



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 275 OF 2013**

NANCY MWANGI

T/A WORTHLINK MARKETERS.....PLAINTIFF/RESPONDENT

VERSUS

AIRTEL NETWORKS (K) LIMITED

(FORMERLY CELTEL KENYA LIMITED)..1<sup>ST</sup> DEFENDANT/APPLICANT

G4S LIMITED.....2<sup>ND</sup> DEFENDANT

SMART PRINTERS LIMTIED.....3<sup>RD</sup> DEFENDANT

**RULING**

1. Airtel Networks Kenya Limited (The 1<sup>st</sup> Defendant or Airtel) seeks the leave of this Court to amend its Defence. That leave is sought in a Motion dated 18<sup>th</sup> May, 2017.
2. It is said for Airtel that the Statement of Defence is to answer allegations of fact raised in the Plaint. The Defence intends to revamp Airtel's answer to the Plaint filed on 01<sup>st</sup> July 2013.
3. In that Plaint, Nancy Mwangi trading as Worthlink Marketers (**Worthlink Marketers or the Plaintiff**) seeks judgment against Airtel, G4S Limited and Smart Printers Limited as follows:-

*(a) A declaration that the Defendants were jointly and severally negligence in discharge of their respective duties in respective to the Concert the subject matter of these proceedings;*

*(b) Special damages of Kshs. 7,969,296.00;*

*(c) Damages for loss of anticipated profit of Kshs. 12,000,000.00;*

*(d) General damages for breach of contract;*

*(e) Costs and interest at Court rates*

4. The claim arises out of a Sponsor Agreement entered between Airtel and the Plaintiff in which the Plaintiff was to fly into Kenya an artist by the name LUCIANO to perform at Airtel's Zain reggae concert held on 3<sup>rd</sup> October 2008 at The Splash Carnivore grounds. The Plaintiff alleges various breaches of the contract allegedly committed by the Defendants herein, details of which are unnecessary for now.

5. Airtel argues that the Amendments to its Defence are essential because the bedrock to its already pleaded Defence was dismissed in a Ruling delivered by Hon. Gikonyo, J on 14<sup>th</sup> July 2014. Its earlier Defence was that the Plaintiff's suit was res judicata and true to its pleading Airtel had taken it up as a Preliminary Objection. In a Ruling delivered on 14<sup>th</sup> July 2014, the Court disagreed with Airtel and did not uphold the argument that this suit is res judicata.

6. Airtel argues that with that Ruling, the Plaintiff's suit is unanswered and the Amendment sought to be introduced will respond to the allegations of fact pleaded by the Plaintiff. And that the Plaintiff will not suffer any prejudice as the matters sought to be pleaded were previously pleaded by Airtel in Arbitral proceedings between the two Parties.

7. The Plaintiff resists the Application for leave and sets out her reasons and position in a Replying Affidavit of 5<sup>th</sup> September 2017. These reasons were augmented by arguments made on her behalf by Counsel at the hearing of the Motion.

8. The Plaintiff takes a view that the Amendments are sought in bad faith and are mischievous. She cites the filing and subsequent withdrawal of an Application dated 16<sup>th</sup> January 2016 for dismissal of the suit for want of prosecution. That this Application falls into the pattern of attempts by Airtel to delay or otherwise scuttle the hearing and expeditious determination of this suit. That the timing of the Application betrays the scheme. That the Application was filed on 18<sup>th</sup> May 2017 when the case was due for pre-trial on 19<sup>th</sup> May 2017. This would not be different from when another Application of 16<sup>th</sup> January 2017 was filed on 3<sup>rd</sup> February 2017 and served on her Advocates on 14<sup>th</sup> February 2017 when the case was coming up for hearing on 17<sup>th</sup> February, 2017.

9. It was also argued that there has been indolence on the part of the Applicant who has taken over 4 years to seek the permission now presented. Worse still, the delay has not been explained.

10. The Court was asked to note that facts sought to be introduced were in respect to what proceeded before the Arbitrator and the premise upon which the Airtel approached the Court. Further, some are matters already admitted by the Airtel who should not and cannot be allowed to depart from its earlier admission.

11. There is consensus that the guiding principles in applications for leave to amend are that;

*“The amendment of pleadings and joinder of Parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; **Beoco Ltd vs Alfa Laval Co. Ltd (1994) 4 All ER 464** adopted. Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”*

**(Central Kenya Ltd vs Trust Bank Limited (2000) 2 EA 365 (CAK)**

12. It was however submitted by Counsel for the Plaintiff that there will be occasion when unreasonable delay will be a ground for refusal for leave because to do so would amount to an abuse of Court process (**Julius Kabui Mwangi & Another vs Wangui Gatundu & 3 Others (2015) eKLR**). In urging the Court not to find favour in the Application, the Court was asked to note that the one Law Firm has represented Airtel since the inception of these proceedings and the delay should be viewed from that perspective.

13. The Defence that is on record on behalf of Airtel is that dated 29<sup>th</sup> August 2013. The anchor Defence to the Plaintiff's claim, as presented therein, was that the dispute between Airtel and the Plaintiff was subject to an Arbitration Agreement and that an appointed Arbitrator had determined the dispute. A defence pleaded was collateral estoppel.

14. In addition, it was pleaded that the Award by the Arbitrator was the subject matter of High Court Misc. Application No. 544 of 2012 in which Hon. Havelock J made a finding on the merit of the Plaintiff's claim. It was the position of Airtel that this suit was res judicata the award and decision in Misc. Application No. 544 of 2012.

