



**Baobab Development Group Limited v East African Mission for School & Orphanage & 2 others  
(Environment & Land Case 58 'B' of 2021) [2024] KEELC 519 (KLR) (8 February 2024) (Ruling)**

Neutral citation: [2024] KEELC 519 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAKURU  
ENVIRONMENT & LAND CASE 58 'B' OF 2021  
LA OMOLLO, J  
FEBRUARY 8, 2024  
FORMERLY MALINDI CMCC NO 384 OF 2018**

**BETWEEN**

**BAOBAB DEVELOPMENT GROUP LIMITED ..... PLAINTIFF**

**AND**

**EAST AFRICAN MISSION FOR SCHOOL & ORPHANAGE .... 1<sup>ST</sup> DEFENDANT**

**SPINCORD LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**FRACTIONAL WAREHOUSE LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. This ruling is in respect of the Defendants'/Applicants' Notice of Motion Application dated 20<sup>th</sup> March, 2023 which is expressed to be brought under Sections 1A, 1B and 3A of the [Civil Procedure Act](#), Order 8 Rule 3 and 5 and Order 51 Rule 1 of the Civil Procedure Rules 2010.
2. The Defendants'/Applicants' seek the following orders:
  - a. That leave be granted to the Applicants to amend their Statement of Defence dated the 6<sup>th</sup> December, 2018 in accordance with the draft amended Statement of Defence and counterclaim annexed hereto.
  - b. That upon such leave being granted the draft amended Statement of Defence and counterclaim be deemed as duly filed upon payment of requisite filing fees.
  - c. That the costs of the application be in the cause.



3. The application is based on the grounds on its face and supported by the affidavit sworn on 20<sup>th</sup> March, 2023 by one Ben Spinks a director of the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants' / Applicants'.

### **Factual Background.**

4. The Plaintiff/Respondent commenced the present proceedings vide the Complaint dated 27<sup>th</sup> November, 2018 where the following prayers were sought;
  - a. A declaration that the Conditional Financing & Purchase Agreement dated the 17<sup>th</sup> day of May, 2016 and the Addendum to the Conditional Financing & Purchase Agreement dated 29<sup>th</sup> day of August, 2016 is rescinded
  - b. General damages for breach of contract.
  - c. Special damages in the sum of Ksh 18,991,690.00 as particularized in Paragraph 7 (i) (c) and 7 (ii) (a), (b) & (c) of the Complaint as at the date of filing suit and further damages to be ascertained.
  - d. Interest on c) above at the prevailing commercial rates and for such period of time as this Honourable Court may deem fit to grant.
  - e. A permanent injunction restraining the Defendants, their agents, servants or any of them from offering for sale, and advertising for sale the 4 two bedroomed fully furnished villas christened ZIWA 1, ZIWA 2, ZIWA 3 and ZIWA 4 which are erected upon Portion No. 14242/101 (Original No 14242/10/9) I.R. 195919.
  - f. Costs of this suit together with interest thereon at such rate and for such period of time as this Honourable Court may deem fit to grant.
  - g. Any such other or further relief as this Honourable Court may deem appropriate.
5. On 23<sup>rd</sup> May, 2023 when the matter came before court and counsel for the Defendant informed the court that they had filed an application dated 23<sup>rd</sup> March 2023 and were yet to receive a response.
6. Counsel for the Plaintiff informed court that they had filed a Replying Affidavit and Grounds of opposition to the said application. The court rescheduled the matter for hearing on 12<sup>th</sup> June, 2023 because the Plaintiff's response was not in the court file.
7. On 12<sup>th</sup> June, 2023, the court confirmed that the replying affidavit and notice of preliminary objection were in the court file and issued directions that the application shall be heard by way of written submissions.
8. On 5<sup>th</sup> July, 2023 when the matter came for mention, both parties informed court that they had not filed their submissions and the matter was rescheduled for mention on 24<sup>th</sup> July, 2023.
9. On 24<sup>th</sup> July 2023, counsel for the Plaintiff informed the court that she had filed submissions and the matter was reserved for ruling.

