



**Manjara v Kenya Commercial Bank & 2 others (Civil Case
76 of 2018) [2023] KEHC 20656 (KLR) (21 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20656 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT ELDORET
CIVIL CASE 76 OF 2018
RN NYAKUNDI, J
JULY 21, 2023**

BETWEEN

DANIEL MANJARA PLAINTIFF

AND

KENYA COMMERCIAL BANK 1ST DEFENDANT

JOYLAND AUCTIONEERS 2ND DEFENDANT

NEW LEGEND CO LTD 3RD DEFENDANT

RULING

1. By a Notice of Motion 17th October, 2022, the Applicant seeks the following orders:
 1. Spent.
 2. That pending hearing inter partes of this application/suit and the determination thereof there be an order of temporary injunction to restrain the 3rd Defendant, New Legend Co. Ltd and their agents and/ or servants from sub-dividing and or transferring and or alienating and or selling and/ or in any way dealing with the land registration No. LR Irong/Iten/588.
 3. The Plaintiff be granted leave to amend the Amended Plaint herein so as to enjoin the Land Registrar, Elgeyo Marakwet County and the directors of New Legend Co. Ltd, the 3rd Defendant herein.
 4. Costs of this application be in the cause.
2. The application is premised on the grounds therein and it further supported by the affidavit sworn on 17th October, 2022 by Daniel Manjara, the Applicant herein.



The Applicant's Case

3. The Applicant deposed that it has come to his realization that the crucial parties to this suit were inadvertently left out. That there is an order for cancellation of the title in the Amended Plaintiff herein and yet the Land Registrar was not enjoined to the present case.
4. The Applicant contends that as much as the suit property is registered in the name of the of the 3rd Respondent, its directors were not enjoined in the suit herein. That the said directors are Lorna Kiplagat and Monica Kiplagat.
5. The Applicant seeks leave to amend the amended Plaintiff as per the draft Amended Plaintiff that enjoins the said parties.
6. The Applicant urged the Court to preserve the suit property pending hearing and determination of the suit herein by restraining the 3rd Respondent from disposing of the same and or alienating it and or transferring it to the 3rd parties.

The 1st Respondent's Case

7. The application is opposed by the 1st Respondent vide the Replying Affidavit sworn on 6th February, 2023 by Lilian Sogo. She deposed that the application herein is incompetent, defective and an abuse of the process of the Court.
8. She further deposed that the Plaintiff/Applicant vide a Plaintiff dated 23/3/2015, filed the suit herein against the 1st, 2nd and 3rd Defendants and later amended the said plaintiff in 2019 seeking an order that the sale of the property known as LR Irong/Iten/538 is null and void for want of Statutory Notices and other illegalities and irregularities; cancellation of the 3rd Defendant's name from the register of the subject land; that in the alternative the Plaintiff be compensated by way of damages being the current market value of the suit herein, plus costs and interests of the suit.
9. She further deposed that the Plaintiff/Applicant herein vide an application dated 31/8/2018 sought leave of Court of amend his plaintiff which application was opposed by the 1st and 3rd Defendants. Upon being considered by the Court, the Court allowed the said the Plaintiff's application to amend the plaintiff.
10. She further deposed that the Applicant herein was advanced loan facilities by the 1st Respondent which facilities were later amalgamated but failed to service the said facilities as agreed causing the loan account to run it arrears and thus prompting the 1st Respondent to issue the (45) days redemption notice and the notification of sale dated 1/11/2010. She added that the Applicant failed to comply with the said notice and that as a result of which the 1st Respondent instructed the 2nd Respondent herein to re-issue the redemption notice and the notification of sale on 22/3/2011 which notice was duly served upon the Applicant but the Applicant still failed to comply. She further added that as at 8/11/1995 the suit property herein was valued at Kshs.1,170,000/= . She further deposed that on 1/9/2011, the 1st Respondent herein did exercise its statutory power of and sold the suit property herein vide an auction.
11. According to the 1st Respondent, the there has inordinate delay in bringing this instant application, the proposed amendments seek to introduce unnecessary parties to the suit and further that a company is a separate entity which can sue and be sued in its own capacity.
12. She further contends that the Applicant herein cannot purport to claim any interest on the suit property as the equity of redemption was extinguished upon the sale of the suit property. She further



maintains that if there is any right whatsoever accruing to the Applicant, then the same can be settled in monetary terms.

