



**Savani & another v Patel & 2 others (Civil Case 130 of 2014)  
[2022] KEHC 307 (KLR) (Commercial and Tax) (21 April 2022) (Ruling)**

Neutral citation: [2022] KEHC 307 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 130 OF 2014  
A MSHILA, J  
APRIL 21, 2022**

**BETWEEN**

**JITU TRIBHOVANBHAI SAVANI ..... 1<sup>ST</sup> PLAINTIFF**

**RAJENDRA TRIBHOVAN HANSRAJ SAVANI ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**ESTATE OF BHAGWANJI TRIBHOVANBHAI PATEL ..... 1<sup>ST</sup> DEFENDANT**

**MANJULA BHAGWANJI TRBHOVAN PATEL ..... 2<sup>ND</sup> DEFENDANT**

**PARAG BHAGWANJIBHAI SAVANI ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Applicant filed a Notice of Motion dated 29<sup>th</sup> May 2020 under Article 50 of *the Constitution* of Kenya, Sections 1A, 1B, 3 & 3A of the *Civil Procedure Act* and Order 8 Rule 3 of the *Civil Procedure Rules*; The Application was supported by the sworn Affidavit of Jitu Tribhovanbhai Savani who sought for orders that;
  - a. The Plaintiffs be granted leave to amend their Plaint as set out in the Draft Further Amended Plaint herein annexed.
  - b. The Court to grant leave to the Plaintiffs to substitute their respective witness statements as set out in the intended substituted witness statements of Jitu Tribhovanbhai Savani and Rajendra Tribhovan Hansraj Savani herein annexed.
  - c. The Draft Amended Plaint and the substituted witness statements be deemed as duly filed and served.
  - d. The costs of and incidental to this Application abide the result of the said Appeal.



2. The Plaintiffs had filed a Notice of Motion dated 15<sup>th</sup> November 2018 seeking to amend the Plaintiff and substitute witness statements to which the Court, vide its ruling dated and delivered on 29<sup>th</sup> April 2020 advised the Applicant to incorporate into the intended amended Plaintiff, certain well timed directions from the Court, which the Applicant has now done and wishes the Court to consider in this Application.
3. The plaintiff stated since the filing of the suit in 2014, circumstances of the suit have drastically changed and there is need for the pleadings to reflect these material changes.
4. In addition, the further amended Plaintiff and substituted witness statements shall not in any way prejudice the Defendants but will enable the court to determine the real question or issues raised by the proceedings.
5. The Respondents/Defendants responded to the Application vide a Replying Affidavit dated 12<sup>th</sup> June 2020 and stated that the Plaintiffs have elected to file another Application for amendment and substitution of witness statements on exactly the same grounds save that there are new factual allegations sought to be introduced in the witness statements. The 3<sup>rd</sup> amendment is an abuse of the process of the court.
6. The parties were directed to canvass the application by filing and exchanging written submissions. Hereunder is a summary of the parties rival submissions;

#### **Applicant's Case**

7. The Plaintiffs submitted that the intended amendments to the Plaintiff are lawful, reasonable and necessary. The intended Further Amended Plaintiff does not depart from the Plaintiff on record in any material way, rather the additions are mere expansions and explanations of the existing paragraphs.
8. The amendments to the Plaintiff and substitution of the witnesses' statements is not just necessary but of tremendous importance to ensure that the Plaintiffs put their proper dispute before this court, to deny them the orders sought would infringe on their right to be heard.
9. The Plaintiffs urged the Court to be guided by the Nairobi Court of Appeal in Civil Appeal No 11 of 2013, *Sanyu International Limited V Oriental Commercial Bank Limited* [2017] eKLR where the court stated that all amendments should be freely allowed and at any stage of the proceedings.
10. It was the Plaintiffs' submission that, in the unlikely circumstance that the intended amendments to the Plaintiff are overruled, the Court should allow the substituted witness statements, it is a fundamental principle in law that a party should be allowed to write his own statement, the adversaries would have an opportunity to interrogate the veracity of those statements at cross examination.
11. The amendments to the Plaintiff and substitution of the witness statements are sought because there have been new developments since the matter was filed, (these are particularized on the affidavit supporting the application) for instance, the trustees summary conclusion on how the family wealth, held under 'Jacob Trust' was intended to be held and divided, came after the filing of the Plaintiff, and this information, sought to be added through the amendment pursued, is of great significance as it would help the court determine the dispute between parties.

#### **Respondent's Case**

12. The Respondent submitted that by the time, the Plaintiffs filed the 3<sup>rd</sup> Amendment Application, the 2<sup>nd</sup> Amendment Application had not been determined as the Plaintiffs had generously been given an



opportunity to rework the proposed draft of the Re-Amended Plaintiff. The Court was quite clear that it had not made a final decision on the 2<sup>nd</sup> Amendment Application.

