



**Daykio Plantatioins Limited v Galba Mining Limited & 4 others (Civil Suit  
31 of 2016 & Civil Case 230, 238 & 237 of 2015 & 499 of 2016 (Consolidated))  
[2025] KEHC 4504 (KLR) (Commercial and Tax) (2 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4504 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX**

**CIVIL SUIT 31 OF 2016 & CIVIL CASE 230,  
238 & 237 OF 2015 & 499 OF 2016 (CONSOLIDATED)**

**EC MWITA, J**

**APRIL 2, 2025**

**BETWEEN**

**DAYKIO PLANTATIOINS LIMITED ..... PLAINTIFF**

**AND**

**GALBA MINING LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**PURPLE SATURN PROPERTIES LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**KOFINAF COMPANY LIMITED ..... 3<sup>RD</sup> DEFENDANT**

**AND**

**SENATE MINING LIMITED ..... 1<sup>ST</sup> INTENDED DEFENDANT**

**JOJOJA PROPERTIES LIMITED ..... 2<sup>ND</sup> INTENDED DEFENDANT**

**RULING**

1. This is a ruling on the application dated 10<sup>th</sup> February 2025 for leave to amend. The plaintiff seeks to amend the plaint and join Senate Mining Limited and Jojoja Propertied limited as 4<sup>th</sup> and 5<sup>th</sup> defendants respectively and other amendments in terms of the draft amended plaint attached to the supporting affidavit.
2. The plaintiff also prays that the amended plaint be served within 7 days and the intended defendants be allowed to file memorandums of appearance and defences within 14 days of service. The application is supported by the grounds on its face and the affidavit of Titus Kiondo Muya.



3. According to the application, the plaintiff and the 1<sup>st</sup> defendant entered into a share purchase agreement with both the intended 4<sup>th</sup> and 5<sup>th</sup> defendants on 10<sup>th</sup> December 2014. The 3<sup>rd</sup> defendant owns several properties, including LR Nos. 11288 and 11289 which are held by the 2<sup>nd</sup> defendant and the proposed 5<sup>th</sup> defendant.
4. The plaintiff paid a deposit of Kshs. 430,500,000 towards fulfilment of its obligation under the share purchase agreement. The balance was secured by a guarantee to the 1<sup>st</sup> defendant from the Co-operative Bank of Kenya Limited.
5. The defendants breached the agreements by failing to perform their obligations under those agreements. The plaintiff then filed a plaint dated 5<sup>th</sup> February 2016, containing specific averments against the 1<sup>st</sup> defendant arising from the agreement. However, due to inadvertence and genuine mistake, the cause of action against the intended 4<sup>th</sup> defendant arising from that agreement was omitted.
6. The plaintiff states that its cause of action against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants arises out of similar transactions making the cause of actions *pari materia*. The plaintiff maintains that the amendments to be made are similar in form and tenor to the pleadings filed against the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> defendants. The addition of the 4<sup>th</sup> and 5<sup>th</sup> defendants will not alter the cause of action or introduce a fresh cause of action against any of the defendants.
7. The plaintiff asserts that the proposed 4<sup>th</sup> and 5<sup>th</sup> defendants are already substantive parties in the consolidated suits. The plaintiff will therefore not seek to introduce new evidence if the amendments are allowed. Documentary evidence on the transactions with the proposed 4<sup>th</sup> defendant over the shares of the proposed 5<sup>th</sup> defendant is already on record and witnesses who testified (PW3; PW4 and PW5) gave testimonies regarding the two agreements. The plaintiff's witnesses also extensively referred to the agreements and were cross examined on those agreements.
8. The plaintiff pleads with the court to allow the application. The plaintiff relies on Order 1 rule 10 and Order 8 rule 3 arguing that they permit amendment of pleading and joinder of parties. Order 8 rule 3 provides 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. The plaintiff argues, relying on Order 8 rule 5, that the intended amendments are for the purpose of determining the real question in controversy.
9. The plaintiff relies on several decisions in this regard. The plaintiff cites Permanent Secretary, Ministry of Roads v Fleur Investments Limited [2016] eKLR, that the power of the court to allow amendments is for determining the true substantive merits of the case. The amendments should be timeously applied for; the power to allow amendment can be exercised by the court at any stage of proceedings and will indeed be allowed even at appeal stage. Even where late amendment is sought, it should, as a general rule, be allowed if made in good faith provided costs can compensate the other side.
10. The plaintiff again argues that even where the amendment is likely to introduce a new case or ground of defence, it can still be allowed. Reliance is placed on the same decision in Permanent Secretary, Ministry of Roads & another v Fleur Investments Limited (*supra*) and Mueke v Co-operative Bank of Kenya Limited & another [2022] eKLR.
11. The plaintiff maintains that a genuine mistake coupled with the need to do substantive justice will be sufficient consideration for the exercise of discretion where the mistake or slip is sought to be cured through an amendment. The plaintiff relies on the decision in Belinda Murai & 9 others v Amos Wainaina [1979] eKLR, that a mistake is a mistake. It is no less a mistake because it is an unfortunate slip. It is no less pardonable because it is committed by senior counsel.