13. According to the 1st Respondent, the application is only a ploy to delay the determination of the matter herein further. Further that justice delayed is justice denied and that litigation must always come to an end.
14. She further deposed that the grounds being relied upon by the Applicant are not new facts and have been within his knowledge all along. In addition, that the Applicant has not demonstrated how the said parties would assist the Court in determining the issue of damages against the Respondents if the event that the Court was to make a finding that they were culpable. Further that the said amendments would only complicate the matter further.
15. She reiterated that the application herein has been brought after a delay of almost eight (8) years which delay the 1st Respondent terms as unreasonable, unconscionable and inexcusable. She also reiterated that the Applicant herein no longer has any proprietary interests on the suit property and hence cannot be granted the injunctive reliefs being sought herein.
16. She further maintains that the if the Court was to allow the application herein then the Respondents will be highly prejudiced as the suit land has already passed another party. Further that the balance of convenience herein tilts in favour of the Respondents.
17. In the end, she urged the Court to dismiss the application herein with costs to the 1st Respondent.

The 3rd Respondent's Case

18. The 3rd Respondent opposed the said application vide the Replying Affidavit sworn on 9/12/2022, by Lornah J. Kiplagat, being one of the Directors of the 3rd Respondent.
19. She deposed that the application herein is mischievous and a complete waste of judicial time. She further deposed that the 3rd Respondent is in possession of the suit property that no injunction can issue to the one in occupation.
20. She further reiterated the averments by the 1st Respondent, that the 3rd Respondent is a legal person separate and distinct from its directors and further that its directors cannot therefore be sued in their personal capacities. She further deposed that the 3rd Respondent is run by professional managers and therefore its directors cannot be held personally liable for the activities of the company. Further that all documentation relating to the suit property are in the name of the company and not its directors. She reiterated that they only signed the said papers on behalf of the company and not themselves.
21. She further deposed that she and her co-director are vehemently opposed to being enjoined to the suit herein in their personal capacities.
22. The application was canvassed vide written submissions. All parties filed their respective submissions which I have duly considered and need not reproduce here.

Analysis and Determination

23. The main issue for determination is whether the Plaintiff/Applicant has made out a case for the granting of the orders sought.
24. The principles guiding the grant of interlocutory injunction are now well settled. Those principles were set out in *East African Industries v Trufoods* [1972] EA 420 and *Giella v Cassman Brown & Co.*



Ltd [1973] EA 358 .In *Nguruman Limited v Jan Bonde Nielsen & 2 Others* [2014] eKLR the Court restated the law as follows:

In an interlocutory injunction application, the applicant has to satisfy the triple requirements to;

- (a) establish his case only at a prima facie level,
- (b) demonstrate irreparable injury if a temporary injunction is not granted, and
- (c) ally any doubts as to (b) by showing that the balance of convenience is in his favour.

