



**National Oil Corporation of Kenya Ltd v Real Energy Limited (Civil Suit 144 of 2017)  
[2022] KEHC 38 (KLR) (Commercial and Tax) (14 January 2022) (Ruling)**

Neutral citation: [2022] KEHC 38 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL SUIT 144 OF 2017  
A MABEYA, J  
JANUARY 14, 2022**

**BETWEEN**

**NATIONAL OIL CORPORATION OF KENYA LTD ..... APPLICANT**

**AND**

**REAL ENERGY LIMITED ..... RESPONDENT**

**RULING**

1. Before Court is an application dated 8/4/2021. It was brought under order 8 Rule 3 of the Civil Procedure Rules and section 3A and 100 of the *Civil Procedure Act* and it sought leave to amend the plaint dated 3/4/2017. The annexed amended plaint dated 8/4/2021 was prayed to be deemed as duly filed and served upon payment of the requisite court filing fees.
2. The application was supported by the affidavit of Irene Lukoba, the Legal Officer of the applicant sworn on 8/4/2021. It was contended that this suit was stayed by this Court on 19/7/2018 pending the hearing and determination of ELC Appeal No. 54 of 2016 (“the ELC matter”). That the ELC matter was decided in May 2020 and that during the period when the suit was stayed, the respondent continued utilizing the applicant’s petrol station resulting in massive loss and damage on the applicant’s part of over Kshs. 42,498,743.46.
3. That it was thus necessary for the applicant to amend the said plaint and include the question of financial loss. That the respondent would not be prejudiced if the application was allowed.
4. The respondent opposed the application vide the affidavit of Rajab Ahmed Karume sworn on 28/6/2021. It was contended that though the suit was stayed as alleged, the respondent did not continue operating the petrol Station till May, 2020. That the applicant used the regulator EPRA to have the Station closed down in October, 2019. That the alleged financial loss sought to be introduced



- constituted a claim for mesne profits. That the same ought to have been brought through the ELC hence the application ought not to be allowed.
5. I have carefully considered the application, the affidavits of the respective parties and the law. The question is whether leave to amend should be granted.
  6. In *Tildesley v Harper (1878)*, 10 Ch.D. at p.296, it was stated that: -

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide, or that, by his blunder he has done some injury to his opponent which could not be compensated by costs or otherwise”
  7. In *St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] Eklr*, the court held: -

“The law as regards the grant of leave to amend are well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See *Eastern Bakery v Castellino (1958) EA 461*). The main principle is that an amendment should not be allowed if it causes injustice to the other side (see “Chitaley, P.BB”)
  8. In *Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A)*, it was held that courts will not permit an amendment that is inconsistent with the original pleading and entirely alters the nature of the defence or plaint.
  9. And in *Ochieng and Others v First National Bank of Chicago Civil Appeal Number 147 of 1991*, the Court of Appeal set out the following as some of the guiding principles for grant of leave to amend pleadings: -
    - 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.
  10. From the foregoing, it is trite that leave to amend is a discretionary remedy which should be exercised judiciously; an amendment of pleadings in general should be allowed before the final judgement is delivered and that it will only be denied if it will prejudice the other party.
  11. In the present case, the suit was at the case management stage when it was stayed by the Court. The amendments sought are alleged financial losses suffered by the applicant. That is not a claim that is inconsistent with the original claim. I do not agree with the respondent that the same should have been raised in the ELC matter.



12. In any event, I see no prejudice on the part of the respondent by allowing the amendment as pleaded. This is so because the respondent will have an opportunity to respond to the claim and defend the same accordingly.

13. In St. Patrick's Hill School Limited Case (supra) the court observed that: -

“In *Budding v. Murdoch* (1875) 1 Ch.D at p.42, it was stated that the court will not refuse to allow an amendment simply because it introduces a new issue or case; in *Raleigh v. Goschen*, (1898) 1 Ch.73 it was also postulated that the court would refuse to grant leave to amend where the amendment would change the action into one of substantially different character...Further, in the case of *Simonian v Jobar*, (1962) EA.336 (K.), the court approved amendment to a plaint which raised new causes of action because they were not of a different character from or foreign to or inconsistent with the original cause of action but stemmed from the same transaction.”

14. In view of the foregoing, I find the application to be merited and I allow the same as follows: -

- a) The amended plaint be filed and served within 7 days from the date of this ruling.
- b) The amended defence be filed and served within 14 days of service.
- c) A reply to the amended defence, if any, be filed and served within 7 days of service of the amended defence.
- d) The suit to be mentioned on 24/2/2022 before the Deputy Registrar for case management.
- e) The costs to the respondent in any event.

It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 14<sup>TH</sup> DAY OF JANUARY, 2022.**

**A. MABEYA, FCI Arb**

**JUDGE**