### **The Applicants/Defendants' Contention.**

10. The Applicants contend that the Respondent commenced this suit by way of Complaint dated 27<sup>th</sup> November, 2018 which was filed in the Chief Magistrate's Court at Malindi.
11. The Deponent deposes that on behalf of the Applicants, he authorized their advocates on record to enter appearance and filed a statement of defence dated 6<sup>th</sup> December, 2018.



12. The Applicants contend that the said firm of advocates however noted that the Malindi Chief Magistrate's Court did not have the requisite geographical and pecuniary jurisdiction to hear and determine the said suit and hence they applied to have the same withdrawn and transferred to this Court which was competent to hear this matter.
13. The Applicants contend that they wish to amend their statement of defence to include a counterclaim for the sum of Kshs 156,000,000/= which is the profit owed to them by the Respondent as agreed at Clause 2.2 the Conditional Financing & Purchase Agreement (Agreement) dated the 17<sup>th</sup> May, 2016.
14. The Applicants further contend that the said Agreement also required the Respondent to pay the 2<sup>nd</sup> Applicant a total sum of Ksh 11,000,000/= with an escalation of 5% for each villa as profit which sum is yet to be paid.
15. It is the Applicants contention that their current Statement of Defence on record does not capture the above sums that they wish to counterclaim from the Respondent.
16. The Applicants contend that it is therefore necessary, and in order to enable this Honourable Court to determine the real issues in dispute between the parties herein, to allow the amendments.
17. The Applicants contend that should this matter proceed for hearing as scheduled without granting leave to the Applicants to amend their Statement of Defence to include the said counterclaim, the same will be highly prejudicial to the Applicants and will thus amount to an injustice and an abuse of the principles of natural justice.
18. The Applicants end by stating that the Respondent will not suffer any prejudice as it has a right to amend its plaint accordingly.

**Plaintiff/respondent's response to the application dated 20<sup>th</sup> March, 2023.**

19. The Plaintiff/Respondent filed a notice of p
20. Preliminary Objection on 24<sup>th</sup> May, 2023. The Preliminary Objection is premised on the following grounds:
  - a. That pursuant to section 7 of the Civil Procedure Act Cap 21 Laws of Kenya, the Defendants' Application is res judicata and this Honourable Court lacks the jurisdiction to hear and determine the same.
  - b. That pursuant to section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the Defendants' intended counterclaim is time barred and the Court has no jurisdiction to entertain the matter.
  - c. That the application is incompetent, misconceived, bad in law and amounts to an abuse of the court process.
  - d. That Plaintiff's suit is therefore a waste of judicial time and ought to be struck out with costs to the Plaintiff.
21. The Respondent also filed a Replying Affidavit on 24<sup>th</sup> May, 2023 in response to the application. The Deponent is one Boldt Andreas and he describes himself as a director of the Plaintiff/Respondent Company.



