



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

HCCC NO. E404 OF 2019

APEX SYSTEMS CONSULTING GROUP LTD.....PLAINTIFF

VERSUS

BOARD OF TRUSTEES OF ZAMARA FANAKA RETIREMENT FUND

(PENSION & PROVIDENT SECTIONS).....DEFENDANT

RULING

PLAINTIFF/APPLICANT'S APPLICATION

The Plaintiff's Application dated 28th August 2020 pursuant to **Article 50 & 159 of the Constitution of Kenya 2010, Sections 1A & 1B of the Civil Procedure Rules 2010** and all other enabling provisions of the law, and sought the Court to grant the Plaintiff's Amended Plaint dated 10th July 2020 filed on 21st July 2020 and deem them properly filed and allow the amendments made.

The Application was based on the grounds that;

- a) The Plaintiff filed an Amended Plaint dated 10th July 2020 on the same date when the 14 days were lapsing but due to the failures of the e-filing system the same was admitted on 20th July 2020, which on the face of it appears to have been filed beyond the statutory 14 days.
- b) The e-filing portal indicated that the matter herein had been closed due to a consent that was entered into by the parties, which was not the case as the consent was in relation to the Defendant's Application only.
- c) The Plaintiff made inquiries at the Court's registry via telephone calls on the erroneous status of the matter on the e-filing portal and they were advised that the same would be rectified in due course.
- d) The error was rectified on 20th July 2020 and the Plaintiff was able to file and serve its Amended Plaint albeit out of time.
- e) The mistakes of Counsel and/or the Judiciary's e-filing system cannot be laid upon a litigant.
- f) The present Application has been filed on bonafide grounds and no prejudice will be caused to the Defendant's rights if the Application is allowed.

DEFENDANT/APPLICANT'S APPLICATION

By Notice of Motion Application filed together with a Supporting Affidavit both dated 7th August 2020, brought under the provisions of **Sections 3A of the Civil Procedure Act, chapter 21, Order 2 Rule 15(1), Order 8, Rule 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010** and any other enabling provisions; the Applicant sought orders;

- a) This Court strikes out the Plaintiff's Amended Plaint.
- b) In the alternative the Court disallows the amendments in the Amended Plaint.

c) The costs of this Application be provided for.

In the Supporting Affidavit of Lucy Muthoni Kambuni, a Senior Counsel and a Chairperson of the Defendant/Applicant herein, stated that Summons to Enter Appearance together with the Plaint in this matter were served upon the Defendant on 19th November 2019, requiring the Defendant to enter appearance within fifteen (15) days from receipt of service thereof.

The Applicant asserts that the Defendant failed to enter appearance within the prescribed time, leading to a default judgment being entered against the Defendant and in favor of the Plaintiff. The Defendant filed an Application dated 20th February 2020 seeking to set aside the default judgment entered against the Defendant in default of entering appearance.

The parties agreed to compromise the Defendant's Application to set aside the default judgment and entered into a consent dated 11th May 2020 and agreed to set aside the default judgment in its entirety, and similarly allowed the Defendant to file and serve its Statement of Defence within fourteen (14) days.

The Defendant stated that its Advocates complied with the consent order and filed and served a Statement of Defence dated 8th June 2020 on behalf of the Defendant. The same was served upon the Plaintiff on 22nd June 2020.

That subsequently, the Plaintiff filed and served upon them an Amended Plaint dated 10th July 2020. The same was served on the Defendant's Advocates on 21st July 2020.

The Defendant averred that the Amended Plaint was filed more than fourteen (14) days after the close of the pleadings and without the leave of the Court. It is clear that the amendments seek to address/defeat the point raised at paragraph 3 of the Statement of Defence, therefore in interest of substantive justice and rule of law the Amended Plaint should be struck out completely, or the individual amendments to the Plaint be disallowed.

REPLYING AFFIDAVIT

The Application was opposed through an Affidavit dated 28th August 2020 sworn by Susan Otiende advocate for the Plaintiff/Respondent, stated that the parties herein entered into a consent to set aside the default judgment entered against the Defendant in its entirety, and to allow the Defendant to file and serve its Statement of Defence so that the issues can be addressed purely on merit/substance.

The Plaintiff stated that the Defendant filed and served a Statement of Defence dated 8th June 2020 upon the Plaintiff via email on 22nd June 2020.

