



**Bank of Africa Limited v Put Sarajevo General Engineering Company & 2 others (Civil Case 51 of 2017) [2022] KEHC 10067 (KLR) (Commercial and Tax) (22 July 2022) (Ruling)**

Neutral citation: [2022] KEHC 10067 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE 51 OF 2017**

**EC MWITA, J**

**JULY 22, 2022**

**BETWEEN**

**BANK OF AFRICA LIMITED ..... PLAINTIFF**

**AND**

**PUT SARAJEVO GENERAL ENGINEERING COMPANY ..... 1<sup>ST</sup> DEFENDANT**

**ESED BECIREVIC ..... 2<sup>ND</sup> DEFENDANT**

**ADNAN TERZIC ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The 1<sup>st</sup> Defendant, Put Sarajevo General Engineering Company (Sarajevo), took out motion on notice dated 30<sup>th</sup> September, 2021, under section 100 of the *Civil Procedure Act* and Orders 8 rules 3 and 5 and 51 rule 1 of the Civil Procedure Rules, seeking Leave to further amend its amended defence dated 23<sup>rd</sup> September 2019 in terms of the Draft Further Amended Defence attached to the application. The amendment is mainly to introduce another party to the suit.
2. The application is premised on the grounds on its face, the affidavit sworn by Jason Savonge on 30<sup>th</sup> September 2021 and written submissions dated 28<sup>th</sup> February 2022. Sarajevo stated that it had discovered additional facts which are relevant and necessary to establish that it is wrongly enjoined in this suit and therefore the plaintiff, Bank of Africa Ltd (Bank of Africa) has no cause of action against it. Sarajevo asserts that it is in the interest of justice that leave be granted to further amend the defence and that the Bank of Africa will not suffer any prejudice.
3. According to Sarajevo, it was originally incorporated in the former Republic of Yugoslavia and on 21<sup>st</sup> May 1980, it was issued with a Certificate of Compliance under No. F 21/80 by the Registrar



- of Companies in order to carry on business in Kenya with Rade Kulic, Zarko Slijepcevic and Mura Hadzimusic as the duly registered directors.
4. Sarajevo stated that it later learnt that another company with a similar name existed but with a different incorporation registration number, namely: C. No. 98786. The company had initially been registered in Kenya as Put Africa Limited on 5<sup>th</sup> June 2002 but later fraudulently and/ or illegally changed its name to Put Sarajevo General Engineering Company Limited on 23<sup>rd</sup> March 2009 with different directors, namely; the 2<sup>nd</sup> defendant Esed Becirevic (Esed), Ramo Gagula (Ramo) and Gradevinsko Preduzece. The new company entered into a loan agreement with Bank of Africa on 15<sup>th</sup> September 2014, which is the subject of this suit.
  5. Sarajevo asserted that it had discovered that Terzic and other unknown persons appointed Esed and Ramo as directors of that company with the mandate to open and operate a bank account with the Bank of Africa for purposes of the loan facility. Sarajevo maintains that Esed and Ramo in their capacity as directors of that company had admitted the debt owed to the Bank of Africa, thus the reason why it has become necessary to further amend the amended defence.
  6. Sarajevo relied on *Eastern Bakery v Castelino* [1958] EA 461 on the principles for consideration in determining an application for amendment of pleadings. According to Sarajevo, the proposed amendments are necessary as they touch on the issue of whether there was a valid loan facility agreement between the parties to this suit. Sarajevo maintained that Bank of Africa will not suffer any prejudice because it will have an opportunity to file a reply to the further amended defence.
  7. Sarajevo further relied on *Mwangi S Kimenyi v Attorney General & another* [2014] eKLR for the argument that Bank of Africa had not demonstrated the prejudice it would suffer if the leave sought was granted.

### **Bank of Africa's Response**

8. Bank of Africa filed a replying affidavit sworn by Victor Keitany, its senior recoveries officer, on 27<sup>th</sup> January 2022, and written submissions dated 21<sup>st</sup> March, 2022. It was stated that according to the account opening forms and supporting documents, it was Sarajevo that opened the account; that there is no account opened in the new Company with the registration number C. 98786; that the Board Resolutions to Borrow dated 19<sup>th</sup> December 2012 and 23<sup>rd</sup> October 2014 do not indicate the registration number C. 98786; that the allegations that a company under C. No. 98786 fraudulently opened an account with it Bank of Africa through Ramo was not true and that letters of admission of the debt signed by Esed and Ramo do not show that the company admitting the debt was registered under C. No. 98786.
9. Bank of Africa asserted that allowing the proposed amendment to join a company with a similar name but different registration number would be perpetuating an illegality because it is illegal to register more than one company with similar names. Relying on sections 57 and 58 of the *Companies Act*, No. 17 of 2015, Bank of Africa asserted that following the discovery of a company with a similar name, Sarajevo ought to have applied to the Registrar of Companies to direct the other company to change its name, or move the Court through judicial review if the Registrar failed to act.
10. Bank of Africa relied *Kassam v Bank of Baroda (Kenya) Ltd* [2002] eKLR, to argue that the application should not be allowed as it is an abuse of the court process and seeks to delay the prosecution of the suit. Bank of Africa faulted Sarajevo for failure to effect the further amendments when the first amendment was done. Bank of Africa asserted that it was being prejudiced by the delay in the hearing of the suit as the debt remains unpaid.