15. Another plea taken up was that the proceedings are barred by statute.

16. The Defence of Res judicata was set up for determination in the Plaintiff's Application of 16<sup>th</sup> September 2013 which was determined by Hon. Gikonyo J, on 14<sup>th</sup> July 2014. In that determination the Judge said:-

*“care should be taken when applying the doctrine of Res judicata in the circumstances of this case, which are peculiar in a sense and relate to decision which set aside an arbitral award for lack of jurisdiction. Accordingly, with all due respect to the counsel for the Defendants, the decision by the court in setting aside the arbitral award was neither a decision of finality on the issues in dispute nor a substitution for the decision of the arbitral tribunal. Their arguments on Res judicata, therefore, fail. I declare this suit is not Res judicata”.*

17. In the same Ruling the Judge observed that the issue of Limitations of Actions needed to be resolved at the hearing.

18. I would therefore agree with the argument by Airtel that the Ruling took away the plank of Airtel's Defence. Any hope by Airtel that it would defeat the Plaintiff's claim by a plea of res judicata was dealt a fatal blow by that decision.

19. The effect of the decision by the Judge was that this dispute ought to be determined on its merit. It does not therefore seem unreasonable for the Airtel to now seek an opportunity of pleading certain facts which could form the subject of a meritorious discussion and subsequent determination of the matter. A Party should not be barred from pleading and presenting facts that will help the Court determine the real question in controversy. Although the Plaintiff states that the amendment seeks to introduce facts that have been admitted by Airtel, those allegedly admitted facts were not set out.

20. Whilst the Application is brought fairly late in the day, about 4 years after the Defence was filed and 3 years after the delivery of the Ruling by Judge Gikonyo, it has been brought before the matter has commenced hearing. In that way, the Plaintiff still has opportunity to respond to it and to prepare her case in a manner that can confront the Defence taken up. Any prejudice that the Plaintiff may suffer will therefore be mitigated.

21. Delay which is inordinate and unexplained will not be countenanced by Court. In the case of **Julius Kabui Mwangi (supra)**, for instance, the Application for leave came 16 years after pleading sought to be amended was filed. For the worse, it came after the hearing had commenced. The circumstances here are different. The delay is not as extensive and the pre-trials herein have not even been settled.

22. This Court leans towards allowing the motion. However, the Court was asked by the Plaintiff not to allow a blanket leave in the event of reaching a decision that permission was merited. The Court was

asked not to allow the introduction of paragraphs 4-9 and 17 of the proposed Defence. It is said for instance that paragraph 9 is a pleading on behalf of G4S which is already a Party herein.

23. The proposed paragraph 9 reads as follows:-

*“Further, the 1<sup>st</sup> Defendant states that the said G4S carried out their duties diligently and kept proper records of the tickets given to them, those sold out including counterfoils which they remitted to the Parties on 6<sup>th</sup> October 2008 together with proceeds.”*

On the face of it, it is indeed a plea on behalf of the 2<sup>nd</sup> Defendant. However, the 2<sup>nd</sup> Defendant had pleaded as follows in its Defence;-

*“save that the second Defendant was by Temporary works order No. 119337, dated 3<sup>rd</sup> October 2008, engaged by the First Defendant to provide cashiering and temporary banking services at the Splash grounds from 4.00 pm to 5.30pm on 3<sup>rd</sup> October 2008, paragraph 14 of the Plaintiff is denied.”*

24. If the 2<sup>nd</sup> Defendant was contracted by Airtel to provide certain services, then it does not seem improper for the Airtel to plead that the 2<sup>nd</sup> Defendant carried out its duties diligently. In any event, the 2<sup>nd</sup> Defendant is not opposed to the leave as sought. I see no reason to exclude that pleading.

25. There is nevertheless merit in the argument that paragraph 17 of proposed Defence should not be permitted. It reads;-

*“without prejudice to the foregoing, the 1<sup>st</sup> Defendant will raise a preliminary objection that the suit as filed is fatally defective and deserving to be struck out.”*

Two observations can be made. First the pleading is imprecise as to the nature of the fatal defect. Airtel has already had opportunity to raise preliminary objections to the suit and the apprehension of the Plaintiff that this amendment merely seeks to give Airtel an opportunity of setting up further objections is not without basis.

26. The second observation to be made is that the reasons put forward by Airtel for seeking leave to Amend is that it needs to confront allegations of fact presented by the Plaintiff. In paragraph 9 of the Affidavit in support of the Application, it is desposed;

*“that it is for the foregoing reasons that the 1<sup>st</sup> Defendant seeks leave to amend its Defence to respond to the allegations of fact pleaded by the Plaintiff in the Plaintiff in terms of the Draft attached and marked email.”*

The controversial paragraph 17 of the draft is not an answer to a question of fact but an issue of law. This is not consistent with the reasons given for seeking leave. Paragraph 17 will not be permitted.

27. Ultimately, I allow the Notice of Motion of 1<sup>st</sup> July 2017. The Draft Defence (but excluding paragraph 17) will be filed and served within 14 days hereof. The Plaintiff has leave of 7 days after service to respond thereto.

28. Costs of the Application will be in the Cause.

Dated, delivered and signed in open Court at Nairobi this 24<sup>th</sup> day of November 2017.

**F. TUIYOTT**

**JUDGE**

**In the presence of:-**

Thiga for the Plaintiff/Respondent

Wilson holding brief for Makambi for the 1<sup>st</sup> Defendant/Applicant

No Appearance for the 2<sup>nd</sup> Defendant

No Appearance for the 3<sup>rd</sup> Defendant

Alex.....Court Assistant