



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 175 OF 2019**

**NJAMA COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**UNIVERSITY OF NAIROBI.....DEFENDANT**

**RULING**

1. This ruling is in respect to the application dated 28th November 2019 and the defendant's Preliminary Objection dated 23rd January 2020.
2. The application seeks orders that: -
  1. Spent.
  2. That the honourable court be pleased to grant the plaintiff leave to amend the plaint and the annexed draft of the amended plaint be deemed as duly filed and served upon payment of the requisite fees.
  3. That upon granting prayer2, summary judgment be entered against the defendant for a liquidated sum of Kshs 44,311,576.04 plus interest.
  4. That in alternative and without prejudice to prayer 3 above, that the defence be struck out.
  5. That costs be in the cause.
3. The application is supported by the affidavit of the applicant Directors Mr. Julius Kabuki Maina and is premised on the grounds that: -
  - a) The plaint dated 24th July 2019 and filed on the same day inadvertently fails to expressly provide for the final certificate owed to the plaintiff by the defendant amounting to Kenya Shillings Forty-Four Million Three Hundred and Eleven Thousand Five Hundred and Seventy-Six and Four Cents (Kshs 44,311,575.04) plus interest.
  - b) The defence was filed out of time and fails to clear address the substantial issues raised by the plaint.
  - c) The plaintiff's claim is made up of clear and very specific liquidated amounts and as such the defence does not raise any bona fide triable issues; and therefore, it does not raise a reasonable defence in law.
  - d) The Statement of Defence was filed out of time, without leave of court thus an abuse of the court process and ought to be struck out.
4. The defendant opposed the application through a notice of preliminary objection (P.O.) dated 23rd January 2020 wherein it states that the application is defective and ought to be struck out.
5. Parties canvassed the preliminary objection and the application by way of written submissions which I have considered. The main issued for determination are firstly: whether the Preliminary Objection is merited and secondly; whether the plaintiff has made out a case for the granting of leave to amend the plaint and for summary judgment against the defendant. Preliminary objection.
6. What constitutes a Preliminary Objection was stated in the case of Mukisa Biscuits Manufacturing Company Limited vs West End

Distributors [1969] EA 696 as follows: -

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.... a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”

7. From the above cited decision, it is clear that a Preliminary Objection should stem from a pure point of law based on undisputed facts contained in the pleadings.

8. In the present case, it is noteworthy that the defendant merely states that the application is fatally defective without elaborating on undisputed facts that support such a contention. I am therefore not satisfied that the Preliminary Objection meets the threshold set in the Mukisa Biscuits (supra) and I therefore dismiss it with no orders as to costs.

9. Turning to the plaintiff's prayer for leave to amend plaint, I note that it is trite that courts will generally allow amendments as long as they are consistent with the original pleadings and do not alter the nature of the case.

10. In St Patrick's Hill School Ltd vs. Bank of Africa Kenya Ltd 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 plaint 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.

11. Applying the above principles to the circumstances of this case, I find that the plaintiff has brought the application in good time as the main suit is yet to be heard, in which case, the amendment will cause no prejudice to the defendant. I therefore find that it will be in the interest of justice to allow the amendment.

12. As regards the prayer for summary judgment, the plaintiff argued that the defendant not only filed the defence out of time, without the leave of the court, but that the defence raises no triable issues.

13. The defendant, on the other hand submitted that the plaintiff cannot seek to amend the plaint and at the same time seek summary judgment based on the original defence as in such a scenario, the defendant will automatically be entitled to corresponding leave to amend the defence.

14. I am in agreement with the position adopted by the defendant herein concerning the prayer for summary judgment. I find that since the plaintiff has been granted the leave to amend its plaint, it naturally follows that the defendant gets corresponding leave to amend the defence in which case, the issue of summary judgment or the striking out of the defence does not arise.

15. Consequently, and having regard to the findings that I have made in this ruling I make the following final orders: -

- a) The plaintiff is hereby granted leave to amend the plaint.
- b) The amended plaint to be filed and served on the defendant within 14 days from the date of this ruling.
- c) The defendant is granted corresponding leave to amend the defence within 14 days from the date of service with the amended plaint.
- d) The costs of the application shall abide the outcome of the main suit.

Dated, signed and delivered via Microsoft Teams at Nairobi this 29th day of July 2021 in view of the declaration of measures restricting court operations due to Covid -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

**Ms Kosgey for Plaintiff/Applicant.**

**Ms Anyango for Kipkorir for Defendant.**

**Court Assistant: Sylvia.**