



**Salat v Kanuli Information Technology Solutions Limited & another  
(Civil Suit 5 of 2018) [2023] KEHC 20847 (KLR) (27 July 2023) (Ruling)**

Neutral citation: [2023] KEHC 20847 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT KERICHO  
CIVIL SUIT 5 OF 2018  
JK SERGON, J  
JULY 27, 2023**

**BETWEEN**

**KENNEDY KIMUTAI SALAT ..... PLAINTIFF**

**AND**

**KANULI INFORMATION TECHNOLOGY SOLUTIONS LIMITED .... 1<sup>ST</sup>  
DEFENDANT**

**FAULU MICROFINANCE BANK LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The Plaintiff filed a suit against the 1st and 2nd Defendants claiming that the 1st Defendant caused to be fraudulently and without the Plaintiff's consent charged to the 2nd Defendant the Plaintiff's parcel of land, Title number; L.R No. Kericho/Chepsirs.s/311. The same was used as security for a facility in the sum of Kshs. 5,600,000/=. On 30th June, 2021 the matter was scheduled for hearing of the main suit, however, counsel for the plaintiff informed the court that he was not ready to proceed and sought leave from court to amend his pleadings. On 30th June, 2021 the court issued directions that counsel of the plaintiff was granted leave of thirty (30) days to file a formal application that seeks to amend his plaint and fix a hearing date for the said application.
2. There was a hiatus in the matter. The matter was mentioned on 24th April, 2023 to take directions on the Plaintiff's application dated 30th July, 2021. Notwithstanding the fact that the matter was last in court on 30th June, 2021 when the court issued orders on the said application.
3. According to the averments by the 2nd Defendant's counsel, counsel for the Plaintiff served the Defendants with the instant application on the morning of 24th April, 2023 almost two years later after filing of the application and further that the instant application was filed in court on 16th September, 2021 was in violation of the orders and directions of the court on 30th June, 2021 as it was filed in



more than the thirty (30) days leave granted by this court. It is against such background that this court is set to determine the application for leave to amend pleadings albeit belatedly.

4. The instant application that is subject of this courts determination is a notice of motion dated 30th July, 2021 filed under Miscellaneous Application No. E033 of 2021 seeking the following orders;
  - i. That the Honourable Court be pleased to grant the Plaintiff leave to amend the Plaint.
  - ii. That the annexed draft of the amended plaint be deemed as duly filed upon payment of the requisite fees.
  - iii. That costs be in the cause.
5. The Application is supported by grounds on the face of it and the supporting affidavit of G.K Kiletyen an advocate in the firm of Sang & Sang Advocates LLP having conduct of this matter and hence competent to swear the affidavit.
6. The Applicant avers that it necessary to amend the plaint to correctly address the issues in dispute in the charge instrument, that the plaint was tainted with inadvertent defects, erroneous figures and typographical errors which need to corrected for clarity annexed and marked as "GKK1" is a copy of the draft amended plaint.
7. The applicant avers that the matter is pending before this court and a hearing date is yet to be fixed.
8. The applicant avers that no prejudice will be occasioned to the respondents if the instant application is allowed.
9. The applicant avers that the application for amendment does not introduce any new facts.
10. The applicant avers that if the application is not allowed, the plaintiff in the primary suit would be occasioned substantial loss and hardship thereby suffering grave injustice.
11. The applicant further avers that it is in the interest of justice to allow the application in order to assist the court to effectively determine the issues surrounding the suit on its substantive merits.
12. The 2nd Respondent filed a replying affidavit in opposition to the instant application the affidavit was sworn by Maurine Kahiro an employee of the 2nd Respondent. The 2nd Respondent strongly opposed the application and urged the court to dismiss it with costs.
13. The 2nd Respondent avers that upon review of the draft amended plaint, it was opposed to the purported changes made on the grounds that the amendments were designed to change the character of the suit despite the same having been certified ready for hearing.
14. The 2nd Respondent avers that the application was filed three (3) months after the court order, which delay was unreasonable, unconscionable and in excusable and further that the applicant had not offered a plausible explanation for the delay.
15. The 2nd Respondent avers that it denies all facts in the applicants supporting affidavit, save and except those expressly admitted herein.
16. The 2nd Respondent avers that the application was deviod of merit and brought in bad faith. It is a ploy by the applicant to introduce new facts late in the day after the matter had been certified ready for hearing.



