



**Mayana Capital Limited v Lenkoina & another (Commercial Case 290 of 2018)
[2023] KEHC 24539 (KLR) (Commercial and Tax) (26 May 2023) (Ruling)**

Neutral citation: [2023] KEHC 24539 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 290 OF 2018
MN MWANGI, J
MAY 26, 2023**

BETWEEN

MAYANA CAPITAL LIMITED APPLICANT

AND

SHIRLEY NAILANTEI LENKOINA 1ST DEFENDANT

NAOMI TORIS LENKOINA 2ND DEFENDANT

RULING

1. The defendants filed a Notice of Motion dated 6th April, 2022 brought under the provisions of Sections 1A, 1B and 3A of the *Civil Procedure Act*, Order 8 rules 3, 5, and 6 of the *Civil Procedure Rules* and all the enabling provisions of the law. They seek the following orders–
 - i. That the time granted to the defendants/applicants to file their amended defence and counterclaim be enlarged and extended to enable the defendants/applicants file the amended defence and counterclaim amended on 18th March, 2022; and
 - ii. That in the alternative fresh leave be granted and the amended defence and counterclaim amended on 18th March, 2022 and served upon the plaintiff/respondent be deemed to be duly filed and served.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on 6th April, 2022 by Shirley Nailantei Lenkoina, the 1st defendant herein. In opposition thereto, the plaintiff filed a replying affidavit sworn by Sarah Muthee, the director of the plaintiff herein on 13th May, 2022.



3. The application was canvassed by way of written submissions. The defendants' submissions were filed by the law firm of Ndegwa Kiarie & Company Advocates on 12th June, 2022, whereas the plaintiff's submissions were filed on 20th June, 2022 by the law firm of Tito & Associates Advocates.
4. Mr. Karanja, learned Counsel for the defendants submitted that the plaintiff instituted the suit herein against the defendants vide a plaint dated 20th July, 2018, for the recovery of a loan and alleged interest. He stated that since the defendants were not disputing having borrowed the principal sum, the plaintiff filed an application seeking for an order for judgment on admission to be entered against the defendants, which application was allowed on 12th February, 2020.
5. He submitted that thereafter, the plaintiff filed another application dated 17th September, 2020 seeking leave to execute before final judgment. In opposition thereto, the defendants filed an application dated 27th September, 2020 seeking an order for stay of execution, and leave to liquidate the sum of Kshs.4,000,000/= as per the judgment on admission in monthly instalments, which application was allowed. The defendants' Counsel contended that the only issue left to be determined by this Court is that of the interest being claimed. He stated that it was for the said reason that the defendants filed the instant application seeking leave to amend their defence and file a counterclaim.
6. Mr. Karanja cited the provisions of Order 8 Rule 6 of the *Civil Procedure Rules*, 2010 and stated that where a party has been granted leave to amend their pleadings and fail to do so within the prescribed time as is the case herein, the Court has the power to extend the said period so as to enable that party to comply. He also cited the provisions of Order 8 Rule 3(1) of the *Civil Procedure Rules*, 2010 and submitted that a party to a suit is at liberty to seek leave of the Court to amend their pleadings at any stage of the proceedings. To this end, he relied on the case of *Harrison C. Kariuki v Blue Shield Insurance Company Ltd* [2006] eKLR, where the Court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* [2000] EA 365. He submitted that Courts have held that leave to amend pleadings should be granted freely to the party seeking it in the interest of justice.
7. It was stated by Mr. Karanja that the suit herein has never been set down for hearing thus the respondent will not suffer any prejudice or injustice in the event that instant application is allowed. He further stated that when this matter came up for case management conference, the defendants made an oral application seeking leave to amend their defence and file a counterclaim pursuant to the provisions of Order 8 Rule 8 of the *Civil Procedure Rules*, 2010 and Section 15 of the *Practice Directions relating to Case management in the Commercial and Admiralty Division of the High Court*. He referred to the provisions of Order 8 Rule 5(1) of the *Civil Procedure Rules*, 2010 and submitted that the amendments in the amended defence and counterclaim dated 18th March, 2022 are meant to assist the Court to resolve the remaining outstanding issue of interest.
8. Mr. Karanja relied on the case of *Ochieng & others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported) cited with approval by the Court in *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR where the Court of Appeal set out the principles that guide Courts in regard to amendment of pleadings. He also relied on the case of *City Clock Limited v County Clock Kenya Limited & another* [2020] eKLR and stated that given the circumstances of this case, the application herein has been made without unreasonable delay.
9. Mr. Tito, learned Counsel for the plaintiff cited the provisions of Order 8 Rule 6 of the *Civil Procedure Rules*, 2010 and submitted that the defendants were granted leave to amend their pleadings but they did not do so until the time granted lapsed. He stated that amendment of pleadings should be done within a reasonable time to avoid impeding the course of justice or wasting the Court's time. He relied on the case of *George Gikubu Mbutia v Consolidated Bank of Kenya Limited and another* [2016] eKLR and further stated that this Court has wide and unfettered discretion to allow or deny the defendants leave



