



**Omboto & 3 others v Board of Trustees, National Social Security Fund & 6 others
(Environment & Land Case 391 of 2019) [2024] KEELC 5283 (KLR) (11 July 2024) (Ruling)**

Neutral citation: [2024] KEELC 5283 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS
ENVIRONMENT & LAND CASE 391 OF 2019**

OA ANGOTE, J

JULY 11, 2024

BETWEEN

**ANDREW OMBOTO 1ST PLAINTIFF
BRENDA SABWA 2ND PLAINTIFF
STEPHEN KYALO MUIA 3RD PLAINTIFF
WINFRED BOSIBORI OBAGA 4TH PLAINTIFF**

AND

**BOARD OF TRUSTEES, NATIONAL SOCIAL SECURITY
FUND 1ST DEFENDANT
LAND REGISTRAR, NAIROBI 2ND DEFENDANT
ATTORNEY GENERAL OF KENYA 3RD DEFENDANT
EATON TOWERS (KENYA TOWERS) LTD 4TH DEFENDANT
NAIROBI CITY COUNTY 5TH DEFENDANT
COMMUNICATIONS AUTHORITY 6TH DEFENDANT
NATIONAL ENVIRONMENTAL MANAGEMENT AUTHORITY 7TH
DEFENDANT**

RULING

1. The Plaintiffs/Applicants have through a Notice of Motion dated 28th February 2024, sought for the following orders:
 - a. That the Applicants be granted leave to further amend the Plaintiff as set out in the draft amended Plaintiff annexed hereto.



- b. That the draft amended Plaintiff annexed hereto be deemed as duly filed upon payment of the requisite court fees.
 - c. That the Respondents be granted corresponding leave to amend their defences if they so wish within 7 days of service of the further amended Plaintiff.
 - d. That this Honourable Court do make further orders that it may deem fit in the interest of justice; and
 - e. That costs be in the cause.
2. The grounds of the application are set out on its face and in the Supporting Affidavit sworn by the 1st Plaintiff, Andrew Omboto, who deposed that the Plaintiffs enjoined the 4th Defendant, Eaton Towers (Kenya Towers) Ltd challenging the sublease granted to it by the 1st Defendant for the construction of the base stations on land title number LR No. 9042/179 (Courts 117, 295, 328, 480, 566).
 3. The 1st Plaintiff deposed that while this suit was still pending, the 4th Defendant's lease with the 1st Defendant expired, prompting the 4th Defendant to abandon the intended construction on the suit land.
 4. Mr. Omboto averred that as the suit against the 4th Defendant was pegged on the sublease which has since expired, and since the 4th Defendant has vacated the suit property, it became necessary to terminate the suit against the 4th Defendant and that the Plaintiffs consequently withdrew the suit against the 4th Defendant through the consent dated 23rd October 2023 and 13th February 2024, which were adopted on 24th October 2023 and 14th February 2024 respectively.
 5. Mr. Omboto deposed that it is because of the withdrawal of the suit against the 4th Defendant that is necessary to amend the Plaintiff; that the Amended Plaintiff is tainted with inadvertent defects and typographical errors which need to be corrected for the sake of clarity and that the application has been filed on bona fide grounds and no prejudice will be visited upon the Defendants if the orders sought are granted.
 6. The 1st Defendant filed Grounds of Opposition dated 14th May 2024. It has opposed the application on the following grounds:
 - a. The application is misconceived, incompetent and an abuse of court process.
 - b. There has been undue delay in filing the application.
 - c. The proposed amendments introduce a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject to a fresh suit, which is highly prejudicial to the 1st Defendant.
 - d. The cause of action sought to be introduced does not arise out of the same facts or substantially similar facts as the already pleaded cause of action.
 - e. The proposed amendments are in violation of Order 8 Rule 7 of the [Civil Procedure Rules](#).

Analysis and Determination

7. The primary issue for determination by this court is whether it should allow the Plaintiffs to amend its Plaintiff. The application has been opposed by the 1st Defendant, on the grounds that there has been undue delay in filing the application; that the proposed amendments are inconsistent with the Plaintiff's suit and that the proposed amendments violate Order 8 Rule 7 of the [Civil Procedure Rules](#)



8. The general power to amend pleadings is provided for under Section 100 of the *Civil Procedure Act*. It 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 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.”

9. Order 8 of the *Civil Procedure Rules* expounds on the process and requirements for amendment of pleadings. Under Order 8 Rule 1, a party may amend his pleadings without leave of the court at any time before the pleadings are closed. However, after the close of pleadings, a party must seek leave of the court before amending their pleading. This is prescribed under Order 8 Rule 3 of the *Civil Procedure Act* as follows:

“[Order 8, rule 3.] Amendment of pleading with leave.

