



Balaji (EPZ) Limited v Nairobi City Water & Sewerage Company Limited (Civil Suit 258 of 2018) [2022] KEHC 11160 (KLR) (Civ) (31 May 2022) (Ruling)

Neutral citation: [2022] KEHC 11160 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CIVIL
CIVIL SUIT 258 OF 2018**

JK SERGON, J

MAY 31, 2022

BETWEEN

BALAJI (EPZ) LIMITED APPLICANT

AND

NAIROBI CITY WATER & SEWERAGE COMPANY LIMITED .. RESPONDENT

RULING

1. Before this court for determination is the Notice of Motion dated March 16, 2021 brought by the plaintiff/applicant and supported by the grounds set out in its body and the facts stated in the affidavit of Byju Kuttan Nair. The applicant sought for the orders hereunder:
 - i. That the plaintiff be allowed to amend their amended plaint dated February 5, 2019 and filed in this honourable court on the same date as per the draft annexed thereto.
 - ii. That the amended plaint annexed hereto be treated as the plaintiff's amended plaint and that the same be deemed as having been duly filed and served.
 - iii. That the defendant be at liberty to amend their defence within 14 days thereafter if they so wish.
 - iv. That costs of the application be costs in the cause.
2. To oppose the Motion, the defendant/respondent put in the following seven (7) grounds in its Grounds of Opposition dated March 30, 2021:
 - i. The application is misconceived, bad in law and amounts to an abuse of the court process.
 - ii. The proposed amendments raise new facts aimed at altering the cause of action in this matter contrary to Order 2, Rule 6(1) of the *Civil Procedure Rules*.



- iii. It is the defendant's legitimate expectation that litigation should come to an end and to allow this application amounts to prolonging the matter which is contrary to the overriding objectives in the Civil Procedure Act and the Judicial Process as a whole which advocates for expeditious disposal of suits.
 - iv. The proposed amendments made by the plaintiff will not enable the court to determine the real question in controversy but are rather aimed at defeating the efficient determination of the suit herein.
 - v. The application is made in bad faith and is grossly incompetent since there has been an inordinate and unexplained delay in making the application thus the applicant is undeserving of the orders sought.
 - vi. As both parties have closed their respective cases, filed their submissions and are awaiting judgment, the proposed amendments will cause the defendant great prejudice which cannot be compensated by way of costs.
 - vii. The application as filed and the prayers sought therein are unmeritorious and ought to be dismissed with costs to the defendant.
3. The parties were directed to file and exchange written submissions on the Motion.
 4. I have considered the grounds laid out on the face of the Motion, the facts deponed in the supporting affidavit; the Grounds of Opposition; and the competing written submissions and authorities cited therein.
 5. Before I proceed to consider the merits of the Motion, I will set out a brief background of the matter.
 6. At the onset, the applicant filed the present suit against the respondent by way of the plaint dated October 28, 2018 and amended on February 5, 2019 and sought for various reliefs in the form of general and punitive damages and a declaratory order, arising out of a claim for breach of contract.
 7. The claim was defended by the respondent who filed a statement of defence and counterclaim on February 19, 2019, to which the applicant rejoined with a reply to defence and defence to counterclaim filed on April 19, 2019.
 8. Going by the record, the matter proceeded for hearing, with both parties calling evidence.
 9. Upon close of the hearing, the parties put in their respective written submissions in respect to the suit.
 10. Going by the record, the parties subsequently attempted to have the matter settled out of court to no avail. Soon thereafter, the instant Motion was filed by the applicant.
 11. Returning to the merits of the Motion, Byju Kuttan Nair states in his supporting affidavit that following the filing of the suit, the applicant discovered that the respondent had unlawfully and wrongfully disconnected its water supply for a period of two (2) days, thereby resulting in immense loss to the applicant and which the applicant is desirous of recovering by way of special damages, and hence the request for leave to further amend the amended plaint.
 12. The deponent states that the proposed amendments arise substantially out of the same facts of the case.
 13. In its submissions, the applicant cites *inter alia*, the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR in which the Court of Appeal rendered itself thus:



“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed *Civil Procedure Rules* under which the application was brought was summarized by this Court, quoting from *Bullen and Leake & Jacob's Precedents of Pleading* - 12th Edition, in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that 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 the proposed amendment must not be immaterial or useless or merely technical; 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.”

