



**D Manji Construction Ltd v Farmers Industry Ltd (Civil Case 286 of 2016)
[2022] KEHC 14217 (KLR) (Commercial and Tax) (21 October 2022) (Ruling)**

Neutral citation: [2022] KEHC 14217 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 286 OF 2016
A MABEYA, J
OCTOBER 21, 2022**

BETWEEN

D MANJI CONSTRUCTION LTD PLAINTIFF

AND

FARMERS INDUSTRY LTD DEFENDANT

RULING

1. Before court is an application dated June 25, 2021. It was brought by the defendant under article 159(2) of the *Constitution*, sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, order 8 rule 3 and order 51 rule 1 of the *Civil Procedure Rules*.
2. It sought orders for leave to amend the defence and counterclaim dated August 17, 2016. The grounds for the application were set out on the face of it and on the supporting affidavit of Grace Ndinda Regina sworn on June 25, 2021 and the supplementary affidavit sworn by Florence Wairimu Mbugua.
3. The applicant's case was that when the matter came up for hearing on June 14, 2021, the plaintiff sought and obtained leave to file a further witness statement and supplementary bundle of documents. The plaintiff proceeded to file the documents on June 21, 2021 which were bulky.
4. That the plaintiff materially changed the nature and character of its claim as pleaded in the plaint and it was imperative that the defendant be granted leave to amend its pleadings and respond to the fresh issues raised in the documents. That it was not sufficient for the defendant to file further witness statements or file additional documents.
5. The plaintiff opposed the application vide The replying affidavit of Harji Patel sworn on October 19, 2021. It was contended that the application was res judicata as the defendant had sought similar orders in its application dated January 13, 2020 which was dismissed vide a ruling delivered on March 12,



- 2020 for the delay on bringing the application without any justifiable reason. That the defendant's application dated March 18, 2020 seeking review of that ruling was similarly dismissed.
6. It was also contended that the respondent did not alter its case as there was no major difference between the witness statement filed on July 19, 2016 and that filed on June 21, 2016. That the only difference was that the latter included correspondence with regard to the variation of works, evidence of delay in payments and evidence of the certificates issued during the pendency of the contract. That all these issues had previously being addressed and/or raised in the initial witness statement.
 7. It was thus contended that the documents filed by the plaintiff only supported the case that it had already filed and did not change the substratum of the case.
 8. The parties made their oral submissions in court on December 16, 2021 wherein the respondent maintained that the application was res judicata, and that there was mischief on the defendant's part for failing to attach the draft defence. The respondent relied on the case of *Merry Beach Limited v Barclays Bank of Kenya Limited & another* [2014] eKLR wherein the court held that the court has to look at the draft defence to see if it is technical or necessary. It also maintained that there were no material differences between the two witness statements.
 9. The applicant on the other hand submitted that, the application was not res judicata as it was prompted by the filing of fresh witness statement and bundle of documents, and that the defendant could not defend itself with the pleadings as they were. That there was no mischief on its part for failing to attach the defence and no prejudice would be suffered if the orders were granted.
 10. The court has considered the pleadings, evidence and oral submissions. The main issue for determination is whether the defendant has made out a case for grant of leave to amend its defence and counter claim. However, this court will first address the objection raised by the respondent based on res judicata.
 11. It is not a disputed fact that the defendant had brought a similar application before vide application dated January 13, 2020 and the same was dismissed. The applicant however contended that in light of the supplementary witness statement and list of documents filed, a new case had been introduced thus necessitating an amendment to address the new issues. This court has carefully read through the initial witness statement dated July 19, 2016 and the latter statement dated June 21, 2021.
 12. Paragraphs 6 and 8 of the latter statement included copies of correspondences with regard to variation of works, evidence of delay in payments and certificates issued during the pendency of the contract.
 13. These issues had already been raised in the plaint and the initial witness statement. It cannot therefore be said that the new documents altered the plaintiff's case or introduced new issues which needed to be addressed.
 14. In any case, nothing stops the applicant from filing its own further witness statement and address any issues raised. What can be discerned from the applicant's affidavits is a complaint that the documents are too bulky and were always in the respondent's possession yet filed years later. Unfortunately, that argument ought to have been made before leave to file the said documents was granted. It is too late in the day to oppose the filing of those documents.
 15. It therefore follows without doubt that the applicant's application is indeed res judicata.
 16. Even if the applicant survived the objection, it is doubtful whether it would have succeeded even on merit. The applicant admitted that it had not attached the intended draft defence. It is lost to this court how it is to determine whether or not an intended amendment is merited, where the draft defence is not attached.



17. In *Daniel Ngetich & another v KRep Bank Limited* [2013] eKLR, the court stated: -

“Normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a devise to abuse the process of the court.”

18. In the present case, the court cannot discern the nature of the proposed amendment. In my view, before a court is to grant leave for amendment, the proposed amendment must be disclosed to the court for it to exercise its discretion, especially if the amendment is being made at a very late stage of the trial.

19. In this regard, this court cannot allow the application for reason that it is res judicata and thus an abuse of court process. It would indeed be an injustice to the respondent to allow an application which is not only unmerited, but is bad in law.

20. The upshot is that the application is without merit and is hereby dismissed with costs to the respondent.

It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 21ST DAY OF OCTOBER, 2022.

A MABEYA, FCIarb

JUDGE