- (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.
- (2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.”

10. The general power to amend is also provided for under Order 8 Rule 5 which 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 document to be amended in such manner as it directs and, on such terms, as to costs or otherwise as are just.”

11. Amendment of pleadings is to enable parties to alter their pleadings to reflect the true state of affairs which they intend to rely on. This was the position taken in the case of *Institute For Social Accountability & Another vs Parliament of Kenya & 3 Others* [2014] eKLR, where the court held as follows:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side.”

12. The Court of Appeal outlined the principles in amendment of pleadings in *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-

“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*.”

13. The Court of Appeal in *Central Kenya Limited vs Trust Bank Limited* (2000) 2 E.A 365 similarly set out the following principles that guide the court in considering an application for amendment of pleadings:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or



accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

14. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows: the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party, which prejudice or injustice cannot be compensated by costs.
15. The first issue is whether there has been undue delay in filing this application. This suit was filed in 2019 and while the application has been made five years later in 2024, this matter is still in the pre-hearing stage. It is also noted that the Plaintiffs have sought to amend the Plaint following the consent between the parties dated 23rd October 2023, which was adopted by this court on 13th February 2024.
16. Considering that this application was made on 28th February 2024, there has been no delay in making the application.
17. The second issue raised by the 1st Defendant is that the proposed amendments introduce a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject of a fresh suit, which is highly prejudicial to the 1st Defendant.
18. The Plaintiff has averred that the proposed changes are for the purpose of effecting the consent to withdraw the case against the 4th Defendant, whose sublease to the suit property has since lapsed. They also contend that the proposed changes are intended to address inadvertent defects and typographical errors which need to be corrected for the sake of clarity.
19. This court takes notice that the proposed amendments withdraw the case against the 4th Defendant, pursuant to the consent adopted by the court on 4th April 2024. The proposed amendments also seek to effect the withdrawal of the case against the 5th, 6th and 7th Defendants, which was adopted by this court on 29th June 2022.
20. In the Proposed Amended Plaint, the Plaintiffs have shifted the cause of action, which was initially a claim of trespass against the 4th Defendant. The Plaintiffs had challenged the issuance of a sublease contract by the 1st Defendant to the 4th Defendant and sought that the sublease be declared null and void. They also sought the eviction of the 4th Defendant and demolition of any construction by the 4th Defendant.
21. While the Plaintiffs had stated in their original suit that the 1st Defendant had failed to operationalize the owner’s corporation of the suit property, they had not sought any reliefs or remedies against the 1st Defendant on the same. The proposed amendments have added particulars as to the alleged violations by the 1st Defendant under the *Sectional Properties Act* and has elaborately set out the reliefs the Plaintiffs seek with respect to the establishment of a management corporation over the suit property and issuance of sectional titles to members of the estate.
22. While these changes are significant, this court is persuaded that they are necessary to address the real question in controversy and will also avoid a multiplicity of suits. It is apparent that the Plaintiffs’ initial suit raised issues with the actions of the 1st Defendant being contrary to the *Sectional Properties Act*, but they all the same neglected to seek any relief against the 1st Defendant.
23. The proposed amendments by the Plaintiffs therefore have not introduced a new cause of action, and the same is not inconsistent with the facts that had been initially raised. In any case, the 1st Defendant’s



proposal to withdraw this suit and file a fresh suit against the very same parties will result in a waste of judicial time and resources and filing of a multiplicity of suits.

24. Further, the continuation of this suit, rather than the filing of a fresh suit, is not likely to visit prejudice on the Defendants on account of the dispute being barred by the *Limitation of Actions Act*.
25. Having found that this application has been brought without undue delay, it is the finding of the court that the proposed amendments will enable the court to adjudicate on the substantive merits of this case and will avoid a multiplicity of suits. Further, the 1st Defendant has not shown the prejudice that it stands to suffer by the amendment of the Plaintiff.
26. For these reasons, the court allows the application dated 28th February 2024 as follows:
 - a. The Plaintiffs are granted leave to further amend the Plaintiff as set out in the draft further amended Plaintiff.
 - b. The Further Amended Plaintiff to be filed and served within 14 days.
 - c. The Defendants are hereby granted corresponding leave to amend their defences if they so wish within 14 days of service of the Further Amended Plaintiff.
 - d. The costs of the application to be in the course.

DATED, SIGNED AND DELIVERED VIRTUALLY IN NAIROBI THIS 11TH DAY OF JULY, 2024.

O. A. ANGOTE

JUDGE

In the presence of;

Mr. Mbogo for 6th Respondent

Mr. Tarus holding brief for Mr. Kamwara for Plaintiffs

Mr. Muuo for Mbabu for 1st Defendant

Court Assistant: Tracy

