



**Nzei & Co Advocates v Export Processing Zones Authority (Environment and Land
Miscellaneous Application E064 of 2022) [2023] KEELC 17970 (KLR) (30 May 2023) (Ruling)**

Neutral citation: [2023] KEELC 17970 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT AND LAND MISCELLANEOUS APPLICATION E064 OF 2022**

MD MWANGI, J

MAY 30, 2023

ARISING FROM

ENVIRONMENT AND LAND COURT AT NAIROBI

ELC CASE NO. 351 OF 2015

WATER RESOURCES MANAGEMENT AUTHORITY..... PLAINTIFF

-VERSUS-

ELC MISC NO E064 OF 2022

RULING 1

EXPORT PROCESSING ZONES AUTHORITY DEFENDANT

BETWEEN

NZEI & CO ADVOCATES ADVOCATE

AND

EXPORT PROCESSING ZONES AUTHORITY CLIENT

*(Being a reference from the Ruling on Taxation of the Advocates- Clients Bill of Costs dated
4th April, 2022 by Hon. Diana Orago (Deputy Registrar) dated 22nd November, 2022)*



RULING

(In respect of the Client's Application dated 2nd March, 2023 seeking leave to amend the reference by Chamber Summons dated 6th December, 2023 to raise further grounds)

Background

1. What is coming up for determination is the client's application dated March 2, 2023, seeking for orders that:
 - a. Leave be and is hereby granted to the firm of M/s Jamal Bake & Associates Advocates to come on record for the Respondent in place of the firm of m/s P.W. Wena & Co. Advocates and the Notice of Change of Advocates herein, be deemed duly filed for service on the outgoing counsel;
 - b. The respondent herein be granted leave to amend the reference by Chamber Summons dated December 6, 2023 to raise further grounds and adduce evidence.
 - c. Any orders that this court deems fit to make.
 - d. The costs of this application are provided for.
2. The application is premised on the grounds on the face of the application and further supported by the Affidavit of Winnie Sang, the Assistant Manager, Legal and Corporate Services of the client/applicant. In summary, the deponent avers that the client appointed the firm of Jamal Bake & Associates Advocates in place of its previous advocates who had filed the reference herein on its behalf. The client intends to amend the said application to raise further grounds and demonstrate how the taxed Bill of Costs unless set aside would lead to unjust enrichment on the part of the Advocate. The deponent states that the instruction fees as taxed are not commensurate to the work done.
3. The deponent stated that the instruction fees of Kshs.3,000,000/= awarded to the Advocate was high, excessive and unjust. He insisted that the Taxing Master erred in failing to consider that the instructions fees were not commensurate to work down since the matter did not go through the rigorous litigation. The Advocate only filed a Memorandum of Appearance, Preliminary objection, a replying affidavit and an application. That the matter was never set down for hearing and was eventually withdrawn in 2021.
4. Further the deponent pointed out that Items 42, 43, 47, 48 of the Bill of Costs dated April 4, 2022 should have been taxed off since the documents were filed online and there was no physical attendance at the registry and the need to make the 3 copies thereof was unnecessary.
5. It was an inadvertent omission on the part of their advocate on record who did not annex the draft Amended Chamber Summons in Support of the instant application.

Replying Affidavit

6. The application is opposed by the Advocate/ Respondent by way of a Replying Affidavit deponed on the April 6, 2023 and sworn by Benjamin M. Nzei.
7. The Advocate avers that the application by the Client is made in bad faith as the Applicant has not annexed a draft of the intended amendments it seeks to make. He states that he is likely to suffer



prejudice as he is not privy to the proposed amendments. He asserts that the intended amendments are speculative thus the orders sought are incapable of being granted at this point.

Court's directions

8. The Court directed that the application be canvassed by way of written submissions. The Advocate filed his submissions dated April 10, 2023. The Client did not file its submission.

Issues for Determination

9. Having perused the application herein together with the affidavits in support, the replying affidavit thereto, and the written submissions by the Advocate, I am of the view that the issues for determination are as follows; -
 - a. Whether the firm of M/s Jamal Bake & Associates Advocates should be granted leave to come on record for the Client.
 - b. Whether the Client should be granted leave to amend the reference.

Analysis and Determination

A. Whether the firm of M/s Jamal Bake & Associates Advocates should be granted leave to come on record for the Client.

10. Order 9, rule 9 of the [Civil Procedure Rules](#) provides as follows;

“When there is a change of Advocate, or when a party decides to act in person having previously engaged an Advocate, after judgment has been passed, such change or intention to act in person shall not be effected without an order of the court—

- (a) upon an application with notice to all the parties; or
 - (b) upon a consent filed between the outgoing Advocate and the proposed incoming Advocate or party intending to act in person as the case may be.”
11. In this particular case the, the Advocate filed an Advocate-Client Bill of Costs claiming legal fees. The Bill was taxed and a Ruling delivered on the November 22, 2022. The Client filed a Reference dated December 6, 2022 challenging the Taxing Master's decision through the firm of P.W. Wena & Co. Advocates. The said Reference is yet to be determined. Judgement has therefore not been entered under the provisions of the Advocates Remuneration Order.
 12. In the absence of a judgement, the provisions of Order 9 Rule 9 of the [Civil Procedure Rules](#) are therefore not applicable. All that is required is for the incoming Advocate to file and serve a Notice of Change of Advocates as provided for under Order 9 Rule 5 of the [Civil Procedure Rules](#). The firm of Jamal Bake & Co. Advocates is therefore properly on record having filed and served a Notice of Change of Advocates. It is not necessary for them to seek leave of the court.

