



REPUBLIC OF KENYA



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

**Ramasalt Agencies Limited v Airtel Networks Kenya Limited (Civil Case 452 of 2011)
[2021] KEHC 290 (KLR) (Commercial and Tax) (25 November 2021) (Ruling)**

Neutral citation: [2021] KEHC 290 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 452 OF 2011
WA OKWANY, J
NOVEMBER 25, 2021**

BETWEEN

RAMASALT AGENCIES LIMITED PLAINTIFF

AND

AIRTEL NETWORKS KENYA LIMITED DEFENDANT

RULING

1. This ruling is in respect to the application dated 14th January 2021 wherein the applicant seeks orders that: -
 - a. Paragraph 12C, 12D and 12F of the amended plaint amended on 2nd November 2020 be hereby disallowed and/or struck out
 - b. Prayer D of the amended plaint amended on 2nd November 2020 be and is hereby disallowed and/or struck out
 - c. Costs of this application be hereby borne by the plaintiff
2. The application is brought under Sections 1A,1B and 3A of the *Civil Procedure Act* Cap 21, Order 8 Rule 2 of the *Civil Procedure Rules*.
3. The application is supported by the affidavit of Ms. Pearlyne Omamo and is based on the grounds that: -
 1. On 7th October 2011 the plaintiff filed a suit dated 6th October 2011 based on a contractual relationship.



2. On 28th September 2020, the defendant's amendment application dated 21st September 2020 in respect to its defence and Counterclaim dated 25th November 2011 was allowed by consent of the parties.
3. The plaintiff was therefore granted corresponding leave being twenty-one 21 days to file and serve its amended pleadings and defence
4. However, the following amendments to the plaintiff's suit are unlawful and a gross abuse of the court process noting that;
 - a. Paragraphs 12C, 12D and 12F of the amended Pleadings seek to introduce a new and inconsistent cause of action under tort which purportedly arose on 23rd March 2012 as admitted by the Plaintiff in relation to;
 - i. The defendant duly calling a performance guarantee dated 12th January 2011 between DTB Kenya limited and the Defendant noting that the plaintiff is not a party to the same. Thus, such new facts would only be relevant in a separate suit between the relevant parties excluding the plaintiff who lacks any locus standi thereto; and
 - ii. A banking relationship between the plaintiff and TB Kenya Limited noting that the defendant is not a party to the same. Therefore, such new facts would only be relevant in a separate suit solely between the plaintiff and the said bank as there is no privity with the defendant
 - b. Prayer D of the amended pleadings seeks to introduce a new and inconsistent cause of action under tort for special damage totaling Kshs 23,020,17.06/= which purportedly arose on 23rd March 2012 as admitted by the plaintiff.
5. However, section 4(2) (actions of contract and tort and certain other actions) of the *Limitation of Actions Act* Cap 22 is manifestly clear that no amendment to include a claim for special damages in tort can be made three years (3) after the cause of action arose which is 23rd March 2012.
6. Therefore, the impugned amendments are extremely prejudicial to the defendant noting that;
 - a. The delay in introducing a new cause of action through the plaintiff's impugned amendments is inordinate and unlawful being almost nine years since the purported cause of action arose.
 - b. It would deny the defendants the opportunity to rely on the defence of limitation
 - c. In the alternative to paragraph b herein above, if this honourable court were inclined to somehow allow the impugned amendments, this shall not serve any useful purpose as the defendants shall plead a preliminary point of limitation which shall ultimately be a waste of judicial time and resources
 - d. The impugned amendments are an afterthought and are not made in good faith as they were triggered by the defendant's application seeking to amend



its pleadings to include inter alia preliminary objections based on the plaintiffs lack of privity of contract to bring this suit which is now attempting to undermine by belatedly introducing a fresh claim in tort.

- e. They relate to facts or legal relationships to which the defendant or the plaintiff has no locus. Therefore, the defendant shall be constrained to defend itself concerning matters and relationships for which a stranger with no access to relevant facts and evidence; and
 - f. Damages shall not be sufficient noting that the impugned amendments shall undermine the defendant's right to a fair trial and the overriding objectives noting that the defendant has for over 10 ten years since taken steps based on its legitimate expectation that the nature of the suit solely relates to a contractual dispute as opposed to a claim in tort.
 7. Noting that the impugned amendments require the exercise of this honourable courts discretion, the case of Stephen Itunga & 2others vs. David Ali [2020] eKLR is instructive as it held that” judicial discretion must be based on fixed principles and not on private opinions, sentiments and sympathy or benevolence but deservedly and not arbitrarily, whimsically or capriciously. The courts discretion being judicial must therefore be exercised on the basis of evidence and sound legal principles with the burden of disclosing the materials falling squarely on the applicants for such orders”
 8. In light of the foregoing, we humbly urge this Honourable Court to grant the prayers sought by the defendant/applicant as the impugned amendments fail to meet the legal threshold for the exercise of this Courts discretion in the plaintiffs favour.
4. The respondent opposed the application through the replying affidavit of its Director Mr. Hassan Noor Maalim who states that the amendments were as a result of consent between the parties which amendments are on issues that have been in contention between the parties and that no fresh cause of action was introduced by the plaintiff. He further states that the defendant sought to dissuade the court from revealing its own action by concealing facts already highlighted in evidence. He further contends that the defendant's advocates were aware of the nature of the plaint and the facts based on the defendant's amended statement of defence.
 5. Parties canvassed the application by way of written submissions which I have considered. The main issue for determination is whether the applicant is entitled to the orders sought in the application. The applicant seeks the striking out of Paragraphs 12C, 12D, 12F and prayer D of the amended plaint.
 6. The applicant contends that the amendments amount to an abuse of the court process as they introduce a new cause of action that is inconsistent with a cause of action under tort. The plaintiff further contends that Section 4(2) (actions of contract and tort and certain other actions) of the *limitation of Actions Act* Cap 22 bars the plaintiff from introducing the claim for special damages in tort after the expiry of three years.
 7. In a rejoinder, the plaintiff/ respondent noted that the amendments are in respect to issues which had been in contention between the parties and that no fresh cause of action was introduced by the plaintiff. The plaintiff further stated that the defendant's advocates were all along aware of the nature of the plaint and the facts based on the defendant's amended statement of defence.



