



**Tatu City Limited & 3 others v Jennings & 6 others (Civil Case 46 of 2015)
[2023] KEHC 1047 (KLR) (Commercial and Tax) (17 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1047 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 46 OF 2015
EC MWITA, J
FEBRUARY 17, 2023**

BETWEEN

**TATU CITY LIMITED 1ST PLAINTIFF
KOFINAF COMPANY LIMITED 2ND PLAINTIFF
NAHASHON NGIGE NYAGAH 3RD PLAINTIFF
VIMALKUMAR BHINJI DEPAR SHAH 4TH PLAINTIFF**

AND

**STEPHEN JENNINGS 1ST DEFENDANT
FRANCES HOLLIDAY 2ND DEFENDANT
HANS JOCHUM HORN 3RD DEFENDANT
PIUS MBUGUA NGUGI 4TH DEFENDANT
FRANK MOSIER 5TH DEFENDANT
ANTHONY NJOROGE 6TH DEFENDANT
CHRISTOPHER BARRON 7TH DEFENDANT**

RULING

1. The 1st, 2nd, 4th, 5th and 7th defendants have filed a notice of motion dated 8th June 2022, under Order 8 rule 3 of the Civil Procedure Rules, seeking leave to amend their statement of Defence dated 7th April 2015 in terms of the draft amended Defence and file witness statements and list of documents to enable the court adjudicate on the issues to be raised in the amended defence.



2. The motion is premised on the grounds on its face and the supporting affidavit sworn by the 7th defendant and further affidavit sworn by on 29th August 2022.
3. The defendants' case is that on 19th March 2015 the plaintiffs filed this suit seeking permanent injunctive orders restraining them from effecting any changes to the memorandum and articles of association of the 1st and 2nd plaintiff as well as taking of accounts of the loan accounts the subject matter of the suit.
4. The defendant state that on 1st October 2015 when the firm of Issa & Company Advocates took over the conduct of the matter on their behalf, they noticed that there was need to amend the statement of defence. The defendants therefore seek leave to amend the defence to bring out with clarity particulars of loan agreements as well as raise jurisdictional challenges arising from these agreements. The defendants posit that the proposed amendments will assist the Court in the just determination of the suit and that the plaintiffs will not be prejudiced.
5. The defendants further point out that they had filed a motion on 2nd February 2021 challenging the jurisdiction of the Court which was, however, compromised on 9th March 2022 to pave way for hearing of the main suit. They state that the delay in filing this application was because parties were engaged in interlocutory applications and that the plaintiffs took no steps to set down the suit for hearing until 6th December 2021.
6. The defendants contend that a challenge to jurisdiction can be raised at any stage and that amendment of the defence will not delay the hearing of the suit. According to the defendants the challenge to this court's jurisdiction is based on the exclusive jurisdiction clauses or choice of forum as contained in the Facility Agreement and Master Intra-Group Loan Agreements and not on arbitration clauses or the London Arbitral proceedings.
7. The defendants rely on *Kampala Coach Limited v First Community Bank Limited & another* [2016] eKLR, that mere delay is not a ground for declining leave to amend. They argued a party can seek leave to amend at any stage.
8. The defendants further cite the decision in *Adero Adero & another v Ulinzi Sacco Society Ltd* [2002] eKLR that jurisdiction cannot be conferred by acquiescence of the parties, and *Gianluigi Cernuschi v Merry Beach Limited* [2002] eKLR, that the plaintiffs will not suffer any prejudice as the overriding consideration is whether the proposed amendments are necessary for determination of the real question in controversy.

Plaintiff's case

9. The plaintiffs oppose the applications arguing that it had been filed 8 years after filing the statement of defence. The plaintiffs contend that the application has not been made in good faith. The plaintiffs also assert that challenge to jurisdiction based on arbitration clauses in the loan agreements ought to have been raised upon entry of appearance but not subsequent to filing of the statement of defence.
10. The plaintiff argue that it is not permissible for the defendants to challenge jurisdiction of the Court through the proposed amendments on grounds that the dispute concerns the internal affairs of Tatu City Limited and Kofnaf Company Limited 6 years later. What is more, the defendants cannot rely on arbitral proceedings commenced after filing of the suit by and against parties not named in the suit as a ground for amendment.
11. The defendants assert that if leave is granted they will be prejudiced because the application goes against orders of the Court issued on 9th March 2022 that the suit be prepared for hearing. They also contend



that the application seeks to re-litigate issues already determined with finality by this Court and the Court of Appeal.