25. These are the three pillars on which rests the foundation of any order of injunction, interlocutory or permanent. It is established that all the above three conditions and stages are to be applied as separate, distinct and logical hurdles which the applicant is expected to surmount sequentially. See *Kenya Commercial Finance Co. Ltd V. Afraba Education Society* [2001] Vol. 1 EA 86. If the applicant establishes a prima facie case that alone is not sufficient basis to grant an interlocutory injunction, the court must further be satisfied that the injury the respondent will suffer, in the event the injunction is not granted, will be irreparable. In other words, if damages recoverable in law is an adequate remedy and the respondent is capable of paying, no interlocutory order of injunction should normally be granted, however strong the applicant's claim may appear at that stage. If prima facie case is not established, then irreparable injury and balance of convenience need no consideration. The existence of a prima facie case does not permit "leap-frogging" by the applicant to injunction directly without crossing the other hurdles in between. It is where there is doubt as to the adequacy of the respective remedies in damages available to either party or both that the question of balance of convenience would arise. The inconvenience to the applicant if interlocutory injunction is refused would be balanced and compared with that of the respondent, if it is granted."
26. The law governing the granting of interlocutory injunction is set out under order 40(1) (a) and (b) of the *Civil Procedure Rules* 2010 which provides that: -
Where in any suit it is proved by affidavit or otherwise—
 - (a) That any property in dispute in a suit is in danger of being wasted, damaged, or alienated by any party to the suit, or wrongfully sold in execution of a decree; or [Rev. 2012] *Civil Procedure* Cap. 21 [Subsidiary] C17 – 165;
 - (b) That the defendant threatens or intends to remove or dispose of his property in circumstances affording reasonable probability that the plaintiff will or may be obstructed or delayed in the execution of any decree that may be passed against the defendant in the suit, the court may by order grant a temporary injunction to restrain such act, or make such other order for the purpose of staying and preventing the wasting, damaging, alienation, sale, removal, or disposition of the property as the court thinks fit until the disposal of the suit or until further."
27. The test for granting of an interlocutory injunction was considered in the *American Cyanamid Co. v Ethicom Limited*(1975) A AER 504 where three elements were noted to be of great importance namely: -
 - i. There must be a serious/fair issue to be tried,
 - ii. Damages are not an adequate remedy,
 - iii. The balance of convenience lies in favour of granting or refusing the application.
28. The important consideration before granting a temporary injunction under order 40 Rule 1 of the Civil Procedure Rules is the proof that any property in dispute in a suit is in a danger of being wasted,



damaged or alienated by any party to the suit or wrongfully sold in execution of a decree or that the defendant threatens or intends to remove or dispose the property, the Court is in such a situation enjoined to grant a temporary injunction to restrain such acts. In the instant case, there is no doubt that the suit property is in danger of being alienated as the 1st Respondent does not deny that it has set in motion the process of realizing the security offered by the plaintiff for the debt. The 1st Respondent however contends that it has a legal right to exercise a statutory power of sale, whereas the Plaintiff/Applicant challenges such a right while contending that the figures given are grossly overstated.

29. The question which therefore arises is whether the application meets the threshold set for the granting of orders of temporary injunction. In *Mrao Ltd v First American Bank of Kenya and 2 others*, [2003] KLR 125 which was cited with approval in *Moses C. Muhia Njoroge & 2 others v Jane W Lesaloi and 5 others*, [2014] eKLR, the Court of Appeal defined a prima facie case as: -

A Prima facie case in a civil application includes but not confined to a genuine and arguable case. It is a case which on the material presented to the court, a tribunal properly directing itself will conclude there exists a right which has apparently been infringed by the opposite party as to call for an explanation or rebuttal from the later”.

30. In present case, although the Applicant seeks an order of temporary injunction against the 3rd Defendant/Respondent. He has not tendered any reasons whatsoever to warrant the issuance of the temporary injunction being sought against the 3rd Defendants/Respondents. The title to the suit property is without a doubt by the Applicant’s own averment registered in the name of the 3rd Respondent and thus there cannot be issuance a temporary injunction without justifiable reasons. At this juncture I must remind parties that Court orders are never issued in vacuum.

31. With the foregoing in mind it is evident that the Applicant has not met the threshold to warrant the issuance of the orders sought as was laid out in the case of *Giella v Cassman Brown*.(Supra).

32. The Application herein is majorly brought under Order 8 Rules 3,5 and 8 of the *Civil Procedure Rules*. For purposes of the ruling, it is important to duplicate the relevant rules of Order 8. Rule 3 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 state 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 sub-rule (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 sub-rule if it thinks just so to do.
- (3) An amendment to correct the name of a party may be allowed under sub-rule (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 sub-rule (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 sub-rule (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.

