



**Rivandell Limited v Kenya Airways Limited (Civil Case E305 of 2020)
[2022] KEHC 549 (KLR) (Commercial and Tax) (28 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 549 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE E305 OF 2020**

JN MULWA, J

APRIL 28, 2022

1. THE DEFENDANT WAS GRANTED LEAVE TO AMEND ITS DEFENCE IN TERMS OF THE DRAFT DEFENCE AND COUNTERCLAIM ANNEXED TO THIS APPLICATION.

2. THE AMENDED DEFENCE AND COUNTERCLAIM WOULD BE FILED AND SERVED WITHIN 14 DAYS FROM THE DATE OF RULING. THE PLAINTIFF WOULD HAVE CORRESPONDING LEAVE OF 14 DAYS TO FILE AND SERVE A REPLY TO THE DEFENCE AND DEFENCE TO COUNTERCLAIM IF IT SO DESIRES.

3 THE COSTS OF THE APPLICATION WOULD BE BORNE BY THE DEFENDANT/APPLICANT.

BETWEEN

RIVANDELL LIMITED PLAINTIFF

AND

KENYA AIRWAYS LIMITED DEFENDANT

RULING

1. By a Notice of Motion dated 20th January 2021 brought under Section IA, 1B & 3A of the *Civil Procedure Act*, Order 8 rule 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules* the Defendant/ applicant seeks leave of court to amend its Defence dated 12th October 2020 in the terms of the annexed draft amended Defence and Counterclaim and for the same to be subsequently deemed as duly filed and served.
2. The application is based on the grounds on its face and the Supporting Affidavit of Cornelius Mayende, the acting head of Materials Management in the Defendant Company.



3. The Defendant avers that being a public-listed company, it is comprised of different departments and any transaction undertaken by it has to be approved by all the relevant departments. Similarly, to get information on any transaction, feedback has to be provided by all the departments involved in the transaction. It is deponed that in the course of the above, additional information relevant to the instant suit was received after the Statement of Defence had been filed and the Defendant now wishes to amend the said defence by raising a Counterclaim based on the additional information obtained.
4. Further, the Defendant states that the proposed amendments will ensure effective adjudication of all the issues pertaining to the dispute between the parties, and does not introduce any new cause of action or alter the nature of the dispute between the parties. It is also averred that no prejudice will be occasioned to the Plaintiff if the proposed amendments are allowed. The Defendant further avers that this application has been filed without inordinate delay.
5. In opposition, the Plaintiff filed a Replying Affidavit sworn on 15th February 2021 by its Director Erick O. Obayi. He deposes that the Plaintiff will be prejudiced by the proposed amendment as it is aimed at introducing a new cause of action. He contends that the alleged additional information is irrelevant to this case and concern different issues which can only best be determined in fresh and independent proceedings. In its view, the application is only aimed at scuttling the expeditious determination of this case as it was filed when parties were proceeding to Pre-Trial Conference which had been scheduled for 27th January, 2021.
6. The application was canvassed by way of written submissions. I have considered the supporting and opposing affidavits and cited case law.
7. The Defendant/applicant submitted that the Counterclaim sought to be introduced by the proposed amendments arises from the same set of facts as those set out in the Plaintiff. It contended that at paragraph 5(e) of the Plaintiff, the Plaintiff claims a refund of USD 30,000 allegedly paid to an entity known as Honeywell for ordered Airplane parts/components, and that the only detail regarding this claim is found in a letter dated 3rd April 2020 from the Plaintiff's advocates to the Defendant explaining that the same arose from an order that the Defendant cancelled when the Plaintiff had already paid a deposit of USD 30,000. The Defendant submitted that its entire Counterclaim relates to the losses that it suffered as a result of the Plaintiff's actions which led to cancellation of the order. In its view, both the claim at paragraph 5(e) of the Plaintiff and the Defendant's proposed counterclaim will turn on one question namely; who, between the Plaintiff and the Defendant, breached the terms of the Service Order No. 671985 issued on 29th May 2019.
8. The Defendant maintained that filing a separate suit in the circumstances will lead to multiplicity of suits yet involving same parties, same subject matter, relying on same facts, same documentary evidence and witnesses, that will no doubt be a waste of precious judicial time and resources.
9. On the other hand, the Plaintiff submitted that the issues raised in the proposed Counterclaim arise from an independent contract which is not the subject of the instant suit and will entirely alter the nature and character of the suit and prejudice the Plaintiff's case. The Plaintiff contended that leave to amend pleadings cannot be granted where the amendments would change the action into one of substantially different character. Additionally, it was the Plaintiff's submission that the application is unmerited and only meant to waste the Court's valuable time hence should be dismissed.
10. The only issue for determination in my considered view is whether the Defendant should be granted leave to amend its Defence.



11. Amendments of pleadings are governed by Section 100 of the [Civil Procedure Act](#) which 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”.

12. Further, Order 8 Rule 3 provides as follows regarding amendment of pleadings leave of court: -

“[Order 8, rule 3] Amendment of pleadings with leave

- (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) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (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.”

13. Further, Order 8 Rule 5 stipulates that:

- “(1) 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.
- (2) This rule shall not have effect in relation to a judgment or order.”

14. From the above provisions, there is no doubt that it is at the discretion of the courts to allow amendment of pleadings at any stage of the proceedings if doing so will aid in determining the real issues between the



parties. Further, it is well settled that amendments should be freely allowed if they will not prejudice or cause injustice to the opposing party which is uncompensatable in costs. See *Eastern Bakery v Castelino* (1958) EA 461 and *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR.

15. In *Joseph Ochieng & 2 otherstrading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR the Court of Appeal laid down principles to consider when determining an application for leave to amend pleadings. The Court rendered itself thus;

“...powers of the court to allow amendment 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff’s claim as originally framed is unsupportable, an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a 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 an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.”

16. In the instant case, it is evident that the Counterclaim sought to be introduced by the amendment relates to the issue of supply of airplane parts and/or components by the Plaintiff which is central to the Plaintiff’s claim. While it may be true that it relates to a different contract for supply of the same items, it does not derogate from the original defence where the Defendant denied that the Plaintiff at all material times supplied the airplane parts within the agreed timelines or as per the agreed conditions. The court is not therefore persuaded by the Plaintiff’s argument that the proposed counterclaim will change the character of the case. Rather, the court is of the view that the amendments should be allowed to enable the parties put all the issues before the court, to enable the court determine the real questions in controversy. Further, and in any event, the Plaintiff has not demonstrated what prejudice it stands to suffer that cannot be compensated in costs if leave is granted. It is not enough to state. Evidence ought to be tendered to the courts satisfaction that the prejudice to be suffered cannot be compensated by an award of costs.
17. For the foregoing reasons, the court finds that the application dated 20th January 2021 is merited and is hereby allowed, upon the following conditions:
 - a. The Defendant is granted leave to amend its Defence in terms of the draft Defence and Counterclaim annexed to this application.



b. The Amended Defence and Counterclaim shall be filed and served within 14 days from the date of this ruling. The Plaintiff shall have corresponding leave of 14 days to file and serve a reply to the defence and defence to counterclaim if it so desires.

c. The costs of the application shall be borne by the Defendant/Applicant.

DATED AND DELIVERED AT NAIROBI THIS 28TH DAY OF APRIL 2022.

J.N.MULWA

JUDGE.

