



Reddy & another v Humming Healthcare Ltd (In Receivership) & 2 others (Civil Suit 11 of 2015) [2023] KEHC 22905 (KLR) (Commercial and Tax) (29 September 2023) (Ruling)

Neutral citation: [2023] KEHC 22905 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 11 OF 2015
FG MUGAMBI, J
SEPTEMBER 29, 2023**

BETWEEN

ROHIT REDDY 1ST PLAINTIFF

DROPA SANDU 2ND PLAINTIFF

AND

HUMMING HEALTHCARE LTD (IN RECEIVERSHIP) 1ST DEFENDANT

**IAN SMALL & KERETO MARIMA (JOINT RECEIVERS & MANAGERS OF
HUMMING HEALTHCARE LTD) 2ND DEFENDANT**

KENYA COMMERCIAL BANK LTD 3RD DEFENDANT

RULING

Brief Facts

1. Before the court is the application dated May 23, 2022. It is brought under Order 8 Rule 3 of the [Civil Procedure Rules](#), sections 1A, 1B, 3A, &100 of the [Civil Procedure Act](#) and Article 159(2) of the [Constitution of Kenya](#). The applicants' main prayer is for leave to amend their Further Amended Plaintiff.
2. This dispute began way back in 2015 when the plaintiffs instituted a derivative suit against the defendants vide the plaint dated January 13, 2015. At the time, the plaintiff's sought to stop the intended liquidation of the 1st defendant and to recover the value of their shares. Simultaneously with the suit the plaintiffs filed an application for interim injunctive relief seeking to stop the liquidation of the company, pending the hearing and determination of the suit. The application was amended and was dated April 8, 2015 and filed in Court on April 18, 2015.



3. The application was heard and although a ruling date was set for August 2015, it was not delivered until after three (3) years, on January 23, 2018. By this time the status quo had completely changed, necessitating the further amendment of the plaint. The substratum of the suit, which was the company, had already been liquidated and the prayers in the amended plaint had therefore been overtaken by events. With the liquidation already complete, the further amendment of the plaint seeks to introduce new grounds showing the negligent actions of the 3rd defendant which.
4. In further defense of their application, the plaintiffs aver that the amendment would aid the Court in rendering justice. That even if the amendment introduced a new cause of action, it was within the Court's power to allow an amendment when it introduces a new cause of action as long as the new cause of action arises out of the same facts.
5. On matters limitation, the plaintiffs' response is that the Court has the power to grant leave for the amendment of pleadings even after the expiry of the relevant period of limitation.
6. The application was opposed by the 3rd defendant vide the Grounds of Opposition dated September 29, 2022. The 3rd defendant took issue with the plaintiff's application which sought to introduce a new cause of action that was time barred. The 3rd respondent states that the 3-year delay in the delivery of the ruling was not a valid explanation for the applicants to introduce a time barred claim. The applicants knew of the alleged negligence and ought to have stated it in their claim from the beginning. The 3rd defendant further submitted that a claim that was time barred could not be introduced by an amendment.
7. Counsel submitted that the 3rd defendant would be highly prejudiced by the amendment which would bring in new claims that were not part of the original pleadings.

Analysis

8. I have carefully considered all the pleadings, submissions and authorities cited by rival parties in support of their cases. The main issue for determination is whether the plaintiffs ought to be granted leave to amend their plaint as sought.
9. The general principle is that the Courts' discretion to amend pleadings at any stage of the proceedings is wide and unfettered except that it should be exercised judicially and upon the defined principles. The legal basis for this argument is the [Civil Procedure Act](#). Section, 100 provides that:

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.”
10. Order 8 rule 3 of the [Civil Procedure Rules](#) is also relevant and it is important to reproduce here rule 3(1), rule 3(2) and 3(5) which relate to the present facts.
 - “(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 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.
 - (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) ...
4. ...
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.”

11. There are also sufficient judicial pronouncements on the right of a party to amend pleadings and what ought to guide the Court where such amendments would result to introducing a new cause of action or a cause of action that is time barred. Some of the decisions which have been cited by the parties themselves include *Ochieng and Others V First National Bank of Chicago*, Civil Appeal Number 147 of 1991; *St Patrick's Hill School Ltd V Bank of Africa Kenya Ltd*, [2018] eKLR and *Elijah Kipngeno Arap Bii V Kenya Commercial Bank Limited*, [2013] eKLR.
12. A summary of the general principles arising from these decisions are to the effect that:
 - i. The power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - ii. The amendments should be timeously applied for;
 - iii. The power to amend can be exercised by the court at any stage of the proceedings;
 - iv. 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;
 - v. 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.
13. Against these crystalized principles and considering the evidence and arguments that parties have made, it is not in dispute that the applicants now seek to introduce a new cause of action based on negligence. The reason for the amendment is to me justified especially since the delay in determining the interim injunctive relief that would have preserved the substratum of the matter in the initial suit was not out of the applicants making.
14. I am not persuaded by the 3rd respondent that the application should be disallowed because the cause of action arose 9 years ago. The assertion by the 3rd respondent is based on section 4(2) of the *Limitation of Actions Act*, which provides that: an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued.
15. The above provision is not couched in mandatory terms. When read alongside the *Civil Procedure Rules*, I am certain that the language in the *Limitation of Actions Act* is deliberate and recognizes the exceptional circumstances where the Court may extend time for a belated action to be entertained by the Court.
16. I further note that the new cause of action relies substantially on similar facts as the previous cause of action which sought to stop the transfer the of the assets, stock or business of the 1st defendant.



The negligence claim arises as a consequence of the first cause of action where the liquidation of the 1st defendant renders the first cause of action mute.

17. Above all, I am of the view that the application for amendment is brought in good faith. In any case, the matter is still at pretrial stage and the 3rd respondent will have an opportunity to put in its defence to the new claim.

Determination

18. Guided by all the reasons that I have stated, I am satisfied that this is a justified suit for the exceptions contemplated under Order 8 rules 3(2) and 3(5). The application dated May 23, 2022 is therefore granted in the following terms: That:
- i. The applicants are hereby granted leave to amend the Amended Plaintiff dated the April 8, 2015 and to file a further list of documents and witnesses.
 - ii. Consequently, the draft Further Amended Plaintiff hereto annexed shall be deemed as duly filed after payment of the requisite fees, and shall be served upon the respondents in any case not later than 7 days from the date of this ruling.
 - iii. The respondents shall have leave to file and serve their amended pleadings and any substituted witness statements and documents within 14 days of service of the pleadings and trial documents by the plaintiffs. Parties shall appear before Court on a date to be fixed on priority to confirm compliance with Order 11 and these directions, in readiness for taking of a date.
 - iv. The costs of this application shall await the outcome of the hearing.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 29TH DAY OF SEPTEMBER 2023.

F. MUGAMBI

JUDGE

