepkien Kigen is already a defendant in the counterclaim filed by the 2nd Defendant.
49. The Defendants/Applicants have also annexed to their supporting affidavit a Draft Further Amended Statement of Defence and Counterclaim incorporating the intended amendments.
50. I have taken into consideration the reasons advanced by the Defendant/Applicant for seeking leave to amend the plaint. I also note that this matter has not proceeded to hearing and find that no prejudice will be occasioned to the parties herein. Further, the Defendant/Respondent have opportunity to amend their pleadings should they deem it necessary.
51. For the aforementioned reasons and having regard to the cited judicial decisions on amendment of pleadings, I find that the amendment is merited and necessary.

B. Which party shall bear the cost of this preliminary objection?

52. On the question of costs of the cost of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.



DISPOSITION.

53. In the result I find that the application is merited and is allowed in the following terms:
- a. Leave is hereby granted to the Defendants/Applicants to further amend their Amended Written Statement of Defence and Counterclaim dated 7th July, 2008 in terms of the annexed draft Further Amended Written Statement of Defence and Counterclaim.
 - b. The draft Further Amended Written Statement of Defence and Counterclaim shall be filed and served within 7 days from the date of this ruling.
 - c. The other parties are hereby granted corresponding leave to amend their pleadings within 14 days, if need be.
 - d. The costs of this application shall abide the outcome of the suit.
54. It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 13TH DAY OF FEBRUARY, 2023.

L. A. OMOLLO

JUDGE

In the presence of:-

Miss Karingo for Karuga for the Defendants/Applicants.

Mr. Kipngeno for Wambeyi for the Plaintiffs/Respondents.

Mr. Kipngeno for the 2nd Defendant/Respondent.

Court Assistant; Ms. Monica Wanjohi.