11. Bank of Africa further asserted that its reputation and goodwill had been negatively affected by this never-ending suit. It relied on *Bank of Africa Ltd v Put Sarajevo Pan African Insurance Co. Limited* [2015] eKLR to contend that it has legitimate expectation that the litigation should come to an end.
12. Relying on *Lawrence Owino Omondi v Kenneth Inea Muyera* [2017] eKLR, Bank of Africa argued that the proposed amendments will cause prejudice as they depart from the original case and introduce a totally new cause of action that would be difficult to respond to. Bank of Africa asserted, in particular, that the issue of which company between Sarajevo and the new company is the properly registered company is a new cause of action whose jurisdiction is not with this Court but the Judicial Review Court.
13. Bank of Africa maintained that if the proposed amendments were allowed, there would be serious misjoinder in that the proposed Defendant is neither a necessary nor a proper party to this suit and that the ultimate order or decree in the suit can be enforced without the proposed Defendant. Reliance was placed on *Technomatic Limited t/a Promopack Company v Kenya Wine Agencies Limited & another* [2014] eKLR.
14. The court was urged to dismiss the application with costs.

### **Determination**

15. I have considered the application, the response and decisions relied on by parties. Sarajevo seeks leave to further amend the amended defence by adding another party to the suit. The application was opposed by Bank of Africa on grounds that it was not made in good faith and that the amendments sought would be prejudicial and delay quick disposal of the suit.
16. Whether or not to grant leave to amend or further amend is at the discretion of the court. Order 8 rule 3(1) gives the court wide discretion to allow amendment to pleading on such terms as to costs or otherwise as may be just and in such manner as it may direct. The time when an amendment should be allowed is not restricted. It should however be within reasonable time and before a party closes his case.
17. In *National Bank of Kenya Limited v Classic Furniture Mart Limited & 2 others* [2015] eKLR, the court stated that parties should be allowed to make such amendments as may be necessary for determining the real question in controversy to avoid a multiplicity of suits, provided there is no undue delay, no vested interest or accrued legal right is affected and there is no injustice to the other party.
18. In *East Bakery v Castelino* [1958] E A 461, it was held that an amendments sought before the hearing should be freely allowed, if they can be made without injustice to the other side. The court emphasized that there is no injustice if the other side can be compensated by costs.
19. On the same principle, Brett, M.R observed in *Clarapede v Commercial Union Association* (883) WLR 262, that however negligent or careless a party may have been in the first omission, and however late the proposed amendment, the amendment should be allowed if it can be done without injustice to the other side. There would be no injustice if the other side can be compensated by costs.
20. The principles enunciated above, point out that the court should be minded to freely allow an application to amend if the proposed amendment will not cause injustice to the other party where if any such injustice can be compensated by costs. This is the cardinal principle of the right to a fair hearing now embedded in our Constitution. However, an amendment should not be allowed where a distinct cause of action is to be substituted for another, or to change by means of amendment, the subject matter of the suit.



21. I have perused the draft further amended defence, the supporting affidavit and the response thereto. There is an argument that the proposed amendment is intended to introduce a distinct cause of action, a departure from the original cause of action. I do not agree. In my view, the proposed amendment will assist the court determine the real dispute before the court and therefore who took the loan is the real issue before the court and the amendment is necessary for fair determination of this suit.
22. There is also no argument that the amendments with cause injustice the other side that cannot be compensated by costs. The argument that the proposed amendment is intended to delay the case seems to ignore the fact that the law allows a party may amend his pleadings at any time on terms as the court may consider appropriate.
23. There is again no denial that this matter has not been heard and, therefore, there can be no argument that the application for amendment has been brought without undue delay. Sarajevo stated clearly that it had discovered facts that would assist the court in fairly adjudicating this matter.
24. The contention by Bank of Africa that allowing the amendment would cause prejudice by adding another party is not a sufficient reason for disallowing the amendment. This is because these party sought to be added is a necessary party more so where it is alleged that the name is similar to the applicant and, therefore, the amendment would assist the court in resolving the issues in dispute at once.
25. Taking into account the totality of the circumstances of this case, and the reasons why the law allows amendments at any stage before close of the party's case, it is the view of this court that the application is merited and is for allowing.
26. Consequently, the application dated 30<sup>th</sup> September October 2021 is allowed and the court makes the following orders:
  1. Leave is granted to Put Sarajevo General Engineering Company to further amended the amended defence.
  2. The further amended defence be filed and served within 14 days from the date hereof.
  3. The respondents are granted leave to file a reply to the further defence (if need be) within 14 days after service of the further amended defence.
  4. Costs of the application be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 22ND DAY OF JULY 2022**

**E C MWITA**

**JUDGE**

