



Munyao & another v Standard Chartered Bank (K) Ltd (Civil Case 40 of 2017) [2022] KEHC 11837 (KLR) (12 August 2022) (Ruling)

Neutral citation: [2022] KEHC 11837 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL CASE 40 OF 2017
OA SEWE, J
AUGUST 12, 2022**

BETWEEN

PATRICK MUNYAO 1ST PLAINTIFF

KENYA HAULAGE AGENCY LTD 2ND PLAINTIFF

AND

STANDARD CHARTERED BANK (K) LTD DEFENDANT

RULING

1. Before the court for determination is the plaintiff's Notice of Motion dated June 7, 2021. It was filed pursuant to article 159 of the Constitution of Kenya, 2010, sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3, 5, 7 and 8 of the Civil Procedure Rules, 2010 for the following prayers:
 - (a) That the court be pleased to grant leave to the plaintiffs to amend the Plaint dated April 6, 2017 as per the draft Amended Plaint dated April 12, 2021 annexed to the supporting affidavit and marked Annexure "PM-1";
 - (b) That upon the grant of prayer [a] above, the court be pleased to narrow down the issues for determination in the suit to the issue of what sums of money are payable to the defendant on account of the loan accounts and list the matter for hearing on priority basis;
 - (c) That the costs of the application be provided for.
2. The application was premised on the grounds that one of the issues raised in this suit concerning the service of statutory notices was settled vide the ruling delivered on November 17, 2017; and that the only issue remaining is the amount due to the defendant from the plaintiffs with respect to the loan accounts. It was further the contention of the applicant that there have been further developments after the filing of the suit, including the exchange of letters and emails in connection with the amounts



payable; and it is therefore necessary that the plaintiffs be granted leave to amend their Plaint so as to take into account those developments.

3. The application was supported by the affidavit sworn by Patrick Munyao, the 1st plaintiff herein, to which he annexed the draft Amended Plaint for the court's consideration. He reiterated the grounds aforementioned and added that, as the suit is yet to be heard, the defendant will suffer no prejudice if the prayers sought are granted. He further averred that the amendment sought will enable the court to effectively and conclusively deal with and determine all issues in dispute.
4. The defendant opposed the application and filed a replying affidavit sworn by one of its managers, Boniface Machuki, who averred that the application is prejudicial to the defendant in so far as it seeks to rely on correspondence exchanged between the parties for purposes of out of court settlement negotiations, such as Annexure "BM1". He further averred that the plaintiffs have not come to court with clean hands since they have not disclosed that there were further discussions on the need for the defendant to exercise leniency on them by allowing them to pay certain amounts. At paragraph 12 of the Replying Affidavit, the defendant contended that the proposed amendments seek to change the cause of action into one of a substantially different character, which could more conveniently be made the subject of a fresh cause of action. The defendant also took issue with the fact that the application for amendment has been brought after a delay of 4 years, and urged the court to find that the delay is not only unreasonable but also inexcusable.
5. Pursuant to the directions given herein on November 15, 2021, the application was canvassed by way of written submissions. Accordingly, Mr. Gikandi for the plaintiff filed his written submissions on February 1, 2022 and relied on Order 8 Rule 5 of the *Civil Procedure Rules* and the case of *Diamond Trust Bank v Tchui Data Limited & 3 others* [2006] eKLR, among others, to underscore his submission that, however late an amendment is sought to be made, it should be allowed if made in good faith provided costs can compensate the other side. Mr. Gikandi submitted that although prejudice was alleged by the defendant, no proof thereof was availed. He relied on *D. Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority* [2017] eKLR for the proposition that a party alleging prejudice must prove it. He therefore invited the court to find merit in the Notice of Motion dated June 7, 2021 and to allow it as prayed.
6. Mr. Muriithi on his part proposed a single issue for determination in his written submissions filed on February 16, 2022, and that is, whether the plaintiffs are deserving of the orders sought by them. He relied on *Eastern Bakery v Castelino* [1958] EA 461 and Civil Appeal No. 147 of 1991: *Ochieng & others v First National Bank of Chicago* for the applicable principles. He submitted that great prejudice would be occasioned should the "without prejudice" correspondence be relied on as the basis for the proposed amendment; particularly in this instance where no settlement was reached between the parties. Mr. Muriithi also submitted that the application has been brought too late in the day and therefore ought to be dismissed with costs.
7. I have given careful consideration to the plaintiff's application and the averments in the affidavits filed herein by the parties. I have likewise paid attention to the written submissions filed by learned counsel on behalf of the parties and the authorities relied on by them. There is no gainsaying that the discretion of the Court to grant leave to amend pleading is indeed a wide one. But it is also trite that the discretion is not intended to be exercised whimsically or capriciously. Hence, Order 8 Rules 3(1) of the *Civil Procedure Rules*, is explicit that:

"...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."