22. He states that he is informed by his Advocates on record that the application seeks leave to file an amended Defence out of time. He states that an application for amendment should be made at the earliest possible moment.
23. He deposes that the Applicants have approached this Honourable Court with unclean hands as there is inordinate delay in filing the application. He deposes that the Statement of Defence sought to be amended was filed on 10<sup>th</sup> December, 2018 and more than 4 years have passed since the said filing.
24. He states that the Applicant has not offered plausible explanation as to the delay and failure to file the said application promptly. He states that the Application is an afterthought and whim to delay the prompt determination of this suit before the Court.
25. He deposes that the Applicants' were economical with facts and concealed information that they had filed the said Defence which was struck out by this Court vide a ruling delivered on 6<sup>th</sup> December, 2022.
26. He deposes that the Application is res judicata and he believes that litigation of an issue should come to an end and the court should not be taken in circles over the same issue. He deposes that the proposed amendment is intended to introduce a new cause of action by way of counterclaim and the same is time barred.
27. He states that the Plaintiff's suit is premised on breach of the Conditional Financing and Purchase agreement dated 17<sup>th</sup> May, 2016 and the particularized breaches were inter alia failure to complete the initial two (2) villas on or about 31<sup>st</sup> August, 2016 and the subsequent two (2) villas (totaling to 4) on or before 31<sup>st</sup> October, 2016.
28. He deposes that the proposed amendments introduce a new cause of action which would now be time barred. He deposes that the Applicants are in possession of the 4 Villas which were financed by the Plaintiff, subject to this case, and they continue to reap benefits at the exclusion of the Plaintiff. He deposes that further delay in determining the suit presented by the Plaintiff will continue causing the Plaintiff irreparable harm.
29. He deposes that this suit was filed in 2018 and has not been determined more than five years later. He deposes that in addition, the Plaintiff has already filed its pre-trial bundle and matter certified ready for hearing and could have proceeded for hearing on 20<sup>th</sup> March, 2023 but for the nationwide demonstrations which obstructed attendance in Court.
30. He deposes that in the circumstances, the Plaintiff will suffer prejudice and irreparable harm for continued delay in determination of the case.
31. He deposes that the Application is mala fide since the Honourable Court was earlier on tasked to strike out the same defence which had been filed before the court. He deposes that the Applicants' are not entitled to the orders sought in the application.
32. He deposes that the application is an abuse of the Court process and should be dismissed with costs in favour of the Plaintiff.

### **Applicants/defendants' Submissions.**

33. The Applicants filed their submissions on 5<sup>th</sup> July, 2023 and they identified the following issues for determination:
  - a. Whether the Applicants can rightly amend their Statement of Defence as sought in their current application?



- b. Whether the Applicant's application is res judicata?
  - c. Whether the Applicant's intended Counterclaim is time barred?
34. The Applicants' rely on Order 8, Rules 3 sub rules 1 and 5 of the Civil Procedure Rules 2010. They submit that the Civil Procedure Rules provide that a party may apply to this Honourable Court to amend any pleadings at any stage of the proceedings for the purpose of determining the real question in controversy between the parties to the suit.
35. The Applicants further rely on the judicial decisions of Eunice Chepkorir Soi Vs Bomet Water Company Ltd [2017] eKLR and Edds Designers Limited Vs United Credit Limited Joseph M. Gikonyo t/a & another [2022] eKLR.
36. The Applicants also submit that the criteria for allowing an application for amendment are: the person applying for amendment must be acting in good faith, if on analysis of it, the amendment is intended for the first time thereby to advance a new ground of defence, to repair an omission due to negligence or carelessness and if the amendment can be made without injustice to the other side.
37. The Applicants' submit that they have brought this application seeking for leave to amend the Statement of Defence dated 6<sup>th</sup> December, 2018 in order to repair an omission in responding to the claims set out in the Respondent's Plaint and to also include a counter claim for the sum of Ksh 156,000,000/=
38. The Applicants' submit that the Respondent was in breach of the contract which is the subject matter of this suit and have thus indicated the particulars of breach by the Respondent in their amended Defence and Counterclaim.
39. The Applicants submits that the particulars of breach will assist this court understand and determine the real question in controversy between the parties herein.
40. They submit that they do not intend to bring in a new cause of action or a new Defence but only seek to shed light on the dispute between the parties herein and further that without the said amended Defence and Counterclaim, this Honourable Court will not be in a position to fully adjudicate the dispute between the parties.
41. The Applicants submit that they have proven that they have a right to amend their pleadings at any stage in order to aid the cause of justice. They submit that the application has been brought timeously considering that the hearing hereof is yet to take place and the Applicants therefore pray that their application is allowed.
42. The Applicants' submit that the doctrine of res judicata is set out in Section 7 of the [Civil Procedure Act](#). They submit that the doctrine ousts the jurisdiction of a Court to try any suit or issue which had been finally determined by a court of competent jurisdiction in a former suit involving the same parties or parties litigating under the same title.
43. The Applicants' rely on the judicial decision of Invesco Assurance Company Limited & 2 others Vs Auctioneers Licensing Board & another; Kinyanjui Njuguna & Company Advocates & another (Interested Parties) [2020] eKLR.
44. The Applicants' submit that the 5 essential elements which a party claiming the issue of res judicata must satisfy are:
- i. the suit or issue raised was directly and substantially in issue in the former suit,