14. The applicant is also of the view that there has been no inordinate delay in bringing the instant Motion.
15. In retort, the respondent reiterates the grounds raised in its Grounds of Opposition that litigation must come to an end and that the application for leave to further amend the plaint has been brought too late in the day which is a clear indication of indolence on the part of the applicant and cites inter alia, the judicial authority of *Mowa Publishers Limited & another v AG & another* [1991] KLR 46 where the court held that:
 - “3. Where the court is moved by any of the litigants, the applicant must show either:
 - a) That the amendment sought is necessary for the purpose of determining the real question in controversy between the parties; or
 - b) That there is an error or defect in the proceeding which need to be corrected by the amendment sought.
 6. Even when an application to amend pleadings is made at the right stage, the court has a duty to ensure that it does not allow amendments to the prejudice of the opposite party.
 7. In law, a litigant who brings an application for leave at a late stage, has a duty to the court to show that the court should exercise its discretion in his favour notwithstanding the delay.
 8. The applicants in this case did not offer any explanation as to the reasons for the delay in presenting the application and they could not therefore expect the indulgence of the court.”
16. The respondent is therefore of the view that this court ought to decline to grant the prayers being sought in the instant Motion.
17. The law on amendments is well settled. Under section 100 of the *Civil Procedure Act*, this court has general power to amend pleadings to correct any defect or error in a suit at any stage of the proceedings on terms as to costs or otherwise as it may deem just and all amendments should be made for the purpose of determining the real question or issues raised by or depending on the proceedings. The above provision is echoed by Order 8, Rules 3 and 5 of the *Civil Procedure Rules*, 2010.
18. To add on, Order 8, Rule 3 (1) of the said Rules grants the court power to allow an amendment of pleadings at any stage of the proceedings as and when it deems fit. I also consider it necessary to mention Order 8, Rule 3 (5) which provides the following:



“An amendment may be allowed under subrule (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.”

19. It is clear from the foregoing that the courts have wide and unfettered discretion to allow the amendment of pleadings at any stage of the proceedings before judgment is entered.
20. A vast array of judicial precedents have addressed the subject of amendment of pleadings. For now, I shall cite the case of *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others*, CA No. 94 of 2003 [2014] eKLR whose finding is echoed in some of the authorities cited by the parties, where the Court of Appeal considered the principles stated in *Mulla, The Code of Civil Procedure*, 18th Ed, Vol 2 at pages 1751-1752 were adopted as follows:
 - i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
 - ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
 - iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
 - iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
 - v. Amendment of a claim or relief barred by time should not be allowed;
 - vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
 - vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
 - viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
 - ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”
21. Upon my perusal of the draft further amended plaint annexed to the Motion, it is apparent that the proposed amendments relate to the inclusion of a prayer for special damages indicating the losses suffered by the applicant following the alleged disconnection of water supply by the respondent.
22. Upon my further perusal of the pleadings and record as a whole, it is apparent that the sought amendments relate to the cause of action under which the claim was brought at the onset and there is nothing to indicate that the proposed amendments will introduce a fresh cause of action, as claimed by the respondent.
23. From my understanding of the averments made by the applicant, the losses suffered and which have triggered the instant Motion likely occurred following the initial amendments to the original plaint.
24. I am therefore of the view that the amendments sought will assist the court in fully ascertaining the issues in dispute which will in turn assist in the proper determination of the dispute.



- 25. Moreover, while the plaintiff stated in its Grounds of Opposition that it stands to be prejudiced if the Motion is granted, it did not demonstrate the manner in which such prejudice will occur or show that any prejudice suffered cannot adequately be compensated through an award of costs, especially since it is apparent that the amendments are limited to the prayer for special damages. In any event, I am satisfied that the respondent will have every opportunity to amend its pleadings accordingly to challenge the averments and evidence tendered by the applicant.
- 26. Upon considering the competing interests of the parties and in the absence of any credible evidence to indicate that the instant Motion has been brought in bad faith, I find that notwithstanding the delay in bringing the same, it would be in the interest of substantive justice to allow the prayer for amendment sought.
- 27. In the end, the Motion dated March 16, 2021 is allowed giving rise to issuance of the following orders:
 - i. The plaintiff is granted leave to amend, file and serve its further amended plaint within 7 days from the date hereof.
 - ii. The defendant to thereafter amend, file and serve its statement of defence and counterclaim if need be, within 7 days from the date of service of further amended plaint.
 - iii. Costs of the application to abide the outcome of the suit.

DATED, SIGNED AND DELIVERED ONLINE VIA MICROSOFT TEAMS AT NAIROBI THIS 31ST DAY OF MAY, 2022.

.....
J. K. SERGON
JUDGE

In the presence of:
 for the Plaintiff/Applicant
 for the Defendant/Respondent

