



REPUBLIC OF KENYA



KENYA LAW
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**NWK v BKG (Civil Suit 55 of 2017) [2022] KEHC 13327 (KLR)
(Family) (23 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13327 (KLR)

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

**FAMILY
CIVIL SUIT 55 OF 2017**

**MA ODERO, J
SEPTEMBER 23, 2022**

BETWEEN

NWK APPLICANT

AND

BKG RESPONDENT

RULING

1. Before this court is the notice of motion dated May 19, 2021 by which the applicant NWK seeks the following orders:-
 - “ 1. That the honourable court be pleased to grant leave to the applicant to amend the originating summons as shown in the annexed draft.
 2. That the amended originating summons be deemed duly filed and served on the applicants
 3. That this honourable court be pleased to grant any other order that it may deem fit and just to grant in the circumstances.
 4. That the costs be in the cause.”
2. The application which was premised upon order 51 rule 1 and order 8 rules 3 of the *Civil Procedure Rules* 2010, sections 1A and 3A of the *Civil Procedure Act* and all other enabling provisions of the law was supported by the affidavit of even date sworn by the applicant.



3. The respondent BKG filed grounds of opposition to the application dated March 23, 2022 as follows:-
- “ 1. That the present application is bad in law as the same is brought very late in the day, the same having been filed almost five years from the date of filing of the suit.
 2. That there is inordinate delay on the part of the application which delay has not been explained.
 3. That the application dated May 19, 2021 is an afterthought, the same having been brought out to frustrate the expeditious hearing of the matter.
 4. That the application is incompetent, misconceived, mischievous and bad in law as the same does not meet the threshold of an application for amendment as the facts that the applicants seek to introduce have not been proved to exist.”
4. The court directed that the application be canvassed by way of written submissions. The applicant filed written submissions dated April 5, 2022. The respondent despite being granted an opportunity to do so did not file any submissions.

Background

5. The applicant instituted this matrimonial cause *vide* the originating summons dated August 28, 2017. She later realized that she had left out certain properties and by this application seeks to amend the summons to include the omitted properties.

Analysis and Determination

6. I have carefully considered this application before court, the grounds of opposition filed by the respondent as well as the written submissions filed by the applicant. The only issue for determination is whether leave ought to be granted to the applicant to amend the originating summons.
7. Order 8 rules 3 and 5(1) of the [Civil Procedure Rules](#) stipulates as follows:-

“

“(3) 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”.

(3) 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”.

General power to amend.

“(5) For the purpose of determining the real question in controversy
(1) 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”.

8. In *Ochieng & others v First National Bank of Chicago Civil Appeal No. 147 of 1991* (unreported) as cited with approval in *St Patrick's Hill Scholl Ltd v Bank of Africa Kenya Ltd [2018] eKLR* the Court of Appeal set out the principles governing the amendment of pleadings as follows: -

- a) The power of the court to allow amendments is intended to determine the true substantive merits of the case.
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the court at any stage of the proceedings.
- d) 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.
- e) 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 limitations act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

9. In *Harrison C Kariuki v Blueshield Insurance Company Ltd [2006] eKLR* the court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank [2000] EALR 365* and held that-

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main thing is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined”. (own emphasis).

10. The respondent in challenging this application claimed that there had been inordinate delay on the part of the applicant in filing the application.

11. The applicant has countered the allegation that she has been sitting on her rights by explaining that the matter had initially proceeded for mediation but the mediation was not successful. A perusal of the court record indicates that indeed the matter had been referred to mediation. As a sign of good faith, the applicant would not have filed the application in order to give mediation a chance. The record indicates that on January 25, 2022 the Hon Deputy Registrar noted that mediation had not been successful. Therefore in actual fact the application was filed a few months after the collapse of mediation

12. In the circumstances I find there was no inordinate delay. In any event even if there had been a delay, this would not be sufficient grounds to deny the application to amend pleadings.

14. In the case of *Central Bank Ltd - vs - Trust Bank Ltd[2000] eKLR* the Court of Appeal held as follows:-

“Accordingly all amendments should be freely allowed at any stage of the proceedings provided that the amendments or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs.



Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation costs.”

13. I note that this matter is yet to be heard. Any amendment would not prejudice the respondent, as he has the right to amend his pleadings if necessary.
14. Finally I do allow this application in terms of prayers (1) and (2). The amended originating summons to be filed and served within fourteen (14) days. Upon service, the respondent has fourteen (14) days to file an amended response to the summons if need be. This being a family matter I make no orders on costs.

DATED IN NAIROBI THIS 23RD DAY OF SEPTEMBER, 2022.

MAUREEN A. ODERO

JUDGE