to amend their pleadings but the said discretion must be exercised judiciously and guarded jealously against misuse.

10. Mr. Tito submitted that the defendants had attributed the delay in filing an amended defence and a counterclaim to financial constraints, an explanation which leaves a lot to be desired in terms of their credibility since filing fees for an amended plaint and a counterclaim are set in such a manner that an ordinary Kenyan can afford them. He contended that the explanation that the delay is attributed to the defendants' engagement in other matters in Court is not enough since they are represented by an Advocate who has the professional and technical capacity to handle multiple cases at once. Mr. Tito referred to the case of *Andrew Kiplagat Chemaringo v Paul Kipkorir Kibet* [2018] eKLR and stated that the defendants had not satisfactorily explained the delay in filing an amended defence and a counterclaim to warrant this Court to exercise its discretion in their favour.
11. He referred to the case of *Francis Ndwigah Nyagah v Transchem Pharmaceuticals Limited* [2021] and submitted that in view of the fact that there is already a partial judgment on record, the defendants are aware that they filed the instant application solely to buy time, which is prejudicial to the respondent's right to have this matter settled expeditiously. He further submitted that the defendants slept on their rights to amend their pleadings and the instant application is a mere attempt to get a second bite at the cherry.

Analysis and Determination

12. I have considered the application herein, the grounds on the face of it and the affidavit filed in support thereof. I have also borne in mind the replying affidavit by the plaintiff and the written submissions by Counsel for the parties. The only issue that arises for determination is whether the instant application is merited.
13. In the affidavit filed by the defendants, they deposed that the Court granted them leave to amend their defence and file a counterclaim but they were not able to do so in time due to financial constraints compounded by dealing with the applications that were alive before the Court. They averred that they have now filed the draft amended defence and a counterclaim amended on 18th March, 2022.
14. It was stated by the defendants that the main suit has never been set down for hearing and that the Court is now poised to hear it and resolve the outstanding issue of interest. They deposed that as a result, it is imperative that a counterclaim be filed and be deemed to be properly on record. They further stated that the amendments and counterclaim are solely aimed at assisting the Court to justly resolve the real question of interest, which is still in controversy.
15. The plaintiff in its replying affidavit deposed that the defendants have not adduced any evidence to show when the Court granted them leave to file an amended defence and a counterclaim. They also deposed that even if leave was granted, the defendants slept on their rights by failing to file the same within the timelines required under Order 8 Rule 6 of the *Civil Procedure Rules*, 2010, and that the said order ceased to have effect after the elapse of fourteen (14) days.
16. The plaintiff averred that the defendants have not tendered any evidence to demonstrate to this Court that they were unable to file their amended defence and a counterclaim in time due to financial constraints. It expressed the view that in a bid to facilitate access to justice, the Court only requires a modest amount as filing fees, therefore the defendants' assertion that they failed to comply with Court orders and/or statutory timelines due to financial constraints is untenable.
17. It was stated by the plaintiff that at this stage, pleadings have closed and the matter has been partially heard. It stated that the instant application not only offends the provisions of Section 1A of the *Civil*



Procedure Act, which provides for the plaintiff's right to a just and expeditious trial, but it has also been overtaken by events.

18. It is trite that this Court has the discretion to make an order for amendment of pleadings pursuant to the provisions of Order 8 Rule 3 (1) of the Civil Procedure Rules, 2010 which states that –

“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.”