- ii. that the former suit was between the same party or parties under whom they or any of them claim,
  - iii. that those parties were litigating under the same title,
  - iv. that the issue in question was heard and finally determined in the former suit and
  - v. that the court which heard and determined the issue was competent to try both the suit in which the issue was raised and the subsequent suit.
45. The Applicants' submit that for the objection as to their application being res judicata, the Respondent must prove that "the issue in question was heard and finally determined in the application filed by the Respondent dated 22<sup>nd</sup> February, 2022."
  46. The Applicants submit that in they explained that the application filed by the Respondents to which a ruling was delivered on the 6<sup>th</sup> December, 2022 sought to strike out the Applicants' amended Statement of Defence and Counterclaim for having been filed while there existed the Statement of Defence dated 6<sup>th</sup> December, 2018.
  47. They submit that the current application before this Honourable Court is one which seeks this Court's leave to amend the said Statement of Defence dated 6<sup>th</sup> December, 2018.
  48. The Applicants' submit that the issues for determination in the Respondent's previous application was whether or not the Applicants' filed Statement of Defence and Counterclaim ought to have been struck out for having been filed irregularly whereas the issues for determination in the Applicants' current application is whether the Applicants ought to be granted leave to amend their written Statement of Defence.
  49. They submit that their current application is not res judicata as the issues for determination have not been dealt with as between the parties herein or by this Honourable Court previously. The Applicants' submits that the Respondents objection therefore fails in this limb.
  50. The Applicants' rely on the judicial decision of Andrew Kariuki Boro Vs David Kinuthia Kimani [2019] eKLR and submit that they asserted their right by way of the counterclaim dated 4<sup>th</sup> February, 2022.
  51. The Applicants' further submit that at the time of filing the said Defence and Counterclaim the Applicants' stopped the time from running. They submit that the ruling dismissing the said Defence and Counterclaim was delivered on the 6<sup>th</sup> December, 2022 and shortly thereafter on the 24<sup>th</sup> March, 2023 the Applicants filed the current application seeking to amend their Defence to include a Counterclaim.
  52. They submit that the time for limitation of their Counterclaim stopped when they filed the Defence and Counterclaim dated 4<sup>th</sup> February, 2023. They submit that time was stopped 3 months before the expiry of the 6 years' limitation imposed by the *Limitation of Actions Act*.
  53. The Applicants submit that the parties thereafter litigated on the irregularity of the said Counterclaim until it was struck out on 6<sup>th</sup> December, 2022. They submit that this application was brought again before the expiry of the said 6 years as the current application was filed on the 24<sup>th</sup> March, 2023 which was still within the 6 years' limitation period. The Applicants submit that their Counterclaim is well within time and the objection falls on this limb.



54. The Applicants submit that the Defence and Counterclaim herein is not one that can prejudice the Plaintiff or embarrass the trial. They submit that a pleading which tends to embarrass or prejudice the Applicant is one which is ambiguous and unintelligible or one which states immaterial matters and raises irrelevant issues which may involve expense, trouble, delay and prejudice the fair trial of the case.
55. The Applicants submit that their application is merited and they pray that this Honourable Court dismiss the Respondent's preliminary objection with costs to the Applicants'.