The Plaintiff averred that the Plaintiff thereafter filed an Amended Plaint dated 10th July 2020 on the same date when the 14 days were lapsing but due to the failures of the e-filing system the same was admitted on 20th July 2020, which on the face of it appears to have been filed beyond the statutory 14 days.

The Plaintiff asserted that in response to paragraph 10 of the Supporting Affidavit, the Amended Plaint was filed out of time, despite the process having been commenced in time, due to online errors on the Judiciary's e-filing system which had indicated "**CONSENT RECORDED, CASE CLOSED**" and as such the Plaintiff was unable to upload and file its Amended Plaint on time as there was no room to upload the document and have it assessed so as to make payments and subsequently file the same.

The Plaintiff asserts that it noticed the anomaly and intended to await the issuance of Summons against the enjoined Defendants in the Amended Plaint, which have not been issued to date, and services of the same before seeking to make the appropriate application seeking leave of this Court to deem it duly filed on time bearing the circumstances under which the delay was occasioned.

The Plaintiff stated that **Order 8 Rule 8 of the Civil Procedure Rules 2010** allows for an application to seek leave to amend pleadings to be made orally and as such the Plaintiff intended to do so after service of the summons on the enjoined Defendants and at the earliest mention of the matter herein or on a formal application like we have already done.

The Plaintiff affirmed that in determining whether to strike out a pleading, the courts ought to be alive to **Article 159 of the Constitution of Kenya 2010** which provides that Courts should administer justice without undue regard to procedural technicalities, and in this case the Amended Plaint which was filed without leave ought to be allowed and/or deemed properly filed.

The Plaintiff is determined to have this matter dispensed with expeditiously and more so justly which is what prompted the Amendment of the Plaint so as to include all concerned parties in the suit and have the matter determined on its merit and as such the Plaintiff is not abusing the Court's processes.

PLAINTIFF'S SUBMISSIONS

On the Defendant's Application Dated 7th August 2020 and the Plaintiff's Application Dated 28th August 2020.

The Plaintiff submitted that its Application which sought leave to file the Amended Plaint out of time and to deem the Amended Plaint properly filed is founded on **Order 8 Rules 3, 5 and 7 of the Civil Procedure Rules 2010** which provides as follows;

“Order 8 Rule 3: Amendment of Pleadings with leave

(1), 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.”

It was the Plaintiff’s submissions that the aim of the overriding objective is to enable the court to achieve a fair, just, speedy, proportionate, time and cost saving disposal of cases before it. That the Plaintiff’s Application has merit and satisfies the overriding principle criteria hence it ought to be allowed in its entirety to enable this matter be determined on merits as opposed to a matter being determined on technicalities.

The Plaintiff relied on Court of Appeal case of Nicholas Kiptoo Arap Korir Salat vs Independent Electrical and Boundaries Commission & 6 Others [2013] eKLR, where the court observed;

“Deviations from and lapses in forum and procedures which do not go to the jurisdiction of the court, or to the root of the dispute or which do not at all occasion prejudice or miscarriage of justice to the opposite party ought not be elevated to the level of a criminal offence attracting such heavy punishment of the offending party, who may in many cases be innocent since the rules of procedure are complex and technical. Instead, in such instances the court should rise to its highest calling to do justice by sparing the parties the draconian approach of striking out pleadings. It is globally established that where a procedural infraction causes no injustice by way of injurious prejudice to a person, such infraction should not have an invalidating effect. Justice must not be sacrificed on the altar of strict adherence to provisions of procedural law which at times create hardship and unfairness.”

The Plaintiff submitted that the amendments contained in the Amended Plaint do not occasion any prejudice against the Defendant as the said amendments have merely sought to include additional parties to the suit herein so that this matter can be determined substantially with all the parties involved being enjoined in the suit. This is allowed under **Order 1 Rule 6 of the Civil Procedure Rules** which states;

“the Plaintiff may at his option join as parties to the same suit all or any of the persons severally, or jointly and severally liable, on any one contract, including parties to bills of exchange and promissory notes.”

The Plaintiff submitted that its claim against the Defendant has not been altered and as such the Defendant’s allegation that the Plaintiff wants to defeat point 3 in its Statement of Defence is not founded on fact or law. The Plaintiff’s Claim does raise substantive issues on breach of contract which was not only partly performed but part payment made.

DEFENDANT’S SUBMISSIONS

The Defendant submitted that the amendments are prejudicial. The Statement of Defence was served upon the Plaintiff on 22nd June 2020 while the application for leave to amend and for amendments to be allowed was filed and served upon the Defendants on 28th August 2020, a lapse of more than two months.