19. Further, Section 100 of the Civil Procedure Act, Cap 21 Laws of Kenya and Order 8 Rule 5(1) of the Civil Procedure Rules, 2010 give Courts the power to grant leave to parties to amend pleadings. Order 8 Rule 5(1) provides as follows:

“For the purpose of determination, 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 documents to be amended in such a manner as it directs and, on such terms, as to costs or otherwise as are just.”

20. The principles under which Courts may grant leave to amend pleadings were summarized by the Court of Appeal in Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991 cited with authority by the Court in St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR as hereunder–

- 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 and amendment notwithstanding the expiry of current period of limitation

21. The defendants contended that this Court granted them leave to file and serve an amended defence and a counterclaim but due to financial constraints they were unable to do so in good time thus necessitating the instant application. On perusal of the record, I note that the defendants filed their amended defence on 25th March, 2022 and on 31st March, 2022, they made an oral application praying that they be allowed to file an amended defence and a counterclaim. The application was however objected to by the plaintiff. The Court scheduled the matter for mention on 12th April, 2022 before the Deputy Registrar for purposes of admission of an amended defence or enlargement of time.

22. This case was mentioned before the Deputy Registrar on 4th May, 2022 and on that day, the defendants indicated that they had filed the instant application. In light of the foregoing, the defendants have never



been granted leave by the Court to file and serve an amended defence and a counterclaim, therefore the issue of them not having complied with the orders of the Court does not arise.

23. On whether the defendants should be granted leave to file and serve an amended statement of defence and a counterclaim, it was stated by the defendants that the suit herein has never been set down for hearing thus the plaintiff will not suffer any prejudice or injustice in the event that the instant application is allowed. The plaintiff on the other hand contends that in view of the fact that judgment on admission was entered against the defendants on 12th February, 2020, the suit herein has been heard partially.
24. It has been held time without number that amendment of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. Amendments should however not alter the character of the case. In the case in issue, it is not disputed that the only issue left for determination by the Court is the issue of interest. The defendants in their submissions contended that the amendments in the amended defence and counterclaim dated 18th March, 2022 are meant to assist the Court in resolving the remaining outstanding issue of interest. I have perused the amended defence and counterclaim on record and it is evident that it does not introduce a new cause of action as it brings out and/or captures the issue of the interest payable.
25. I agree with Counsel for the defendants that this matter is yet to be set down for hearing on the issue of how much interest is payable to the plaintiff. The principles upon which a Court acts in an application to amend a pleading before trial are succinctly stated in the case of *Eastern Bakery v. Castelino* [1958] E.A.461 (U.) at p.462 as follows –

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.”
26. Applications for amendment of pleadings must not only be made within reasonable time but also in good faith. The application herein was filed on 8th April, 2022 approximately four years after the institution of the suit. It is however worth noting that judgment on admission was entered on 12th February, 2020. Thereafter, the file was inactive until 17th May, 2021 when it was listed for notice to show cause why it should not be dismissed for want of prosecution. I also note from the record that at some point, the original file in this matter had been misplaced and the Deputy Registrar directed that the matter proceeds via a skeleton file. That notwithstanding, there is no indication and/or evidence that the instant application is being made in mala fides, and that the delay in filing the amended defence and counterclaim has occasioned any prejudice to the plaintiff.
27. As explained hereinabove, any amendments allowed by the Court should be geared towards achieving a just and final determination of the real issues in controversy between the parties. It is this Court’s finding that the amendments in the amended defence and counterclaim will facilitate the determination of the real question in controversy between the parties by the Court. In addition, in the event that the instant application is allowed, no prejudice shall be occasioned to the plaintiff since it will have an opportunity to file a reply to the amended defence and a defence to counterclaim.
28. I find that the application dated 6th April, 2022 is merited and it is allowed in the following terms –
 - i. That leave is hereby granted to the defendant to file and serve an amended defence and counterclaim within 21 days from today;
 - ii. That the plaintiff shall file a reply to the defence and defence to the counterclaim, if it so wishes, within 21 days from the date of service of the amended defence and counterclaim; and



iii. That costs of the application shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 26TH DAY OF MAY, 2023. RULING
DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:

Mr. Mwangi Karanja for the defendant/applicant

Mr. Wanyonyi h/b for Mr. Tito for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