B. Whether the Client should be granted leave to amend the reference by the Chamber Summons dated 6th December, 2023.

13. I will start by addressing the Advocate's contention. The Advocate contends that the client had not attached the draft intended amendments for the court to decide if the amendments are necessary. The client avers in its further affidavit that the omission to attach the draft was inadvertent. Although



leave to file a Further Affidavit had not been sought, the court will exercise its discretion and admit the same in the interest of justice.

14. Now turning to the amendments, the general power to amend pleadings draws from section 100 of the *Civil Procedure Act*. Parties to a suit have a right to amend their pleadings at any stage of the proceedings, with leave of the court. The leave is discretionary. However, this discretion being judicial discretion should be exercised judiciously for the interests of justice.
15. Order 8 rule 1 of the *Civil Procedure Rules* empowers the court, at any stage of the proceedings, on such terms as to costs or otherwise as may be just, and subject to the limitations stated therein to allow any party to amend his pleadings.
16. The clear and unambiguous import of the rule is that leave of the court is required for an amendment under Order 8 rule 1.
17. Order 8 rule 5 of the *Civil Procedure Rules* provides as follows: -

“For the purpose of determining 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 manner as it directs and on such terms as to costs or otherwise as are just.”
18. Section 2 of the *Civil Procedure Act* describes pleadings as follows:

“Pleading” includes a petition or summons, and the statements in writing of the claim or demand of any plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counter -claim of a defendant.”
19. The Black’s Law Dictionary on the other hand defines pleadings as:

“The formal allegations by the parties to a law suit of their respective claims and defences with the intended purpose of being to provide notice of what is to be expected at trial.”
20. As I pointed out on a different matter, there are varying opinions as to whether an application, like the one before me is a pleading for purposes of amendment.
21. Havelock J (as he then was) in the case of *Fredrick Mwangi Nyaga v Garam Investments and another* (2013) eKLR, was of the view that an application is not a pleading and cannot therefore be amended under the provisions of Order 8 of the Civil Procedure Rules. He, in dismissing the application to amend a Notice of Motion stated that,

“First of all, let me state that I do not consider a Notice of Motion application to be a pleading. As pointed out by Counsel, section 2 of the *Civil Procedure Act* defines ‘pleading’ as including a petition or summons and the statements in writing of the claim or demand of any Plaintiff, and of the defence of any defendant thereto, and of the reply of the Plaintiff to any defence or counter-claim of a defendant.”



22. The Court of Appeal has however expressed a different opinion. In the case of *Peter M. Echaria v Priscilla N. Echaria* (1998) eKLR, the Court of Appeal granted leave to amend a Notice of Motion application stating that;

“We agree that the Notice of Motion is defective but the defect is curable and for that reason, and Ms. Karua having applied for leave to amend the Notice of Motion, we grant leave for the Respondent to amend the Notice of Motion so as to comply with the requirements of rule 42 (1) of the rules of the court.”

23. In *National Bank (K) Limited v Mary S. Ndeto & James M. Mangoka T/A Jama Economic Printers & General Supplies* [2002] eKLR the court stated that;

“I feel certain that on the recognition of human frailties Section 100 was enacted and Section 3A was also enacted to avoid situations where injustice would be done to a party simply because of what could have resulted from no more than human mistakes. In all such cases what court has to look into is as to whether any prejudice has been occasioned.”

24. The client/ respondent herein has sought leave to amend the Chamber Summons filed by its previous advocates so as to raise more grounds in support of the prayers thereof. I am persuaded that the very reason why amendment is sought in this matter is to enable the court to determine the real question in controversy herein. I see no prejudice shall be suffered by the Advocate if the amendment is allowed.

25. I therefore allow the client’s application dated March 2, 2023.

26. Accordingly, this court makes the following orders: -

- a. The client/applicant is granted leave to amend its Chamber Summons dated December 6, 2022.
- b. The amended chamber summons to be filed and served within 7 days from the date of this ruling.
- c. The costs of the application shall abide the outcome of the Reference and the cross-reference.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF MAY 2023

M.D. MWANGI

JUDGE

In the virtual presence of:

Ms. Kwamboka for the Advocate.

Ms. Odhiambo holding brief for Mr. Bake for the client.

Court Assistant – Yvette.

M.D. MWANGI

JUDGE

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