**Respondent's/plaintiff's Submissions.**

56. The Respondent filed its submissions on 18<sup>th</sup> July, 2023.
57. The Respondent identified the following issues for determination:
- a. Whether the intended Counterclaim is time barred pursuant to section 4 of the Limitation of Actions Act?
  - b. Whether the Defendants are entitled to the orders sought?
  - c. What are the orders as to costs?
58. The Respondent relies on Order 8 Rule 3 (1) of the Civil Procedure Rules and the judicial decision of Central Kenya Ltd Vs Trust Bank Ltd & 5 others [2000] eKLR. It submits that the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment has not been made with undue delay or will not result in prejudice or injustice to the other party.
59. The Respondent submits that the Defendants' proposed amendment to the Defence has been brought more than five (5) years since the Defendants' first filed their Statement of Defence and more than seven (7) years since parties executed the Conditional Financing and Purchase Agreement.
60. The Respondent relies on Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya. It submits that the intended Counterclaim is alleged breach of the Conditional and Financing Agreement entered between parties dated 17<sup>th</sup> May, 2016. It submits that specifically, the Defendants' plead at paragraph 1 of the draft as follows:
- “ 1. The Defendants state they entered into an Agreement with the Plaintiff on the 17<sup>th</sup> May, 2016 for the construction of 14 to 24, 2 bedrooms foully (sic) furnished villas at an estimated cost of Ksh 4,500,000/- per villa.”
61. The Respondent submits that the Defendants' purported cause of action arises from alleged breaches on the Plaintiff's part, being inter alia failure to complete the initial two (2) villas on or about 31<sup>st</sup> August, 2016 and the subsequent two (2) villas (totaling to 4), on or before 31<sup>st</sup> October, 2016. It submits further, the Defendants seek an order for rescission of the Agreement dated 17<sup>th</sup> May, 2016.
62. The Respondent submits that the Defendants' cause of action arises from alleged breaches of the Agreement dated 17<sup>th</sup> May, 2016 and pursuant to section 4 of the Limitation of Action Act, the claim ought to have been brought before Court by 31<sup>st</sup> October, 2022.
63. The Respondent relies on the judicial decisions of Edds Designers Limited Vs United Credit Limited Joseph M. Gikonyo t/a & another [2022] eKLR, Kenya Breweries Limited V Municipal Council of Mombasa & 6 others [2012] eKLR, Andrew Kariuki Boro Vs David Kinuthia Kimani [2019] eKLR and James Maina Kinya Vs Gerald Kwendaka [2018] eKLR.



64. The Respondent submits that the Defendants herein neither filed an independent suit nor a Counterclaim in this case prior to the intended Counterclaim, which is the subject of this application.
65. The Respondent submits that the allegations that the Defendants filed the amended Statement of Defence and Counterclaim on or about 4<sup>th</sup> February, 2022 is misleading. It submits that the said amended Defence and Counterclaim was never filed as it was struck out vide the Ruling of the Honourable Court delivered on 6<sup>th</sup> December, 2022. The Respondent submits that time has been running continuously since the alleged breaches in 2016 and the intended Counterclaim is time barred.
66. The Respondent submits that this is a classical case where an amendment ought to be denied for reasons that there has been inordinate delay, of a period of seven (years), and no explanation has been provided for the unreasonable delay. It submits that further, the Respondent will be seriously prejudiced if it is to be asked to provide a Defence to the intended Counterclaim after a period of over 7 years, which is barred by statute.
67. The Respondent submits that the intended amendment does occasion great injustice to the Respondent which cannot be properly compensated in costs for the following reasons:
- a) The Plaintiff filed the instant suit in 2018 and the same is yet to be determined,
  - b) The Defendants, jointly, continue to benefit from the financing which was made by the Plaintiff,
  - c) The Plaintiff has not been compensated and/or refunded the sum of money which it paid pursuant to the financing agreement subject of suit,
  - d) The Plaintiff has already complied with pretrial directions and filed the necessary pretrial bundle and matter marked for hearing and
  - e) the Defendants are guilty of inordinate delay.
68. The Respondent submits that the matters raised in the intended counterclaim are time barred and the Plaintiff may not be able within a reasonable time, to gather necessary information and documents for its defence to the said counterclaim considering the change in management and/or directorship over the years since 2016.
69. The Respondent submits that the injustice likely to be suffered cannot be compensated in monetary terms. It also submits that the intended amendment to the Defence is only meant to delay the determination of this suit contrary to Article 159 (2) (d) of *the Constitution*.
70. The Respondent submits that due to the inordinate delay and the several managerial and/or change of directorship, at is company, it will not be able to gather its defence to the intended Counterclaim within a reasonable time. The Respondent submits that it will suffer injustice and its right to fair hearing will be violated and/or threatened. It submits that the said injustice cannot be properly compensated in monetary terms.
71. The Respondent concludes by submitting that the application before the court has been filed after inordinate delay, which no plausible explanation has been proffered. It submits that the intended Counterclaim is time barred and will occasion the Plaintiff great injustice which cannot be compensated in monetary terms. The Respondent submits that the Applicant is not entitled to the orders sought and the Application should be dismissed with costs to the Plaintiff.