12. The plaintiffs complain that the defendants have previously unsuccessfully challenged the Court's jurisdiction to hear this matter in the application dated 25th February 2015 that sought to strike out the suit for want of jurisdiction but which was dismissed
13. The plaintiffs state that on 22nd September 2017, the Court of Appeal delivered a judgment and directed this court (High Court) to hear and determine the suit on priority. Subsequently, on 9th March 2022, the defendants abandoned an application dated 7th March 2017 seeking to strike out the suit for lack of jurisdiction.
14. The plaintiffs rely on *I H Jacob, Bullen and Leake and Jacob's Precedents of Pleadings* 12th Edn, Sweet & Maxwell [1975] and *A S Sheikh Transporters Ltd and Another v Barclays Bank of Kenya Ltd and Others* [2013] eKLR, urging the court to dismiss the application.
15. The plaintiffs again rely on *Lofty v Bedouin Enterprises Limited* [2005] 2 EA 122 where the court found that the appellant had lost its right to have the matter referred to arbitration because the core issue was already pending before the court.
16. The plaintiffs further cite the decision in *Mt Kenya University v Step Up Holding (K) Ltd* [2018] eKLR for the proposition that an applicant ought to file an application for reference to arbitration simultaneously with the entry of Appearance and take no further procedural steps in the matter.
17. The plaintiffs again cite the decision in *Mburu Kinyua v Gichini Tuti* [1976-80] KLL 790, that the application is res judicata; *Nishit Yogendra Patel v Pascale Mirethe Baksh & Another* [2009] eKLR and *Hunker Trading Company Limited v Elf Oil Kenya Ltd* [2010] eKLR that pursuit of the jurisdictional question through different motions is an abuse of the Court process.
18. The plaintiffs rely on *Khan v Roshan* [1965] EA 289 that amendments that introduce fresh matters or create inconsistencies should not be allowed.

Determination

19. I have considered the application, the response and submissions by parties. I have also considered the decisions relied on by parties and read the record of proceedings in this matter.
20. The defendants have sought leave to amend their statement of defence so as to enable the court fairly adjudicate on the issues in the suit. The plaintiffs have opposed the application on grounds that the application has not been brought in good faith, it has been brought about 8 years after the statement of defence was filed and it is meant to delay the hearing and determination of the suit.
21. The law, as it stands, allows a party to apply for leave to amend his pleadings and the court has wide discretion to grant such leave on terms it considers just. The court should, however, exercise this discretion judiciously. Decisions on the issue are clear and I need not advert to them, save state that an application for leave to amend should be made without delay and should not be made with the sole aim of delaying the hearing and determination of a suit.
22. The record shows that the suit was filed in 2015. And the defendants filed statements of defence the same year. Thereafter, parties went into litigation over interlocutory applications and appeals. The defendants did not apply to amend their statement of defence until 8th June 2022.



23. The plaintiffs have argued that the application was made after almost 8 years after the statement of defence had been filed. In answer to this, the defendants have justified the delay arguing that parties had been engaged in numerous interlocutory applications and that was why the application was not made.
24. I have read the supporting affidavit and submissions by the defendants. The defendants state that when Messrs. Issa & Company Advocates took over the conduct of the case on their behalf on 1st October 2015, they noticed that there was need to amend the statement of defence to bring out all matters that would assist the court in a just determination of the suit. Even then, no application was made for leave to amend until June 2022.
25. As earlier adverted to, parties litigated on interlocutory applications up to the Court of Appeal and on 22nd September 2017, the Court of Appeal directed this Court (High Court) to hear and determine this suit on priority basis. On 9th March 2022 while dealing with an interlocutory application, this court drew the parties' attention to the directions by the court of Appeal that the suit be heard on priority. Parties compromised the application so that this suit could be prepared for hearing as the Court of Appeal had directed.
26. Despite this court's directions that the suit be prepared for hearing in compliance with directions by the Court of Appeal, the defendants filed the present application seeking leave to amend their defence. The plaintiffs have taken the view and, I am inclined to agree with them, that this application, if granted, will be prejudicial to their case.
27. The defendants were present when the Court of Appeal directed that the suit to be heard and determined on priority. Directions of the court are binding on parties and they cannot take certain steps to circumvent those directions. The defendants have not shown why this court should ignore the directions given that the suit be heard on priority and reopen the suit to fresh amendments that the defendants had an opportunity to make but did not.
28. The defendants have also not shown that they were not aware of the issues they now want to introduce through the intended amendments to persuade this court that they deserve exercise of the court's discretion in their favour. They are, in my view, surreptitiously trying to avoid this court's directions that parties comply with pre-trials so that the suit can be set down for hearing without delay.
29. In the circumstances, I am not persuaded that the application for leave to amend has been made in good faith given the time lapse and concerns the Court of Appeal had when it directed that the suit be heard without delay. Consequently, the application is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 17TH DAY OF FEBRUARY 2023

E C MWITA

JUDGE

