



REPUBLIC OF KENYA



KENYA LAW
THE NATIONAL COUNCIL FOR LAW REPORTING
Where Legal Information is Public Knowledge

**Gathungu v Ernst & Young LLP (Commercial Case 419 of 2018)
[2022] KEHC 13382 (KLR) (Commercial and Tax) (22 September 2022) (Ruling)**

Neutral citation: [2022] KEHC 13382 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 419 OF 2018
WA OKWANY, J
SEPTEMBER 22, 2022**

BETWEEN

LABAN GATHUNGU PLAINTIFF

AND

ERNST & YOUNG LLP DEFENDANT

RULING

1. The defendant filed the application dated May 31, 2021 seeking the following orders;-
 1. The defendant be granted leave to amend its Defence as shown in red in the draft Amended Defence and Counterclaim annexed hereto.
 2. The costs of the application be costs in the cause.
2. The application is supported by the affidavit of Anthony Makenzi Muthusi, a partner of the defendant firm, and is based on the following grounds:-
 - a. The plaintiff's claim relates to the dissolution of his membership as a partner in the defendant. It is the defendant's case that it dissolved the plaintiff's membership as a partner due to the plaintiff's breach of the partnership agreement and breach of fiduciary duty.
 - b. The plaintiff's breach of the partnership agreement and breach of fiduciary duty has caused the defendant to suffer loss and damage. The defendant was unable to compute the loss and damage suffered as a result of the plaintiff's actions by the time the defendant was required to file its defence.
 - c. The defendant has now computed the loss and damages it has suffered as a result of the plaintiff's actions.



- d. The defendant intends to amend the defence to include a counterclaim for the loss and damage suffered by the defendant as a result of the plaintiff's breach of the partnership agreement and breach of fiduciary duty.
 - e. The amendment is necessary for the purpose of determining the real question in controversy between the parties in this case.
 - f. The plaintiff will not be prejudiced if the application is allowed.
3. The plaintiff, Laban Gathungu, opposed the application through the replying affidavit dated October 15, 2021 wherein he states that the application is brought in bad faith and is intended to delay the hearing of the matter. He further states that the defendant is guilty of laches as it has had more than two years to amend its pleadings. He observes that the defendant did not indicate that it intentions to amend its pleadings during the pretrial conference and that the present application was therefore an afterthought.
 4. Parties canvassed the application by written submissions which I have considered. The issue for determination is whether the defendant's application is merited.
 5. Section, 100 of the *Civil Procedure Act* (cap 21) laws of Kenya, stipulates that: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.
 6. Order 8 rule 3 of the *Civil Procedure Rules, 2010*, provides that:-
 - “(1) 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.
 - (2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 - (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
 - (5) An amendment may be allowed under sub-rule (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.

7. The defendant seeks leave to amend its statement of defence to include a counterclaim for the loss and damage it allegedly suffered as a result of the plaintiff's breach of the partnership agreement and breach of fiduciary duty. The plaintiff opposed the application while stating that it is brought in bad faith after a period of two years and four months and that the application should not be allowed for the defendant had disobeyed court orders.
8. In *Ochieng and others v First National Bank of Chicago* Civil Appeal Number 147 of 1 (unreported) as cited with approval in *St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR the Court of Appeal set out the principles under which Courts may grant leave to amend the 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 plaintiff the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.
9. Further in the case of *Joseph Ochieng & 2 others v First National Bank of Chicago* Civil Appeal No. 149 of 1991 the Court of Appeal while citing with approval *Bullen, Leake & Jacobs in Precedents of Pleadings*, 12th Edition remarked regarding amendment of pleadings as follows:

“The power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); 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 if the proposed amendment introduces 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 would more conveniently be made the subject of a fresh action..”
10. Applying the principles stated in the above authorities to the instant case, I note that the plaintiff filed this suit on December 5, 2018 where the plaintiff. The defendant on the other hand filed a statement of defence on or about February 5, 2019.
11. The instant application seeks to amend the defence and introduce a counterclaim. I have perused the proposed amendments and I note that the same do not seek to introduce a new cause of action as they revolve around the same set of facts. While I appreciate the plaintiff's concerns over the apparent delay in the filing of the application, I note that the said delay cannot be said to be inordinate as the hearing of the case has not commenced. The plaintiff has raised other issues concerning the application which, in my view, form the substratum of the main cause of action and can only be addressed at the hearing.



12. In the upshot, I find merit in the application and I therefore allow it with orders that costs shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 22ND DAY OF SEPTEMBER 2022.

W. A. OKWANY

JUDGE

In the presence of: -

Mr. Sirawa for Kimani for Defendant.

Mr Eredi for Plaintiff.

Court Assistant- Sylvia