### **Analysis and Determination.**

72. I have considered the application and the affidavit in support of the application. I have also taken into consideration the preliminary objection, the replying affidavit and the rival submissions filed.
73. In my view, the questions that arise for determination are:
- a. Whether the preliminary objection filed by the Plaintiff/Respondent on 24<sup>th</sup> May, 2023 is merited?
  - b. Whether leave should be granted to the Applicants to amend their statement of Defence and file a counterclaim.
  - c. Who should bear the cost of this application?

### **A. Whether the preliminary objection filed by the Plaintiff/Respondent on 24<sup>th</sup> May, 2023 is merited?**

74. A Preliminary Objection was described in the judicial decision of Mukisa Biscuits Manufacturing Co. Ltd Vs West End Distributors Ltd (1969) EA 696 to mean: -

“So far as I am aware, a Preliminary Objection consists of a point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary point may dispose of the suit...”

Further Sir Charles Nebbold, JA stated that: -

“A Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact had to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of points by way of Preliminary Objection does nothing but unnecessarily increase costs and, on occasion, confuse the issue. The improper practice should stop”.

75. In the judicial decision of Oraro Vs Mbaja (2005) 1KLR 141, where it was held that:-

“Anything that purports to be a Preliminary Objection must not deal with disputed facts and it must not derive its foundation from factual information which stands to be tested by rules of evidence”

76. In George Kamau Kimani & 4 Others Vs County Government of Trans Nzoia & Another (2014), eKLR, the Court in answering whether the question of res judicata can be raised by way of a preliminary objection held as follows:-

“I have considered the points raised by the 1st Defendant. All those points can be argued in the normal manner. They do not qualify to be raised as Preliminary Points. One cannot raise a ground of res judicata by way of Preliminary Objection. The best way to raise a ground of res judicata is by way of Notice of Motion where pleadings are annexed to enable the court to determine whether the current suit is res judicata. Professor Sifuna did not raise the issue of res judicata by way of Notice of Motion. Professor Sifuna only annexed a ruling in respect of



a case which was struck out. This is not a proper way of issues which require ascertainment of facts by way of evidence. They cannot be brought by way of Preliminary Objection”.

