



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

MILIMAN COMMERCIAL & TAX DIVISION

HCCC NO. 160 OF 2015

LAFEY CONSTRUCTION LIMITEDPLAINTIFF/RESPONDENT

VERSUS

PRISM INVESTMENTS LIMITED.....DEFENDANT/APPLICANT

RULING

1. The ruling relates to a notice of motion application dated 10th May 2019, brought under the provisions of Order 8 Rules 3 and 5 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act, Cap 21 of the Laws of Kenya and the inherent powers of the court.
2. The Applicant is seeking for orders that; the defendant be granted leave to amend its defence in terms of the draft amended defence and counterclaim annexed to the supporting affidavit to the application and the draft amended defence and counterclaim be deemed to be duly filed and served upon payment of the requisite court fees. The plaintiff be at liberty to amend their plaint within fourteen (14) days thereafter or within a period that the court may determine and the costs of the application be costs in the cause.
3. The application is premised on the grounds on the face of it and an affidavit dated 3rd April 2019, sworn Applicant's Finance Director David Lugwong. He deposed that, the amendments contained in the draft amended defence and counter claim are necessary to enable the court deal with the real issues in controversy. The same are necessitated by the disclosures made in the final accounts, which have since been prepared by the project Quantity Surveyor.
4. The Applicant was unable to present these documents earlier as; the plaintiff delayed in signing off on the final accounts, as required by law and procedure and ultimately refused to do so. That the delay in execution was occasioned by the contractual need for consultation and concurrence with the contractor's Quantity Surveyor. In the circumstances, it was manifest that the plaintiff's Quantity Surveyor deliberate upon and concur with the final accounts prepared by the project Quantity Surveyor.
5. That, the amendment was further necessitated by the fact after reconciliation and preparation of the aforementioned final accounts, the sums of; Kshs. 35,000,000 was fraudulently paid out to the plaintiff as follows; a lump sum payment of;
 - a) *Kshs. 20,000,000, without the sanction without the sanction of the defendant's board. It was duly acknowledged by the plaintiff in various items of correspondence.*
 - b) *A further sum of Kshs. 15,000,000 was paid out directly by Kenya Bankers Association (a stakeholder as purchase in the project), in part settlement of the defendant's obligation under the above stated 'agreement'.*
6. This last amount was paid by a third party, without approval or consent of the defendant and demonstrates further collusion and fraud against the defendant. The Kshs 35,000,000, is what the defendant seeks to claim from the plaintiff vide the amended defence and counterclaim, as no consideration was ever provided for the agreement.
7. That the plaintiff absconded from the site of the project and the defendant was compelled to take over the works on or about the 14th June 2014, well before the agreement was executed on 22nd September 2014. The handing over the site cannot be considered as consideration.
8. Finally, the Applicant averred that, the proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the plaintiff in this suit. The plaintiff does not stand to suffer any prejudice if the current application is allowed, since it shall have leave to reply to the amendments sought.

