



**Mueke & another v Co-operative Bank of Kenya Ltd & another (Environment & Land Case 370 of 2011) [2022] KEELC 14635 (KLR) (9 November 2022) (Ruling)**

Neutral citation: [2022] KEELC 14635 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT MACHAKOS  
ENVIRONMENT & LAND CASE 370 OF 2011  
A NYUKURI, J  
NOVEMBER 9, 2022**

**BETWEEN**

**JONAH MALIKA MUEKE ..... 1<sup>ST</sup> PLAINTIFF**

**JOSEPH MUENDO MALIKA ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**CO-OPERATIVE BANK OF KENYA LTD ..... 1<sup>ST</sup> RESPONDENT**

**GARAM INVESTMENTS COMPANY ..... 2<sup>ND</sup> RESPONDENT**

**RULING**

**Introduction**

1. Before this court is the application dated 10<sup>th</sup> February 2020, filed by the Plaintiffs/Applicants in this suit, seeking the following orders;
  - a. That the honourable court be pleased to grant leave to the Plaintiffs to amend the Plaint filed on 8<sup>th</sup> December 2011 as per the draft Plaint annexed hereto.
  - b. That the honourable court be pleased to grant leave to the Plaintiffs to file further list of documents.
  - c. That costs of the application be in the cause
2. The application is premised on grounds on its face and the supporting affidavit of the 2<sup>nd</sup> Plaintiff Joseph Muendo Malika, sworn on 10<sup>th</sup> February 2020. The Applicants' case is that the Plaintiffs' case arises from the Defendant's false misrepresentation which led the Plaintiffs to suffer loss. They also averred that amendment of the Plaint was necessary to allow that Plaintiffs to plead facts on loss of business as a result of the Defendants' false misrepresentation.



3. Further, that the Plaint as filed on 8<sup>th</sup> December 2011, by the advocates did not include loss of business on the part of the Plaintiffs as a result of misrepresentation by the Respondent. They added that they also wished to file a further list of documents and amend any other prayer appropriately. It was their contention that they only became aware of the omission on the loss of business while preparing for hearing and that they made the prayers for amendment without delay. They concluded by stating that the Defendants would not be prejudiced by the proposed amendments.
4. No response was filed in opposition to the application.
5. The application was canvassed by written submissions. On record are the Applicants' submissions dated 30<sup>th</sup> December 2021, and the 1<sup>st</sup> Defendant's submissions dated 19<sup>th</sup> October 2020.

### **Submissions**

6. Counsel for the Applicant submitted that the court ought to allow an application for amendment if it is made at any stage before judgment if the interest of justice so require. They relied on the cases of Kajiado HCC No.7 of 2017, *St. Patricks Hill School Ltd vs Bank of Africa Kenya Ltd*, *J.C Patel v D. Joshi* (1952) EACA 12, *Eastern Bakery v Castelino* (1958) E.A 461 (U) at p. 462 for the proposition that amendments ought to be allowed by court at any time before judgment for purposes of facilitating substantive as opposed to technical justice.
7. On the question of whether the claim for loss of business was statute barred, they relied on provisions of Rule 3 (2) of Order 8, *Civil Procedure Rules* which states as follows;
 

Where an application to the court for leave to make an amendment such as is mentioned in Subrule (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 Subrule if it thinks just so to do.
8. The Applicants further referred to the case of *Ochieng & Others vs First National Bank of Chicago* Civil Appeal No.147 of 1991 where the court outlined principles under which courts may grant leave to amend pleadings, including the discretion to grant leave notwithstanding the expiry of the period of limitation.
9. As to whether the amendment would introduce a new cause of action by the claim of loss of business, they relied on provisions of Order 8 Rule 3 of the Civil Procedure Rules, which allowed for amendment not withstanding that the effect would be to add or substitute a new cause of action, if the new cause of action arose out of the same facts.
10. On their part, the Respondents submitted that the Plaintiffs' claim is time barred. They argued that the prayer for loss of business was being brought 8 years after filing suit. They relied on provisions of Section 4(2) of the *Limitation of Actions Act*, cap 22 Laws of Kenya which provide that actions founded on tort ought to be brought within 3 years. They cited the case of *WAB hotel Ltd (in receivership) & Another v industrial Development Bank Ltd* (2020) eKLR where the court held that the proposed amendments were time-barred since they were founded on alleged torts. They further argued that the limitation of time touched on jurisdiction and that this court has no jurisdiction to entertain the application.

### **Analysis and Determination**

11. I have considered the application and the rival submissions by the parties. In determining whether this court should exercise its discretion in favour of granting leave to amend the Plaint, the question that



this court has to address is whether the amendment sought will cause injustice to the Respondent that cannot be compensated in costs.. The general rule is to grant leave to a party who seeks to amend their pleadings where the prejudice to the other party can be compensated in costs.