Rule 5 on the other hand reads:

- (1) 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.
 - (2) This rule shall not have effect in relation to a judgement or order.”
33. The power of Courts to allow amendment is however discretionary and such discretion ought to be exercised judiciously.
34. In the case of *City Clock Limited v County Clock Kenya Limited & Another* [2020] eKLR the court referred to a Court of Appeal decision in the case of *Ochieng and Others v First National Bank of Chicago* Civil Appeal Number 149 of 1991 [1995] eKLR which was cited with approval in *St. Patrick's Hill School v Bank of Africa Ltd* [2018] eKLR where the Court of Appeal set out the principles under which courts may grant leave to amend the pleadings. They were enunciated as follows:
- a. The power of the court to allow amendments is intended to determine the true substantive merits of the case:
 - b. The amendments should be timeously applied for;
 - c. Power to amend can be exercised by the court at any stage of the proceedings;
 - d. 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;
 - e. 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
35. In the case of *Lawrence Owino Omondi v Keneth Inea Muyera* [2017] eKLR the Honourable Court held that: -
16. In the current case the plaintiff relies on Order 8 Rule 3 above. The discretion of the court is made to be subject to satisfaction on the courts part that: -
 - (1) The mistake sought to be corrected was a genuine mistake.
 - (2) The mistake was not misleading.
 - (3) The mistake was such as to cause any reasonable doubt as to be identity of the person intending to sue or intended to be sued.”
36. It is evident that from the above provisions of the law, an amendment of pleadings may be permitted at any stage for purposes of determining the real question in controversy between the parties.
37. I have looked at the draft amended plaint and note that the Plaintiff intends to do an extensive overhaul of his original plaint. The effect of the proposed amendment would introduce a new cause of actions by introducing new parties who are not parties to the dispute at hand. The issue at hand involves a charge instrument which in my view does not directly involve the Land Registrar Elgeyo Marakwet, so as to require his/her presence in the matter herein.



38. The Applicant also seeks to enjoin the directors of the 3rd Respondent as party to the suit herein. I find it needless to remind the Applicant that a Company is separate and distinct person from its directors and shareholders unless there are substantive reasons to warrant the piercing of the corporate veil which in this case have not been tendered. By seeking to enjoin the directors of the company alongside the company itself, the Plaintiff is said to be trying to lift the corporate veil of the company without satisfying the requisite requirements for that process.
39. In circumstances of this case, I am not convinced that the amendments being sought by the Applicant are geared towards ensuring that the dispute at hand is heard and determine judiciously but rather to further delay the final determination of the dispute herein. I am therefore convinced that the failure to include the alleged crucial parties at the time of filing this suit was deliberate and not done by mistake and thus the same is not a genuine mistake requiring the invoking of the discretion of this Honourable Court. I even doubt if the Plaintiff herein is keen on prosecuting his case.
40. In the case of *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR, the Court held as follows: -
6. The Learned Authors of *Halsbury's Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -
“.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.
...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”(Emphasis added).
 7. In the matter before me, the Plaintiff avers that he has realized there is need to broaden the prayers sought from the Court in order to cover all eventualities and that the Defendants would not be prejudiced in any way by the amendments. I have looked at the draft amended Plaintiff. While the Plaintiff avers that he merely intends to broaden the prayers, a perusal thereof reveals that the Plaintiff intends to literally amend the entire Plaintiff and to introduce a completely new version of Paragraphs 8 to 13 as well as an additional paragraphs 16 to 19.
 8. While it is true that the said amendments are based on facts arising from the same circumstances leading to the filing of this suit, the Plaintiff does not state why the said amendments were not brought earlier in the day. This suit was filed on 3rd June 2016, some three years before this application was filed. As it were, the parties went for pre-trial directions and thereafter the Plaintiff testified at the trial and closed his case a month before this application was filed.
 9. Considering the record and the material placed before me, it is evident that by this application, the Plaintiff seeks to fill the gaps that were raised by the defence during the cross-examination of the Plaintiff.”
41. From the foregoing I am of the view that allowing this application will highly prejudice the Defendants/Respondents as was held in the case of *Harrison C. Kariuki v Blue Shield Insurance Co. Ltd* [2006] eKLR whereby the learned Judge held: -

