



**Vivo Energy Kenya Limited (Formerly Known as Kenya Shell Ltd) v Gamasil Company Ltd
(Environment & Land Case 101 of 2019) [2023] KEELC 17103 (KLR) (27 April 2023) (Ruling)**

Neutral citation: [2023] KEELC 17103 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 101 OF 2019**

**EO OBAGA, J
APRIL 27, 2023**

BETWEEN

**VIVO ENERGY KENYA LIMITED (FORMERLY KNOWN AS KENYA SHELL
LTD PLAINTIFF**

AND

GAMASIL COMPANY LTD RESPONDENT

RULING

1. This is a ruling in respect of a notice of motion dated January 10, 2023 in which the Defendant/Applicant seeks the following orders: -
 1. That leave be granted to the Applicant/Defendant to amend its Defence and counter-claim.
 2. That the annexed draft amended defence and counter claim and the accompanying verifying affidavit marked as "SCL 1" be deemed as duly filed upon grant of prayer (1) and payment of the requisite filing fees.
 3. That pursuant to prayer (2) being granted, the Applicant/Defendant be allowed to file further witness and list of documents.
 4. That pursuant to prayer (2) being granted, the Respondent/Plaintiff be allowed to amend their plaint and file further documents in a bid to comply with order 11 of the Civil Procedure Rules if need be.
 5. That the cost of this application be in the cause.
2. The Applicant contends that there is need to bring all issues for determination before the court for adjudication. The Applicant states that the Applicant's defence and counter-claim did not capture the entire claim which the court is to make a determination on and that therefore there is need to amend



the defence and counter-claim to bring on board what was missing to avoid a situation where there will be need to file fresh and separate suits.

3. The Applicant's application was opposed by the Plaintiff/Respondent based on grounds of opposition dated January 30, 2023. The Respondent contends that the application for amendment is being brought too late in the day; that the amendment cannot be used to reward a party who is in breach of its contractual obligations; that a court cannot re-write a contract for the parties and that the Applicant has moved to court with unclean hands.
4. The parties put in written submissions in respect of the application. I have gone through the Applicant's application as well as the opposition to the same by the Respondent. I have also gone through the submissions by the parties. The only issue for determination is whether the Applicant has made a case for grant of leave to amend the defence and counter-claim.
5. There are a number of decisions from the superior courts on grounds which amendments to pleadings can be allowed. However, there is the case of *Elijah Kipngeno Arap Bii vs Kenya Commercial Bank Limited* (2013) eKLR which captures the grounds well. The Court of Appeal in that case sated as follows: -

“The law on amendment of pleadings 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 pleadings* -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 is that powers of the court to allow amendments 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 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 amendment of the plaint the Defendant would be deprived of his right to rely on limitation of actions...”

6. In the case of *Central Kenya Limited vs Trust Bank Limited* (2000) 2 EA 365, the Court of Appeal stated as follows:-

“... 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.”

7. It is in light of the above principles that I will decide the application herein. The defence and counter-claim in this case were filed on September 23, 2019. The application for amendment was made in January 2023. This is a period of over 3 years. The delay notwithstanding, the court has to ensure that



the amendments are not brought in bad faith; will not prejudice the opposite party; will not introduce a new cause of action and will not deny the opposite party to rely on limitation period.

8. In the instant case, there have been attempts to negotiate a settlement. The main suit and counter-claim are based on breach of contract. Both parties are seeking damages out of the aborted contracts. The amendment sought by the Applicant is to plead the special damages which it submits it suffered as a result of the alleged breach. There is nothing new being introduced which will alter the original cause of action. The amendment will not prejudice the Respondent in any way.
9. This suit has not started being heard. The delay of about slightly three years in seeking amendment can be attributed to the attempts to negotiate a settlement in this matter. The law on special damages is that they have to be pleaded before being proved. It is therefore necessary that the special damages be pleaded and the only way they can be placed before the court is through amendment to the defence and counter-claim. I therefore find that leave should be granted to the Applicant to amend the defence and counter-claim. I consequently grant the Applicant leave to amend the defence and counterclaim. The amended defence and counter-claim shall be filed within fourteen days from the date hereof. The costs of this application shall be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 27TH DAY OF APRIL, 2023.

E O OBAGA

JUDGE

In the virtual presence of;

Ms Irimah for Mr Luseno for Respondent

Mr Wasonga for Defendant/Applicant

Court Assistant –Laban

E O OBAGA

JUDGE

27th APRIL, 2023