9. Further, paragraph 11 of the defence dated 30th April 2015 and filed on 4th May 2015, effectively put the plaintiff on notice of the defendant's intention to file an amended defence and counterclaim upon presentation of the snagging and defects report and taking of final account, which has since come to pass vide the final report attached hereto. In all the circumstances of this case and for the ends of justice to be met, the orders sought in the application ought to be granted.
10. However, the application was opposed vide a replying affidavit dated, 25th June 2019, sworn by the Plaintiff's director, Mahamud Khalif. He termed the application as unmerited, frivolous, abuse of the court process, brought in bad faith, and aimed at delaying the quick and fair disposal of the suit, thus keeping the plaintiff from realizing its just action.
11. He deposed that, the time allowed under the law for amendments of pleadings has lapsed, thus the application has been overtaken by events as the matter has been certified ready for hearing. That the Applicant has not come to court with clean hands, due to inordinate and deliberate delay in filing the application.
12. He averred that, the proposed amendments are prejudicial to the Respondent and the proposed counterclaim does not raise any legitimate claim against the Plaintiff and therefore does not qualify to be a proper counterclaim.
13. Further, the averments in the supporting affidavit that, the amendments to the pleadings are necessitated by the availability of defects report and final accounts are not only misleading to the court but inherently false as the alleged defects report and final accounts, although referenced in the said affidavit dated 10th May 2019, have not been attached therein, clearly indicating that, they are not actually available as claimed or at all.
14. That, although the defendant alleges in its proposed counterclaim that, the Separation Agreement dated 22nd September 2014, was procured fraudulently by the plaintiff in collusion with a director of the defendant, to its as a company, through fraudulent payment of; KShs. 35,000,000 to the plaintiff, but the defendant does not set out the particulars of fraud and neither does it tender any evidence whatsoever to support its said allegations.
15. The Honourable court should therefore not permit the defendant to derail and/or delay the course of justice by relying on vague and unsubstantiated assertions. That, the averments made by the defendant in its proposed counterclaim are an afterthought as it has taken it more than four (4) years to raise them.
16. Further, it is instructive to note that, the defendant in its proposed amended defence puts great emphasis on dispute resolution through arbitration and declares its intention to make an application for the matter to be referred to arbitration. The defendant's true intention in making the application to amend its defence is to delay the hearing of this matter in order to force the Plaintiff to resort to arbitration.
17. The application was disposed of through written submission, whereby the Applicant submitted that, the subject matter of the suit involves a dispute over the construction of; proposed Shaba Village, which constitutes 51 Maisionettes and 80 Apartments & associated civil works (hereinafter "the project"), in which the Plaintiff was the contractor and the Defendant a developer.
18. The agreement between the parties was contained in the standard form agreement prepared by the Joint Building Council Kenya ("the JBC") dated the 16th December 2011 (hereinafter "the JBC agreement") and incorporated in toto the; FIDIC Conditions of Short Form of Contract, which is commonly referred to as the Green Book (hereinafter "the FIDIC Conditions").
19. The Plaintiff filed the suit on 27th March 2015, by way of plaint contemporaneously with an application seeking interim injunctive relief against the Defendant. The Defendant filed defence on the 4th May 2015 in answer to the claim by the Plaintiff.
20. By a ruling delivered on the 18th August 2016, an injunction order was issued in favour of the Plaintiff pending the hearing and determination of the suit, and since then; the Plaintiff did not take any steps to prosecute the suit prompting the Defendant to file an application on 14th November 2017; seeking dismissal of the suit for want of prosecution.
21. By a ruling delivered by the court on 27th June 2018, the court found that, there was inordinate unexplained delay in prosecuting the case, but allowed the plaintiff in the interest of justice to pursue its claim. The parties were directed to comply with pre-trial directions before setting down the suit for hearing. In addition, the court found that the interim order of injunction had lapsed by operation of the law having not been extended for more than one year. In a bid to comply with the pre-trial directions as ordered by court, the Defendant has filed the subject application.
22. The Applicant relied on the provisions of; Article 159(2)(d) of the Constitution of Kenya 2010, Section 100 of the Civil Procedure Act, and Order 8 Rules 3 and 5 of the Civil Procedure Rules 2010, and submitted that, leave to amend pleadings out of time is a matter of judicial discretion. The case of: *AAT Holdings Limited vs Diamond Shields International Ltd (2014) e KLR*, was also cited to argue that, in the exercise of discretion, the courts of law apply the established principles of law to each case, based on the facts disclosed and evidence attended thereto, with the ultimate goal of serving the substantive interests of justice.
23. The Applicant further submitted that, the case law is settled that, amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs, as held in the case of; of; *Central Kenya Limited vs Trust Bank & 4 Others, CA No.222 of 1998 (2000) eKLR*. Furthermore, the new cause of action should emanate from the same cause of action as held up in the case of; *Kuloba vs Oduol (2001) 1EA 101*.
24. The Applicant reiterated that, the intended amendment will enable the court decide on all issues in dispute and relied on the case of;

25. However, the Respondent submitted that, the Applicant's conduct is suspect as the amendment is sought when the matter is due for hearing. The law on amendment of pleadings is set out under section 100 of the Civil Procedure Act, which deals with the general power to amend, and order 8 (3) of the Civil procedures Rules, which provides that, the court may at any stage of the proceedings , on such terms as to cost or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

26. That, the overriding consideration in application for leave to amend pleading's, is whether the amendments are necessary for the determination of the controversy between the parties and the granting or refusal of leave to amend any pleading is a matter in the discretion of the court. The Respondent argued the court to reject the application, for being an afterthought and meant to delay the matter, and relied on the case of; Allan George Njogu Kamau vs National Bank of Kenya Limited (2019)

eKLR.