77. Whether or not this application is res judicata which will require the probing of evidence as contained in pleadings and ruling mentioned. I am ,therefore, unable to make a determination on it.
78. The Plaintiff/Respondent has also raised a preliminary objection on the ground that pursuant to section 4 of the *Limitation of Actions Act* Cap 22 Laws of Kenya, the Defendants’/Applicants’ intended Counterclaim is time barred and the court has no jurisdiction to entertain the matter.
79. Section 4 (1) of the *Limitation of Actions Act* provides as follows;
- The following actions may not be brought after the end of six years from the date on which the cause of action accrued:
- a. actions founded on contract;
  - b. actions to enforce a recognizance;
  - c. actions to enforce an award;
  - d. actions to recover a sum recoverable by virtue of a written law, other than a penalty or forfeiture or sum by way of penalty or forfeiture;
  - e. actions, including actions claiming equitable relief, for which no other period of limitation is provided by this Act or by any other written law.
80. In its submissions, the Respondent/Plaintiff submits that the Applicants/Defendants cause of action arises from alleged breach of the Agreement dated 17<sup>th</sup> May, 2016 and pursuant to section 4 of the Limitation of Action Act, the claim ought to have been brought before 31<sup>st</sup> October, 2022.
81. On the other hand, the Applicants’/Defendants’ submit that the time for limitation of their counterclaim stopped running when they filed the Defence and Counterclaim dated 4th February, 2023. They submit that time stopped running three months before the expiry of the six years limitation period imposed by the *Limitation of Actions Act*.
82. The Applicants/Defendants also submit that the parties thereafter litigated on the irregularity of the said counterclaim until it was struck out on the 6th December, 2022. They submit that this application was brought again before the expiry of the said 6 years as the current application was filed on the 24th March, 2023 which was still within the six-year limitation period. The Applicants submit that their Counterclaim is well within time and the objection is therefore unmerited.
83. It is apparent that both the Plaintiff and the Defendant have divergent views on whether the Counterclaim is time barred and when time begins to run.
84. In *Tony Obare Ogolla & another Vs Jacob Olang Ajero* (Suing as the administrator of the Estate of Jeremiah Olang – deceased) & another [2020] eKLR, the Learned Judge cited with approval the decision in *Sichuan Huashi Enterprises Corp. Limited Vs Micheal Misiko Muhindi* [2019] eKLR, wherein in it was held that the defence of limitation of time was a matter for determination at the trial and not to be summarily dealt with as a preliminary objection



85. In Sichuan Huashi Enterprises Corp Ltd. (Supra) the learned Judge cited with approval the cases of Oruta & Another Vs. Nyamato [1998] KLR 590 and Divecon Ltd vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997 as follows:

“The court should formulate limitation as one of the issues for determination and decide it on evidence adduced at the trial. On this see the case of Oruta & Another vs. Nyamato [1998] KLR 590, where the court held that limitation of action:-

“... could only be queried at the trial but not by... a preliminary objection... The Appellant could raise the objection at the trial and the trial judge would have to deal with the matter on the evidence to be adduced at the trial.”

86. In Divecon Ltd Vs Shirinkhanu S. Samani Civil Appeal No. 142 Of 1997, the Learned Judge quoted with approval the words of Gachuhi, J.A., the leading judge in the Oruta case (Supra) that:

“It will be up to the judge presiding at the trial to decide the issue of limitation as one of the issues but not as a preliminary point. The raising of the preliminary issue that would cause the suit for the Plaintiff to be struck out is not encouraged by the Limitation of Actions Act...”

Gikonyo J. in the same case further held:

“I should also think that the requirement in Order 2 rule 4 (1) of the Civil Procedure Rules that the relevant statute of limitation should be specifically pleaded in the Defence underscores the legal necessity to make limitation a matter for determination at the trial. The policy underpinning this position of the law is that a successful Defence of limitation makes the claim not maintainable and the Plaintiff is not entitled to a remedy.

Doubtless, this is a matter that affects rights of the claimant and therefore substantial, for under the Constitution a right cannot be taken away in a summary manner especially where the law requires plenary hearing and determination of the issue.”

87. Guided by the above judicial decisions, I find and hold that a preliminary objection is not a proper way of determining the question of res judicata and limitation of action for the reason that they both require the court to ascertain facts which can only be done by interrogating evidence.

**B. Whether leave should be granted to the Applicants to amend their Statement of Defence and file a counterclaim.**

88. Order 8 Rule 3(1) of the Civil Procedure Rules provides 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.

89. In Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR; the court of appeal restated the law relating to amendment of pleadings as stated in Bullen and Leake & Jacob's Precedents of Pleadings – 12<sup>th</sup> Edition and captured in the Court of Appeal decision in Joseph Ochieng & 2 others v First National Bank of Chicago (supra) 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.”