13. Yet before such final determination, the Plaintiffs filed the 3<sup>rd</sup> Amendment Application seeking the same relief. Until and when the 2<sup>nd</sup> Amendment Application was disposed of, it was an abuse of process of the Court to file a third one.
14. By operation of the doctrine of issue estoppel, the Plaintiffs are precluded from challenging the directions by Nzioka J. by way of the 3<sup>rd</sup> Amendment Application or all. The averments of JITU's 2<sup>nd</sup> Affidavit are therefore wholly misguided. The doctrine of issue estoppel and its operation have been affirmed in several decisions of the Court of Appeal including *Trade Bank Limited V L Z Engineering Construction Limited* [2001] E.A.266, 2000 IRA 266;
15. The respondents urged the court to dismiss the application with costs.

### Issues for Determination

16. After considering the Application, Response and the written submissions by the parties; the Court has framed only one issue for determination;
  - a. Whether the Plaintiffs should be granted leave to amend their Plaintiff a third (3<sup>rd</sup>) time and to substitute their respective witness statements?

### Analysis

Whether the Plaintiffs should be granted leave to amend their Plaintiff a third (3<sup>rd</sup>) time and to substitute their respective witness statements?

17. The power given to court to grant or refuse leave to amend pleadings is discretionary and like all discretionary powers, must be exercised so as to do what is just in the particular case. In *Bosire Ogero v Royal Media Services* [2015] eKLR, it was held:

“In *Bullen Leak and Jacobs Precedents of Pleadings*, 12<sup>th</sup> Edition page 127 titled “amendment with leave –time to amend “it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise.”

18. It was the Plaintiff's case that the intended amendments to the Plaintiff are lawful, reasonable and necessary. The intended Further Amended Plaintiff did not depart from the Plaintiff on record in any material way, rather the additions are mere expansions and explanations of the existing paragraphs. The amendments to the Plaintiff and substitution of the witnesses' statements is not just necessary but of tremendous importance to ensure that the Plaintiffs put their proper dispute before this court, to deny them the orders sought would infringe on their right to be heard.
19. The Respondents opposed the proposed amendment on the basis that the Plaintiffs filed the 3<sup>rd</sup> Amendment Application, the 2<sup>nd</sup> Amendment Application had not been determined as the Plaintiffs had been generously given an opportunity to rework the proposed draft of the Re-Amended Plaintiff



20. Further, the Respondents stated that by operation of the doctrine of issue estoppel the Plaintiffs are precluded from challenging the directions by Nzioka J. by way of the 3<sup>rd</sup> Amendment Application or at all.
21. The applicable law is found under the provisions of Order 8 Rule 5(1) of Civil Procedure Rules provides: -
- “(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.”
22. The Court in *Irene Kemunto Ongori v Housing Finance Company of Kenya Limited* [2018] eKLR relied on the case of *Central Bank of Kenya Limited vs. Trust Bank Limited* [2000] 2 E.A 365 at page 368; where the Court stated as follows: -
- “It is also trite law that as far as possible a litigant should plead the whole of his claim which he is entitled to make in respect to his cause of action. Otherwise, the court will not later permit to re-open the same subject of litigation. (See Order 11, Rule 1 of the Civil Procedure Rules), only because they have from negligence, inadvertence or accident omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obviate this. Hence the guiding principle in applications for leave to amend, that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendments or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.”
23. This Court has read the ruling delivered by Nzioka LJ. where the Applicants were given directions to file their intended amendments within 14 days and the Respondents were equally given time to respond.
24. The Plaintiffs argued that the amendments sought are as a result of new developments since the matter was filed for instance the trustee’s summary conclusion on how the family wealth was intended to be held and divided is of great significance as it would help the court determine the dispute between the parties.
25. The above mentioned new developments are similar to the grounds relied upon by the Applicants in their Notice of Motion dated 15<sup>th</sup> November 2018 and which Application has already determined by Nzioka LJ and directions given. From the proceedings of the court, there is no indication that the Applicants complied with the said court directions. The Ruling was delivered on 29<sup>th</sup> April 2020, on 21<sup>st</sup> July 2020 the parties did not appear in court and on 6<sup>th</sup> October 2020 the Advocate for the Plaintiffs stated that the purpose for the mention was for directions for the Applicant’s present Application dated 29<sup>th</sup> May 2020.
26. This is clearly an abuse of the court process and as a result the issue estoppel arises. In the case of *Serab Njeri Mwobi v John Kimani Njoroge* [2013] eKLR, the Court of Appeal held that:
- “The doctrine of estoppel operates as a principle of law which precludes a person from asserting something contrary to what is implied by a previous action or statement of that person.”



27. In light of the above, the Applicants' Application seeking a 3<sup>rd</sup> Amendment of the Plaint implies that the 2<sup>nd</sup> Amendment had been effected yet there is no indication that the same was effected. The Applicants are thus estopped from challenging the directions of the court by way of this 3<sup>rd</sup> Amendment Application.
28. This court is satisfied that the Applicants' Application is unmerited as the same amounts to an abuse of the court process.

### **Findings And Determination**

29. For the foregoing reasons this court makes the following findings and determinations;
- i. This court finds the application devoid of merit and is an abuse of the court process;
  - ii. The application is dismissed with costs;
  - iii. The applicant shall bear the costs.

Orders Accordingly.

**DATED, SIGNED AND DELIVERED ELECTRONICALLY AT NAIROBI THIS 21<sup>ST</sup> DAY OF APRIL, 2022.**

**HON. A. MSHILA**

**JUDGE**

In the presence of;

