



**RSW International INC & another v Kenya Electricity Transmission Company Limited (Civil Case E146 of 2020) [2025] KEHC 3637 (KLR) (Commercial and Tax) (24 March 2025) (Ruling)**

Neutral citation: [2025] KEHC 3637 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
CIVIL CASE E146 OF 2020  
AA VISRAM, J  
MARCH 24, 2025**

**BETWEEN**

**RSW INTERNATIONAL INC ..... 1<sup>ST</sup> PLAINTIFF**

**AECOM AFRICA (PTY) LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA ELECTRICITY TRANSMISSION COMPANY LIMITED . DEFENDANT**

**RULING**

**Introduction**

1. By the Notice of Motion dated 7<sup>th</sup> May, 2024 (“the Application”), the Plaintiffs sought leave to amend their Amended Plaint dated 18<sup>th</sup> October, 2021, and to file supplementary and/or amended witness statements, list of witnesses and bundle of documents in support of the amended pleadings.
2. The Application is supported by the affidavit of Darrin Green sworn on 3<sup>rd</sup> April, 2024 (“the Supporting Affidavit”).
3. The Defendant opposed the Application through the affidavit of Florence Mitey, sworn on 12<sup>th</sup> September, 2024 (“the Replying Affidavit”).

**Background**

4. By the Amended Plaint dated 18<sup>th</sup> October, 2021 (“the Amended Plaint”), the Plaintiffs seek various reliefs from the Defendant in relation to alleged breach by the Defendant of various agreements entered by the parties between 2015 and 2016 for the provision of project management and construction supervision services provided to the Defendant (“the Agreements”).



5. The Plaintiffs submitted that the Application is made under Order 8 rules 3 and 5 of the Civil Procedure Rules, 2010 (“the CPR”) to enable them include a prayer for unjust enrichment in the reliefs sought and provide more facts, including supporting evidence, on the claim for unjust enrichment (“the proposed amendment”).
6. The Applicant submitted that the Application is premised upon the fact that, in paragraph 18 of their Amended Reply to Defence and Defence to Counterclaim dated 1<sup>st</sup> March, 2022 (“the Amended Reply to Defence”), the Plaintiffs pleaded unjust enrichment on the basis that the Defendant benefitted from the services provided by the Plaintiffs under the Agreements but has failed to pay the Plaintiffs.
7. On the other hand, the Defendant submitted that the Plaintiffs seek to introduce new cause of action that would materially change the cause in the present matter and introduce an alternative prayer.
8. In further opposition, the Defendant submitted that the Application had been made after a prolonged period of delay, given that the breach of contract occurred in 2016.
9. In the Defendants’ view, the proposed amendment was outside of the applicable period of limitation being, six years. The Defendant submitted that the Plaintiff had filed a plaint on 7<sup>th</sup> November, 2019, and subsequently, amended the same on 18<sup>th</sup> October, 2021, and in both instances, failed to introduce the claim sought in the proposed amendment. In their view, the delay was unreasonable, and the Plaintiff was estopped from benefiting from its indolence, having slept on its rights.
10. Finally, the Defendant submitted that the proposed amendment would cause prejudice and occasion injustice on account of the proposed amendment being time-barred. The Defendant pointed out that the claim of unjust enrichment is based on the law of restitution, rather than law of contract, which was a materially different claim.

### **Issues for determination**

11. The issues for determination arising from the Application are:
  - a. whether the Application meets the threshold for grant of leave to amend pleadings under Order 8 Rule 3 of the CPR; and
  - b. whether the proposed amendment is time-barred as claimed by the Defendant in the Replying Affidavit.

### **Analysis and determination**

12. I have considered the affidavit sworn in support of the Application, the reply sworn in opposition to the same, and the rival submissions of the parties, together with the relevant pleadings filed by each of the parties.
13. The law applicable to amendment of pleadings is as follows:-

Order 8, rule 3 of the Civil Procedure Rules states as follows:-

“[Order 8, rule 3.] Amendment of pleading with leave.

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.”



“Order 8, rule 3(5)

(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.

14. Further to the above, Order 8, rule 5 of the Civil Procedure Rules states as follows:-

“[Order 8, rule 5.] General power to amend.

5.

(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

15. Further to the above, the guiding principles for the Court to consider when considering an application for leave to amend pleadings are (a) whether the amendment is necessary for the just determination of the suit and (b) whether the amendment would prejudice other parties. See the Court of Appeal’s decision in *Central Kenya Ltd v Trust Bank Ltd, Trust Finance Ltd, Floriculture and International Ltd, First National Finance Ltd & Registrar Of Titles* [2000] KECA 367 (KLR).

16. Guided by the above, and looking at the pleadings, I see that the claim of unjust enrichment was raised previously by the Plaintiff in its Amended Reply to Defence. The said claim is pleaded under paragraph 18 which states that:-

“18.2. The Defendant accordingly received a benefit from the Plaintiffs, being the said services, and was enriched thereby at the Plaintiffs’ expense;

18.3. It would, in the circumstances, be unjust to allow the Defendant to retain the benefit of the Plaintiffs’ services without compensating it thereof;”

17. Considering the above, I do not think that the Defendant will suffer any prejudice because the proposed amendment was already raised in the Amended Reply to Defence, and therefore, the Defendant was already on notice that the said claim was an issue to be resolved between the parties.

18. Further, having read the proposed amendment, it is evident that the said claim arises out of the same cause of action, and is based on the same facts already pleaded before the Court concerning the contractual dispute. In this sense, I am persuaded that Plaintiff is not introducing a new cause of action after the period of limitation, but rather, pleading a new relief, based on the same cause of action, in the alternative, to the present relief, and is clarifying the basis of the relief it seeks from the Court.

19. I take note that the relief sought by the Applicant is based on the law of equity and concerns questions of restitution, which is a different relief from the remedies relating to breach of contract. However, I note that the said claim arises out of the same facts and is pleaded in the alternative.



20. Therefore, given the above, and especially because the Defendant was already on notice, and the said point had been raised within the period of limitation, in the first instance, I do not think this is a form of prejudice that cannot be cured by way of costs.

21. This is in line with the general rule emanating from the Jobling v Firearms Licensing Board [2022] KECA 1170 (KLR), where the court of Appeal stated as follows:-

“The court’s approach in dealing with amendments has always been that an application for amendment should be allowed unless the application to amend is mala fides or it will prejudice the other party. The practical rule adopted seems to be that amendments will always be allowed unless the application to amend is mala fides or unless such amendment would cause an injustice to the other side which cannot be compensated by costs or in other words unless the parties cannot be put back for the purposes of justice in the same position as they were when the pleading which it is sought to amend was filed. The court has a discretion to grant or refuse the amendment which must be exercised judicially. The court is inclined to grant the amendment where it is made in good faith and no prejudice will be caused to the other party.”

22. As regards the issue of delay, I am guided by the decision of the Court of Appeal in Central Kenya Ltd v Trust Bank Ltd Supra held the following in relation to the issue of delay:-

“Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

23. Based on the reasons above, I find that the Application is with merit. The same is allowed in the following terms:-

- a. Prayer 1 is allowed.
- b. Prayer 2 is allowed.
- c. Prayer 3 is allowed.
- d. The Plaintiff shall bear the costs of the Application because it is the party seeking the amendment from the Court.

**DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24<sup>TH</sup> DAY OF MARCH, 2025**

**ALEEM VISRAM, FCIArb**

**JUDGE**

In the presence of;

..... Court Assistant

..... for 1<sup>st</sup> Plaintiff

..... for 2<sup>nd</sup> Plaintiff

..... for Defendant