8. In *Joseph Ochieng & 2 Others vs. 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 as follows regarding amendment of pleadings: -

“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..”

9. In the case of *Institute for Social Accountability & Another vs Parliament of Kenya & 3 others [2014] eKLR*, the 3-Judge bench of justices Lenaola, Mumbi and Majanja while determining whether to allow the petitioner to amend their consolidated petitions observed that:-

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings.”

10. The principle that arises from the above cited decisions is that the power to amend pleadings is at the discretion of the court. It is not in dispute that the parties entered consent to amend their pleadings. It is also not in dispute that the amended plaint was filed pursuant to a court order issued on 30th September 2020. The question before court is whether the impugned paragraphs should be struck out.

11. The Plaintiff states as follows in the impugned paragraphs: -

12C

The calling in of the kshs 21,000, ppp/+ guarantee caused the plaintiff to incur direct pecuniary loss arising from the fact that: -

- a. When the said deposit was made in court by the plaintiffs bank the said bank debited the plaintiffs account to settle the same
- b. The said account did not have funds to cater for the deposit as a result of the Plaintiffs account was overthrown to the tune of Kshs 23,373,411.01 as at 12th January 2012
- c. At the time the plaintiff was only authorized to overthrow its account to a maximum of Kshs 2,000,000/=. As such the said debit caused the plaintiff to exceed its approved overdraft limit and the plaintiffs bank therefore debited penal interest from the said account
- d. To prevent further penal interest from being levied on the account the plaintiff directors agreed to sell a house that had been charge to the bank as security. The said house was sold at a depressed value of Kshs 40,000,000 yet the said house had a forced sale value of Kshs 62,000,000



- e. In the meantime, the plaintiff took a shorter loan of Kshs 21,000,000 which was levied interest at the rate of 23% per annum on 23rd march 2021 to be paid from the proceeds that were received from the sale of the house.

12D

Consequent to the calling of the kshs 21,000,000/= bank guarantee, the plaintiff has suffered damage particularized as follows;

- a. kshs 905,174.07 interest on the overdrawn amount for the months of January and February 2012
- b. Kshs 115.000 being appraisal fees paid to diamond trust bank(Kenya) Limited for the short term loan facility
- c. The 24% per annum rate of interest that the plaintiff is paying to Diamond Trust Bank(Kenya) Limited under the short term loan facility
- d. A loss of kshs 22,000,000/= caused by the sale of the aforesaid house at a depressed value of Kshs 40,000,000 occasioned by the depressed market conditions yet he said house had a forced sale valuation of Kshs 62,000,000.
- e. The plaintiff avers that prior to the recalling of the guarantees, the plaintiff's business was thriving. However, when the guarantees were recalled its business could not service the loans. As such the plaintiff's business collapsed.

12F

In view of foregoing, the plaintiff seeks relief for the damage suffered due to the unlawful calling in of the Kshs 21,000,000= bank guarantee.

12. In *Kenya Commercial Bank Limited & another vs Naftali Ruthi Kinyua & 2 others [2015] eKLR* the court observed that; -

“It is our considered view that whether or not a cause of action is affected by limitation is a question of mixed fact and law; limitation goes to the competence of a suit. The learned judge erred in failing to note that paragraph 4 of the replying affidavit raised limitation as a point of law relevant to the competence of the proposed further re-amended plaint. In *Faulkner -v- Agricultural Development Corporation (1976-80) 1KLR, 762*, it was held that an amendment to a plaint might be made after a period of limitation had expired if the court thought it just and no prejudice or injustice would be involved. The ruling delivered by the learned judge did not evaluate the competence of the re-amended plaint in view of limitation as raised in paragraph 4 of the replying affidavit; the question whether the court considered it just to further re-amend the plaint was not considered; and whether prejudice or injustice would be occasioned to the respondent was also not considered. We note that the grounds upon which limitation is founded are issues of fact and the learned judge in striking out paragraph 4 without considering the merits thereof erred in locking out the appellant from laying the basis upon which the court could determine the issue of limitation as a matter of law.”

13. A perusal of the pleadings reveals that even though the plaintiff introduced the issue of special damages in the impugned paragraphs, the cause of action remains the same and arise from the same transaction. I also note that the plaintiff introduced the issue of fraud and mistake in the impugned amendments but



find that the legality of the same cannot be ascertained at this interlocutory stage of the pleadings. I find that it will be prudent to have the contested issues determined at the hearing. I am also of the humble view that the defendant's concern over the impugned amendments to the plaint can be addressed by way of an amended defence. In this regard, the court grants the defendant leave to further amend the defence, within 14 days from the date of this ruling, so as to include the defence of limitation should it be deemed necessary.

14. In the premises I find that the instant application lacks merit and is therefore dismissed. The costs of the application shall bide the outcome of the main suit. Mention on 17th April 2022.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 25TH DAY OF NOVEMBER 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 Muyaa for Rimui for Plaintiff.

Ms Omamo for Defendant/Applicant.

Court Assistant – Margaret