17. The 2nd Respondent avers that the parties have been in litigation in this matter for over six (6) years since 2017 and in the intervening period the facility in issue continues to accrue arrears and interest at the default rate to its detriment and that of its depositors.
18. The 2nd Respondent avers that the applicant failed to comply with the orders and directions issued by this court on 30th June, 2021 and faulted the applicants for the following; firstly, the failure to file the instant application as ordered in good time, secondly, the failure to offer a plausible explanation for the delay and thirdly, the failure to take out a hearing date and as a result there had been no activity in the file since the orders issued by this court on 30th June, 2021, the file has been dormant.
19. The Applicant filed submissions in support of the application and contended that it was necessary to amend the plaint to correctly address the issues in dispute to wit the charge instrument and that the plaint was tainted with inadvertent defects, erroneous figures and typographical errors which needed to be corrected for clarity purposes and that the instant application if allowed would assist the court to hear and determine the dispute at hand exhaustively and on its substantive merits and further that no prejudice would be occasioned on the respondents in a manner that cannot be compensated by costs and in any event the defendants would be enjoined to amend their defense in response to the amended plaint.
20. The Applicant stated that the court has a wide berth in granting leave to amend pleadings and maintained that it was deserving of leave to amend pleadings and cited order 8 rule 3 and order 8 rule 5 of the Civil Procedure Rules in support of its case and relied on the following authorities Institute For Social Accountability & Anor v Parliament of Kenya & 3 others [2014] eKLR & Arap Bii v Kenya Commercial Bank Limited [2013] eKLR.
21. The Applicant argued that grounds enumerated in the application and supporting affidavit of the applicant were reflective of the legal parameters governing the amendment of pleadings as set out by various courts. The Applicant further argued that the amendments were not foreign or inconsistent with the subsisting cause of action which is centered around the charge instrument rather the amendments were geared towards the clear and substantive resolution of the dispute herein.
22. The Applicant contended that based on well enunciated principles on amendment of pleadings in general, amendments of pleadings should be allowed before final judgment is delivered and the instant case was pending hearing.
23. The 2nd Respondent filed submissions in opposition to the instant application and contended that the thirty (30) day leave granted by this court on 30th June, 2021 for the applicant to file an application for amendment of pleadings and pick a date for hearing of the application was not arbitrarily set but rather dictated by the need to maintain orderly proceedings and respect the rule of law.
24. The 2nd Respondent faulted the applicant for gross misinterpretation of the court's leniency and for filing his application approximately two months past the stipulated time frame, thereby flouting the court's express orders. The 2nd Respondent argued that the unexplained, intentional and willful delay in filing the said application was contempt of court and cited DLK v CM [2020] eKLR Musyoka J. who stated as follows; "—a party does not choose how to obey a Court order he should comply with it as framed. A party should first comply with a court order even as it asks the same court, or even a higher one, to review the orders. A court order is not a proposition or suggestion; it is a command. It must be obeyed first and complaints raised later." and therefore argued that the applicant was undeserving of the court's audience in the instant application.
25. The 2nd Respondent submitted on the mix up in case numbers, as the instant application had been filed as Miscellaneous Application No. E033 of 2021 under a different suit, instead of the suit herein