90. In the case of David Jonathan Grantham & Another –Vs- National Social Security Fund [2007] eKLR the court held as follows:

“The court’s power to allow amendments is donated under Order VIA Rules 3, 5 and 8 (now Order 8 under the 2010 Civil Procedure Rules). The court can allow amendments at any stage of the proceedings. The only test being whether it was timeously made; whether it is in good faith; and whether costs can compensate the Defendant/Respondent and whether the amendment is material and not merely technical.” (Emphasis Mine)

91. The court in the case of Eastern Bakery –vs- Castelino [1958] E. A 461 set out the principles the court has to consider in determining whether or not to allow an application for amendment as follows:

- (a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.
- (b) The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.

92. In the judicial decision of Cyrus Mucebiu Irungu Vs Alexander Mugambi Miriti & 7 others [2019] eKLR, the court at paragraph 13 stated:

“Thus, the overriding consideration in an application for leave for amendment is whether the amendments sought are necessary for determining the real question in controversy and whether any delay in

bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs” (Emphasis mine)

93. The Defendants/Applicants are seeking leave to amend their Statement of Defence to introduce particulars of breach of contract on the part of the Respondent and a Counterclaim of Kshs. 156,000,000

94. The Plaintiff/Respondent opposes the said amendment on grounds of limitation and res judicata, which I have already addressed. The other reasons are that there has been a delay in making this application to amend the Statement of Defence.

95. The Plaintiff/Respondent states that the statement of defence was filed on 6<sup>th</sup> December, 2018 and that it will suffer prejudice and irreparable harm for continued delay in determination of the case. The Plaintiff states that the suit was already confirmed for hearing and it has prepared and filed its trial bundle.



96. I note that there is an amount of inconvenience that the granting of leave to amend shall cause to the Plaintiff but that in itself cannot be a reason to refuse the amendment. In any event this can be resolved by awarding costs.
97. It is clear from the principles set out in the cases quoted above that the court can allow amendments of pleadings at any stage of proceedings. The Defendants/Applicants have also annexed to their supporting affidavit a Draft Amended Statement of Defence and Counterclaim incorporating the intended amendments.
98. I have taken into consideration the reasons advanced by the Defendant/Applicant for seeking leave to amend the Statement of Defence. I also note that this matter has not proceeded to hearing and have no doubt that no prejudice will be occasioned to the Plaintiff save for a degree of inconvenience. Further, the Plaintiff/Respondent have opportunity to amend its pleadings should it deem it necessary.
99. This court notes that the Applicants have been tardy in filing the application to amend their Statement of Defence. However, in the interest of justice, in order to determine the real issues in controversy and to avoid multiplicity of suits, this court grants leave to the Applicants to amend their Statement of Defence.

**B. Which party shall bear the cost of this preliminary objection?**

100. On the question of costs of the cost of the application, the general rule is that costs shall follow the event in accordance with the provisions of Section 27 of the *Civil Procedure Act* (Cap. 21). A successful party should ordinarily be awarded costs of an action unless the court, for good reason, directs otherwise.

**Disposition.**

101. Consequently, I find that the application dated 20/3/2023 is merited and is hereby allowed in the following terms:
- a. The Preliminary Objection filed by the Plaintiff/Respondent on 24<sup>th</sup> May, 2023 is hereby dismissed.
    - a. Leave is hereby granted to the Defendants/Applicants to amend their Written Statement of Defence and Counterclaim dated 6<sup>th</sup> December 2018 in terms of the annexed draft Amended Written Statement of Defence and Counterclaim.
  - b. The draft Amended Written Statement of Defence and Counterclaim shall be filed and served within 7 days from the date of this ruling.
  - c. The Plaintiff/Respondent is hereby granted corresponding leave to file its response to the amended pleadings within 14 days, if need be.
  - d. The Plaintiff/Respondents shall have costs of Kshs. 50,000 for the inconvenience caused to it.
  - e. The costs of this application shall abide the outcome of the suit.
102. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAKURU THIS 8<sup>TH</sup> DAY OF FEBRUARY, 2024.**

**L. A. OMOLLO**

**JUDGE**



**In the presence of: -**

Mr. Kutonya for the Plaintiff/Respondent.

No appearance for the Defendants/Applicants.

Court Assistant; Mr. Miruya