12. Order 8 of the Civil Procedure Rules gives the court power to grant leave to amend pleadings after close of pleadings as follows;
  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 Subrule (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 Subrule if it thinks just so to do.
  3. An amendment to correct the name of a party may be allowed under Subrule (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 Subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the Plaintiff or counterclaim, he could have sued.
  5. An amendment may be allowed under Subrule (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.
13. Therefore, the general rule is to allow amendments where circumstances afford the Respondent to be compensated in costs, where he may suffer injustice. *The Constitution* has elevated values of equity to constitutional values. Denying a party an opportunity to amend their pleading is limiting them from presenting their entire case to court for adjudication. That would fly in the face of fairness and equity. By dint of Article 159, this court is enjoined to facilitate substantive justice as opposed to technical justice. Since allowing an amendment will grant the opposing party opportunity to respond, there ought to be no restrictions on an application for amendments as long as the injustice caused may be compensated in costs.
14. In the case of *John Gakuo & another v County Government of Nairobi & another* [2017] eKLR the Court of Appeal upheld the holding in *Eastern Bakery -vs - Castelino* (1958) E.A. 461, where it was held as ;

It will be sufficient, for the purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.... The court will not refuse leave to allow an amendment simply because it introduces a new case....



15. Similarly, in *George Gikubu Mbutia v Consolidated Bank of Kenya Ltd & Another* (2016) eKLR, it was held that parties to a suit have the right to amend their pleadings at any stage of the proceedings before judgment and that courts should liberally allow such amendments.

16. On the question of limitation, the Court of Appeal did pronounce itself in the case of *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR as follows: -

The law on amendment of pleading in terms of Section 100 of the *Civil Procedure Act* and Order VIA Rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12<sup>th</sup> Edition, in the case of *Joseph Ochieng & 2 others vs. First National Bank of Chicago*, Civil Appeal No. 149 of 1991 as follows:-

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.

17. Also, in the case of *Kuloba v Oduol* [2001] eKLR the court discussed a similar scenario as follows;

What I am trying to bring out is that the Courts had recognized the need for allowing certain amendments which were outside the period of limitation and or which sought to introduce a new cause of action even before order VIA rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is taken to have knowledge of such cause at the time the original pleading is filed. In considering similar provisions under the English Rules, the learned authors of *The Supreme Court Practice 1988* said as follows at page 351:

...if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified...the defence of limitation would not have been available to the Defendant, and accordingly, if in its discretion, the Court thinks it just to grant leave to amend the defects in the writ or pleading within the scope of the circumstances specified...., so that such defects in the proceedings are treated as having been cured ab initio, the Defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend that in the cases specified in these paragraphs, that the Defendant had an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under Order 20 Rule 8 and Order 15 Rule 6, 7 and 8 (see per Holroyd Pearce, LJ in *Pontin v Wood* [1962] 1 QB 594, p 609; [1962] 1 All ER 294, 298).” Lord Denning in his character said as follows in *Mitchell v Harris Engineering Co Ltd* [1967] 2 QB 703 at p 718 in this respect:...

He went further and gave another illustration;

(a) X enters into a contract with Y which is breached in a manner giving rise to both a contractual and tortious claim. He brings an action within three years for a claim in tort but omits his contractual claim. Eight years after the cause of action arose he applies to amend his Plaint to



bring the claim in contract. Is this an amendment that can be allowed under order VIA Rule 3(2) of the Rules? I think so.

18. In my view therefore, amendments even for allegedly time-barred claims, where the cause of action arose from the same facts to those already pleaded, ought to be allowed. Relying on Limitation statutes to bar an amendment on ground that the cause of action to be introduced is time barred would, in my considered view, be putting the horse before the cart. It is not a claim before it is pleaded. It is after pleading/ amendment that the Defendant can then raise a defence of limitation. Therefore, a party should be given the liberty to amend their pleadings, without being unnecessarily fettered in line with Constitutional tenets of fairness as espoused in Article 50 (1) of *the Constitution* of Kenya 2010. In this matter, the Defendants have not demonstrated that they will suffer injustice that cannot be compensated in costs, if the amendment is allowed.
19. The upshot of the above is that I find and hold that the application dated 10<sup>th</sup> February 2020, is merited and consequently the same is allowed as follows;
  - a. Leave be and is hereby granted to the Plaintiffs to file and serve their amended plaint together with a further list of documents within 14 days of this ruling.
  - b. Costs of the application shall be in the cause.
20. It is so ordered.

**DATED, SIGNED AND DELIVERED AT MACHAKOS VIRTUALLY THIS 9TH DAY OF NOVEMBER, 2022 THROUGH MICROSOFT TEAMS VIDEO CONFERENCING PLATFORM**

**A. NYUKURI**

**JUDGE**

**In the presence of;**

Mr. Mbindyo for the Plaintiffs.

Ms. Kahiu holding brief for Ms. Abobo for the 1st Defendant.

No appearance for the 2nd Defendant.

Court Assistant- Josephine

