



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**  
**AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CIVIL SUIT NO. 286 OF 2016**

**D. MANJI CONSTRUCTION LIMITED...APPLICANT**

**- VERSUS -**

**FARMERS INDUSTRY LIMITED ..... DEFENDANT**

**RULING**

1. **Farmers Industry Limited**, the defendant by a **Notice of Motion** application dated **13th January 2020** seeks this court's leave to amend its defence and counter-claim. The application is opposed by the plaintiff, **D. Manji Construction Limited**.

2. Order 8 Rule 3 of the Civil Procedure Rules give the general principle of amendment of pleadings thus, "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."

3. Bearing that principle in mind it useful to consider the case of **Merry Beach Limited v Barclays Bank of Kenya Limited & another [2018] eKLR** where it was stated:

"The Court of Appeal in **Elijah Kipngeno Arap Bii** (supra) restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings – 12th Edition** and captured in the Court of Appeal decision in **Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991** thus:

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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 the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce 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 could more conveniently be made the subject of a fresh action; that 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 Limitation Acts."

4. The plaintiff filed this case on 19th July 2016. The defendant filed its defence, which it now seeks to amend, on 19th August 2016. The parties case was referred to court's annexed mediation in April 2017. That mediation failed because the defendant failed to participate in the mediation. This court summoned the defendant to show cause why action should not be taken against it for failing to comply with the directions of the mediator. On attending court on 2nd October 2017 the defendant pleaded with the court to be given it another chance to comply. The court obliged by once again referring the case back to mediation. The defendant did not comply with mediation the second time and the mediator provided a certificate of non compliance on the part of the defendant. The defendant was once again ordered to show cause why action should not be taken against it for failing to so comply. This court by its Ruling of 29th November 2019 found that the defendant deliberately failed to attend mediation sessions and in accordance with the Practice Directions No 9 on mediation the court struck out the defendant's defence. The defence was reinstated, on 6th November 2019, on an application being made by the defendant. That reinstatement was conditional as can be seen by the orders of the court of 6th November 2019, as follows:

**"a. The order striking out the defendant's pleadings made on 29th November 2018 is set aside on the following conditions:**

- i. That the defendant does within 7 days file its witness statements and documents;

ii. The defendant does file within 7 days its list of issues for determination in this case.

iii. The defendant shall be ready to proceed with this case at the date the court will fix at the reading of this Ruling.

**b. If the defendant does not comply with conditions (i) to (iii) above the defendant’s pleadings will be deemed as struck out with costs to the plaintiff.”**

5. When the Ruling was delivered, on 6th November 2019, this case was fixed for full hearing on 18th of March 2020. That is five days from today.

6. I need to state that the defendant has not to date complied with the conditions set out above in that Ruling. Nevertheless not having complied with that clear order set out above the defendant now seek, on the eleventh hour, to amend its defence.

7. There is no doubt that the court has discretion on whether to permit a party to amend its pleadings. An amendment should be allowed where it will assist the court determine the real question in controversy.

8. The plaintiff’s claim in this action is for payment, by the defendant, of various sums in respect to a contract for building. The plaintiff alleges by its claim that the defendant failed to pay certain sum money of that contract and failed to pay for vacation of work which the defendant ordered to be undertaken by the plaintiff.

9. The defendant by its defence and counter-claim, filed on 19th August 2016, denied the plaintiff’s claim and countered-claimed pleading that the plaintiff’s work was substandard, that the plaintiff varied the works and therefore claimed for general damages for breach of contract. The defendant also pleaded as follows:

**“The defendant is still quantifying its claim against the plaintiff and shall seek leave of the court to amend its statement of defence and counter-claim to include the details of its claim once it completes the inspection of the works done by the plaintiff and executes remedial works therefore.”**

10. By the proposed amendment the defendant seeks to pray that it overpaid the defendant Ksh. 23,834,537.60 and for Ksh. 26,000,000.00 as damages for the alleged delay in completion of the construction.

11. The defendant did not adequately explain why it delayed since 2016 to 2020 to seek leave to amend its defence. More importantly the defendant did not explain why since 6th November 2019, when the Ruling was delivered, it failed to seek leave but instead waited until January 2020.

12. In my view the leave sought is not merited. It is not merited because the defendant cannot tell this court that it took three years to determine that it overpaid the defendant or that the defendant delayed in completion of the contract. Mind you in the defence already on record the defendant did not allege any over payment or delay incompleteness of the contract. I form the opinion that the amendment sought is for nuances value and for the intent of delaying the hearing of this case fixed for hearing on 18th March 2020. Because of that finding and because it was not timeously filed and perhaps more importantly because the defendant has failed to abide by the order of 6th November 2019 the Notice of Motion dated 13 January 2020 is hereby dismissed with costs to the plaintiff.

**DATED, SIGNED and DELIVERED at NAIROBI this 12<sup>th</sup> day of MARCH, 2020.**

**MARY KASANGO**

**JUDGE**

**Ruling Read and Delivered in Open Court in the presence of:**

Sophie..... **COURT ASSISTANT**

..... **FOR THE PLAINTIFF**

..... **FOR THE DEFENDANT**