27. That the Applicant brought the issue of amendment without any reasonable explanation of the delay and in the circumstances, it has a duty to show why the court should exercise discretion and allow it to amend as held in the cases of; Mowa Publishers Limited .& Another vs Attorney General & Another (1991) KLR 46 and John Mulwa Kang'atu vs Pan African Insurance Co. Ltd (2015) eKLR.

28. I have considered the application and the submissions filed by the parties and I find that the only issue to determine is whether, the Applicant has satisfied the criteria for grant of the orders sought. The provisions that govern amendment of pleadings is provided under section, 100 of the civil procedure Act (cap 21) laws of Kenya, which states that: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

29. The procedural provisions that supports the aforesaid provisions are provided for under order 8 rule 3 of the civil procedure Rules, 2010, which states: -

“(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.

(3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the

identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under sub-rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

30. Similarly, case law has settled that, amendment of pleadings should be freely allowed, if made without injustice to the other side. This is supported by several cases, including but not limited to the cases of; Eastern Bakery vs Castelino (1958) EA 461 and Central (K) Limited vs Trust Bank of Kenya Ltd (2002) 2EA 365. Be that as it were, the grant of leave to amend pleadings, is a discretionary power of the court that, should be exercised judiciously and in the interest of justice.

31. Indeed, the amendment of pleadings is basically for the purpose of bringing about final adjudication in a suit and to avoid multiplicity of pleadings. In the case of; Harrison C. Kamau vs Blue Shield Insurance Co. Ltd (2006) eKLR, the court stated that:-

“the amendments of pleadings....(is) aimed at allowing a litigant to plead the whole of the claim he (is) entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as (are) necessary for determining the real issue in controversy or avoiding a multiplicity of suits, provided:

(i) There has been no undue delay;

(ii) No new inconsistent cause of action (is) introduced;

(iii) No vested interest or accrued legal right (is) affected; and

(iv) The amendment (can) be allowed without injustice to the other side.....”

32. In the same vein, the court in the case of; Joseph Ochieng & 2 Others vs First National Bank of Chicago Civil Appeal No. 149 of 1999 stated as follows; -

“The ratio that emerges out of what was quoted from the same 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 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 claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

33. I have considered the proposed amendments herein and I find that, the main new matter proposed to be introduced is the claim in the counter-claim. Apparently, the defendant had intimated at paragraph 11 of its statement of defence that it would raise a counter claim as against the plaintiff for the refund of Kshs. 35,000,000.

34. That is indeed the subject of the intended amendment. The Respondent is therefore not taken by surprise and/or ambushed. Although the Respondent argues that, the Applicant has delayed in filing this application and/or has not provided evidence in support of the claim in the counter claim, I believe that the issue of evidence can be dealt with at the hearing of the case.

35. I also take note of the fact that, the plaintiff was granted an injunction in its favour on 18th August 2016 and/or the defendant has sought for dismissal of the suit due to delay of the prosecution thereof. Therefore, any delay in the disposal of the matter is attributed to both parties. In that regard, taking into account that the hearing of the case has not commenced and the basis of established principle that an amendment can be allowed at any stage on the conditions stated, I shall allow the application in the interest of justice but compensate the Respondent with costs thereof.

36. I however, note that the Applicant avers that the matter should be referred to arbitration. If that is the intent of the Applicant, it should not be taking court's limited resource in terms of time, if the dispute resolution forum is arbitration

37. It is so ordered.

Dated, delivered and signed in an open court this 22nd day of May 2020.

G.L. NZIOKA

JUDGE

In the presence of:

Mr. Isaac Wanjohi for the plaintiff/Respondent

Mr. Muthuri Victor for the defendant/Applicant

By virtual communication