In any case, it is settled law that amendments would not be allowed where prejudice would be occasioned to the other party. In the case of Andrew Wabuyeke Biketi v Chinese Centre for the Promotion of Investment Development & Trade in Kenya Limited & 2 Others, Gikonyo J. observed thus;

“However, if the application be made mala fide, or if the proposed amendment will cause undue delay, or will in any way unfairly prejudice the other party, or is irrelevant or useless, or would raise merely a technical point, leave to amend will be refused.”

Article 159 of Constitution of Kenya 2010, Sections 1A & 1B of Civil Procedure Act are not a panacea for litigants to willfully flout procedural requirements.

The Defendant submitted that were the amendments allowed then the Defendant would suffer great prejudice, as they would have been denied an opportunity to argue all the merits of proposed amendments, prejudice that cannot be compensated by an award of costs.

DETERMINATION

Both Applications center on whether amendment of the Plaint is granted or not.

In Daniel Ouma Okuku vs Kenya Plantation & Agricultural Workers Union & Anor [2019] eKLR the Court of Appeal found;

“Order 8 CPR donates wide discretionary power to the Trial Court to allow amendment of pleadings for purposes of determining the real questions in controversy between the parties or to correct any defect or error in the proceedings. The Court may do so either on its own motion or application by a party.

Parties can amend their pleadings with leave of the Court at any time before Judgment. As was stated in Suleiman vs Karasha [1989] eKLR it did matter whether the hearing had been concluded, the Court had to consider such an application for leave to amend a pleading and give effect to such an application as it deemed fit.”

The Respondent objected to amendment of the Plaintiff on the following grounds;

- a) The Amended Plaintiff was filed without leave of Court.
- b) The Amended Plaintiff was filed after inordinate delay.
- c) The Amended Plaintiff was filed to defeat the Defence at paragraph 3 of the Defence filed by the Defendant.
- d) The amendments will cause prejudice to the Defendant.

The Plaintiff/Applicant explained the cause of inordinate delay it was due to failure of access to the Court’s e-filing system. On various enquiries, the Plaintiff/Applicant was informed that by virtue of Parties Consent the matter was marked Case Closed which was not the position. The Applicant annexed the said email from Court Registry of **24th August 2020 at 2.44 pm** explaining the position highlighted above. The inordinate delay of 2 months is attributed to the lack of access to the e-filing portal of the Court.

Consequently, the Plaintiff/Applicant could not seek leave from Court before filing the Draft Amended Plaintiff so as to serve the Respondent and thereupon obtain a mention date to appear and seek leave from Court.

In **Diamond Trust Bank of Kenya Ltd vs Garex (K) Ltd, Firestone E.A Ltd & James Mwangi Gitau T/A Fore Front Agencies [2014] eKLR**, the High Court observed;

“The principles which attend amendment of pleadings are whether the amendment will prejudice or deny the Respondent an accrued defense or right, whether the amendment is introducing a new matter, whether the amendment [(s) is/are] necessary and will assist the Court determine real issues in controversy, completely and effectually. Delay in bringing the application is also an aspect of prejudice to the Respondent and should be considered.”

In the instant case, the Plaintiff/Applicant filed Draft Amended Plaintiff and joined parties to the Suit after it was served with the Defence. It is to enable the Court determine real/all issues in controversy. The Defendant will not be prejudiced as grant of corresponding leave to amend the Defence if need be shall be granted. The Defence raised in paragraph 3 of the Defence shall not be defeated automatically by filing of the Amended Plaintiff as the triable issues shall be tested during the Trial of the suit after close of pleadings and Case Management. The Plaintiff did not raise any new claim but expanded the existing claim to include more parties.

DISPOSITION

- 1. The Plaintiff/Applicant’s Application dated 28th August 2020, for leave to allow amendment of Plaintiff and consider it filed in Court is granted.**
- 2. The Defendant’s Application of 11th August 2020 to strike off the Amended Plaintiff is dismissed with costs.**
- 3. The Defendant is granted leave to amend if need be the Defense within the requisite period.**

DELIVERED SIGNED & DATED IN OPEN COURT ON 28TH JUNE 2021 (VIRTUAL CONFERENCE)

M.W. MUIGAI

JUDGE

PLAINTIFF N/A

DEFENDANT N/A

COURT ASSISTANT: TUPET