8. The rationale for amendment of pleadings need not be belaboured; it is so that the Court can then effectively and effectually determine the issues in controversy between the parties to the suit. In *Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation* [2007] eKLR, for instance, it was held that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”

9. Likewise, in *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR it was observed that:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

10. The principles that guide the exercise of discretion in an application of this nature are now well settled. Hence, in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (supra), the Court of Appeal held thus:

“The law on amendment of pleading ... 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.” (see also *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR)

11. Hence, the issues that emerge for determination, from the averments in the affidavits filed in respect of the instant application as well as the written submissions filed herein, can be summarised as hereunder:

- (a) Whether the proposed amendment is necessary and sought in good faith;
- (b) Whether the proposed amendment will introduce a new cause of action;
- (c) Whether the application for leave to amend was brought after undue delay;



12. On whether the proposed amendment is necessary, I have looked at the initial Plaintiff dated April 6, 2017 and the amendments sought herein and I find that the amendments are substantially similar to the cause of action out of which the claim arose as Prayer (a) of the Plaintiff dated April 6, 2017 seeks to stop the sale of the suit property by way of public auction until the amount allegedly owed is agreed upon. In this case the Applicants have proposed an amendment to the effect that the outstanding amount be determined to be Kshs. 8,808,928.42. In the circumstances, it would be imprudent use of judicial time if the plaintiff were to file a separate suit to determine the amounts owed when the same issue can be effectually disposed of in this suit.
13. To my mind therefore, the proposed amendment is not only necessary, but has also been brought in good faith. In the same vein, I am not convinced that the proposed amendment would have the effect of totally changing the complexion of the plaintiff's cause of action into a completely different one. In any event, Subrule (5) of Rule 3 stipulates that:
- “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.”
14. Last, but not least, is the question whether the application for amendment was filed within time; and if not, whether the delay has been sufficiently explained to the satisfaction of the court. In this regard, although counsel for the defendant pointed out that the delay of over 4 years since the suit was filed is inexcusable, Order 8 Rules 3(1) of the Civil Procedure Rules, recognizes that amendments may be allowed by the court “...at any stage of the proceedings...” It is significant therefore that the application has been brought before the commencement of the hearing; and therefore that no prejudice will befall the defendant for which costs would be inadequate recompense. In *Eastern Bakery v Castelino* [1958] EA 461 it was held thus:
- “...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”
15. Indeed, as aptly pointed out by Apaloo, JA in *Philip Chemwolo v Augustine Kubende* [1985] KLR 492, the duty of the court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:
- “I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”
16. On whether the amendments should be rejected on the basis that they are premised on inadmissible documents, my view is that the objection is premature. The parties are, at this point, dealing with pleadings and not the evidence upon which their respective pleadings are premised. One of the issues that parties will be required to canvass at pre-trial conference is the question whether there are objections to the admissibility of documents per Order 11 Rule 3 of the Civil Procedure Rules. Hence, I find the defendant's arguments that the proposed amendments are based on “Without Prejudice” communication to be premature.



17. In the result, it is my finding that the plaintiff's application dated June 7, 2021 is meritorious. The same is hereby allowed and orders granted as prayed in the following terms:

- (a) That leave be and is hereby granted to the plaintiffs to amend their Plaint in terms of the draft Amended Plaint annexed to the Supporting Affidavit herein.
- (b) That the Amended Plaint be filed and served within 14 days from the date hereof; with corresponding leave to the defendant to amend its Defence, if need be.
- (c) That the costs of the application be borne by the plaintiff in any event.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 12TH DAY OF AUGUST, 2022.

OLGA SEWE

JUDGE