I hold that to allow the extensive amendments sought by the Plaintiff at this late stage will occasion great prejudice to the Defendant that cannot be made good by costs. It will



occasion injustice to the Defendant who will have to extensively amend its defence. The Defendant will probably rue the admissions it made after suit was filed and which resulted in the consent order of 30th January, 2001. It will have to meet a much more expanded case than was originally pleaded, and it will have to summon again its witnesses to testify afresh. This is not merely a matter of time and effort wasted. This is a case being pleaded afresh by one party after taking advantage of admissions made by the other party towards expeditious disposal of the suit. Yes, a great deal of time and effort will have been wasted. But that is not all. There is also a heavy element of vexation that should not be permitted.

Having considered all matters placed before me, and in exercise of my discretion I will refuse the application. It is hereby dismissed with costs to the Defendant.”

42. The present case as filed way back on 23rd March 2015 is governed by the Civil Procedure Act and Civil Procedure Rules 2010 as amended from time to time to meet the needs of fair administration of justice. The Civil Procedure Act contains a prescriptive provision under Section 1(a) as read with 1(b) with the overriding objective of enabling the court to deal with cases justly and at proportionate cost. The context of an overriding objective is a question of balancing the scales of Civil Justice System in Kenya. In the present application the Applicant is litigating against all odds and guarantees in the Civil Procedure Act and Rules. Dealing with the case justly is to appreciate the letter and the spirit of the entire Act interpreted purposively as a whole. What do I see as some of the critical elements to constitute an overriding objective in the administration of justice in the realm of Civil Law:
- a. Ensuring that the parties are on an equal footing and can participate fully in proceeding, and that parties and witness can give their best evidence
 - b. Saving expense
 - c. Dealing with the case in ways which are proportionate
 - i. To the amount of money involved
 - ii. To the importance of the case
 - iii. To the complexity of the issues: and
 - iv. To the financial position of each party
 - (d) allotting to it an appropriate share of the courts resources, while taking into account the need to allot resources to other cases, and
 - (f) enforcing compliance with rules, practice directions and orders.
43. What the plaintiff is trying to do in this case it is to subject the pleadings to a fresh amendment without any sufficient cause or compelling evidence in support of the application. In any event the plaintiff had an opportunity to amend the plaint during compliance protocols provided for under order 11 of the Civil Procedure Rules. It is also established principle in law that in exercising discretion for leave to file an amendment outside the period of closure pleadings, disclosures, exchange of witness statements, interlocutory applications, and pre-trial conferences, the test the court should apply is as stated: Utali Transport Company Limited & 3 Others v Nic Bank Limited & another [2014] eKLR “Where’s there is no precise measure of what amounts to inordinate delay, and whereas what amounts to inordinate delay will differ from case to case depending on the circumstances of each case. The subject matter of the case, the nature of the case, the explanation given for the delay, and so on and so forth. Nevertheless inordinate delay should not be difficult to ascertain once it occurs: the litmus test being that it should be an amount of delay which leads the court to any inescapable conclusion that it is inordinate and



therefore inexcusable. On applying courts mind on the delay, caution is advised for courts not to take the word “inordinate” in its dictionary meaning, but in the sense of excessive as compared to normality”

44. The nature of some fundamentals on procedural justice prevents the applicant from benefiting of the accorded rights in the *Civil Procedure Act* and Rules on amendment of pleadings.
45. For those reasons, going by the above context the issues for determination in the application have been duly considered and found not to be responsive to overriding objective in Section 1(a) & (b) of the *Civil Procedure Act* and it is only good for dismissal with costs to the respondents. The long overdue suit be heard on a priority basis as earlier scheduled by this court

DELIVERED, DATED AND SIGNED AT ELDORET ON THIS 21ST DAY OF JULY 2023

In the presence of :

Mr. Wanjala for the 1st Defendant

Mr. Otieno for the 3rd Defendant

M/s Kesei for the Plaintiff

.....

R. NYAKUNDI

JUDGE

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