- being HCCC No. 5 of 2018. The 2nd Respondents argued that the apparent mix-up with the case numbers rendered the application fatally defective and as a result HCCC No. 5 of 2018 before this court has no application for the amendment of a plaint and that the application was filed under Miscellaneous Application No. E033 of 2021 which is not before this court and the same was an abuse of court process. The 2nd Respondent contended that entertaining the instant application would cause unnecessary drain on this court's precious time and further that is not within the ambit of this court's jurisdiction to make determinations on an application meant for a different case.
26. The 2nd Respondent contended that the applicant's counsel, as an officer of the Court, owed the Court, opposing counsel and their clients a duty to be diligent in the conduct of their practice and at all times assist the court in ensuring that the justice system functions effectively, efficiently and in a respectable manner. In the pursuit of these tenets, it was the duty of counsel of the applicant to inform the Court of this anomaly and as a result save this court's time and cited *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR and *Francis Mugo & 22 others v James Bress Muthee & 3 others*, Civil Suit No. 122 of 2005 [2005] eKLR.
  27. The 2nd Respondents also faulted the applicant for non-compliance with the court's orders on costs on 31st June, 2021, the court awarded Kshs. 6,000/= as the 2nd defendant's costs of the day and an adjournment fee of Kshs. 1,000/= which amounts remain unpaid to date these sums were payable before the next hearing date. Despite this explicit order, the Plaintiff chose to disregard the courts orders further exemplifying a blatant lack of respect for the authority of this esteemed court. Cost orders are not merely punitive but also a measure of the court's control over its proceedings. Therefore, in light of the applicants disregard for the court's cost orders, the 2nd Respondents maintained that the instant application is not properly before this Court and cited *Econet Wireless Kenya Ltd v Minister for Information & Communication of Kenya & another* [2005] 1 KLR 828
  28. The 2nd Respondent argued that the inordinate delay in filing and serving the application is prejudicial to its client and was an abuse of court process.
  29. The 2nd Respondent reiterated that the unjustifiable delay in filing and serving the present application by the applicant is not merely prejudicial, but also flagrantly abusive of this court's due process. The court's record incontrovertibly demonstrates that the application was lodged on 16th September 2021, which egregiously exceeds the 30-day timeframe decreed by this Court, manifesting as an over two-month delay, the gross tardiness further exacerbated by the subsequent delay in serving the application, which did not transpire until April 2023, nearly two years later. The applicant's inexplicable delay in filing and serving the application severely prejudices the 2nd Respondent's client, who has endured a state of limbo since the court's directions in June 2021.
  30. The 2nd Respondent contended that the court process should not be weaponized as an oppressive tool by litigants who disregard Court orders and timelines cavalierly and cited the Court of Appeal's decision in *Muchanga Investments Limited v Safaris Unlimited (Africa) Ltd & 2 others* Civil Appeal No. 25 of 2002 [2009] eKLR 229.
  31. The 2nd Respondent reiterated that the unnecessary and unexplained delay in filing and serving the instant application is antithetical to the principles of diligence and good faith and did not warrant this court to exercise discretion in the applicants favour. They maintained that the applicant's conduct in the matter has shown a flagrant disregard for court directions, orders and timelines. They faulted the applicant for occasioning an unsettling mix-up in the case numbers, contributing to unnecessary confusion and further delay. The application, filed under a different miscellaneous number but placed in the file of the instant case has led to misdirection and misuse of the court's valuable time. The



2nd Respondent maintained that such conduct should not be rewarded or tacitly endorsed by this Honourable Court.

32. The 2nd Respondent argued that the equitable principle of the vigilant suitor with clean hands is instructive in this case. It is the bedrock upon which parties seeking equity must base their conduct. Unfortunately, the applicant's indolence, lethargy and violation of orders disqualify him from any favourable equitable consideration.
33. The 2nd Respondent finally submitted that instant application should be dismissed with costs.
- 34.
- 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. "I have considered the application and the supporting affidavit thereto replying affidavit in response to the instant application, the rival submissions by the parties. I find fault in the lax manner that the applicants herein have conducted this suit and denounce the flagrant disregard for court orders in the harshest terms possible, however, I find that amendment of pleadings is necessary in order to ensure that the substantive suit is heard and determined on its merits, in any event that no prejudice would be occasioned on the respondents in a manner that cannot be compensated by costs and in any event the respondents would be enjoined to amend their defenses in response to the amended plaint. In *Ochieng and others v First National Bank of Chicago* Civil Appeal Number 147 of 1991 the Court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. The same is 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;
35. Accordingly, I find that the application dated 30th July, 2021 has merit and I allow it on the following term;
- i. that the applicant comply with the court orders on 30th June, 2021 and pay up court Kshs. 6,000/= as the 2nd defendant's costs of the day and an adjournment fee of Kshs. 1,000/= ;
- ii. That the applicant be and is hereby granted leave to amend its plaint in terms of the draft amended plaint annexed to its application;
- iii. That the draft amended plaint be and is hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling;
- iv. Upon service, the respondent be and is hereby at liberty to file and serve an amended defence within 14 days.
- (v) The applicant to file and serve a reply to the amended defence within 7 days of service.
- v. Mention on 28<sup>th</sup> September, 2023 to confirm compliance with Order 11 of the *Civil Procedure Rules* and to take directions; and
- (vii) Costs be in the cause.

**Dated, Signed and Delivered this 27th day of July, 2023**



.....

**J.K. SERGON**

**JUDGE**

**In the presence of:**

**C/Assistant - Rutoh**

**Onsare for 2<sup>nd</sup> Defendant**

**No Appearance for Kiletyen for Plaintiff**