12. The defendants have filed grounds of opposition dated 18<sup>th</sup> February 2025 in opposing the application. The defendants state that the application is prejudicial to them; the plaintiff seeks to introduce a new cause of action which is time barred by statute barred thus, offends provisions in the *Limitation of Actions Act*. According to the defendants, the application is solely informed by the plaintiff's witness admission in cross examination that it did not plead specific agreements in the plaint.
13. The defendants are of the view, that admissions during cross examination cannot form the basis for seeking leave to amend. The trial of cases having been concluded, amending the cause of action now is untenable. The defendants assert that parties to be added are already in the consolidated suits as the 4<sup>th</sup> plaintiff (Senate Mining Limited) while Jojoja Properties Limited is the 28<sup>th</sup> defendant, a fact the plaintiff has always been aware of, making the application unmeritorious.
14. The defendants rely on several decisions in urging the court to dismiss the application. They include; *Kassam v Bank of Baroda (Kenya) limited* [202] KEHC 1109(KLR) for the position that leave to amend should not, as a general principle, be refused unless the court is satisfied that the party applying is acting malafide or that his blunder has caused some injury to the other side which cannot be compensated by costs or otherwise.
15. The defendants maintain that late amendment may be done, but the party must show why the application was made late and must satisfy the court that the delay is not deliberate. Late applications for amendment are liable to be rejected if there has been unexplained delay. A delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion.
16. The defendants again rely on the decision in *Coffee Board of Kenya v Thika Mills Limited & 2 others* [2014] eKLR, that amendments which are necessary for determination of the real controversies in the suit should be allowed; the proposed amendments should not alter or be a substitute of the cause of action on the basis of which the original list was raised. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment.
17. The defendants argue that there has been inordinate delay in applying to amend. Reliance was placed on *Mwangi S Kaimenyi v Attorney General & another* [2014] eKLR, that there is no precise on what amounts to inordinate delay but this will differ from case to case; nature of the case and the explanation given for the delay. However, it is the amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inescapable.
18. According to the defendants, no amount of costs will cure the violation of their right to a fair hearing guaranteed by Article 50(1) read with Article 25(c) of *the Constitution*. It is their position that the suit has been heard to conclusion and is scheduled for highlighting of submissions.
19. They maintain that allowing the application would mean giving the added defendants time to enter appearances, filed defences, documents and call evidence. The application is thus, an abuse of the process of the court. They rely on *Graham Rioba Sagwe & 2 others v Fina Bank Limited & 5 others* [2017] eKLR on abuse of the court process.
20. I have considered the application, the response and arguments by counsel for the parties. The facts in this matter are not in dispute. The plaintiff filed this suit in 2016 against the defendants. Many other suits were also filed against other parties between 2015 and 2016. These suits were all consolidated with file No. 230 of 2015 designated as the lead file.



21. Further directions were issued following agreement by counsel for the parties so that all other parties in the other suits became defendants while plaintiffs in suit No. 230 of 2015 (the lead file were retained as the plaintiffs).
22. Hearing of the consolidated suits began; parties called their witnesses who testified and were cross examined. Upon conclusion of the hearing, directions were issued on filing of written submission with a date for oral highlighting set for 2<sup>nd</sup> April 2025. It was after those directions that this application was filed seeking leave to amend.
23. The general power to amend pleadings is drawn from section 100 of the *Civil Procedure Act*. Parties to a suit have a right to amend their pleadings at any stage of the proceedings. That right is, however, not absolute. It is dependent on the discretion of the court. This discretion should be exercised judiciously and in line with the criteria set out in Order 8 rule 3 of the Civil Procedure Rules.
24. Further, Order 8 rule 5 gives the court the general power to amend or to allow amendments 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 on its own motion or on the application of a 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.
25. The Court of Appeal outlined the principles on amendment of pleadings in *Central Kenya Limited v Trust Bank Limited & 5 Others* [2002] eKLR (referring to commentaries on the Indian Civil procedure Code by Chitaley and Rao) thus:

A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.
26. The general principle in law is plain that amendments may be allowed at any stage, but the court retains the discretion to determine whether or not to allow the amendment. Even where leave to amend is to be granted, the court will do so on terms that are just, including payment of costs. The party applying to amend must however satisfy the court that the application is made without delay and in good faith.
27. The plaintiff has argued that the application has been made in good faith, without delay and that failure to include the intended defendants was inadvertent and a genuine mistake. The defendants have contended that the application has been made after an inordinate delay; the omission of the intended defendants was not inadvertent and the amendments have come too late after parties concluded their cases. In the view of the defendants, any amendments will not only be prejudicial to them, it will violate their right to a fair hearing.
28. As already adverted to, this suit was filed in 2016; defences were then filed; documents exchanged and hearing of the consolidated suits concluded. Directions then issued on filing of written submissions and a date for oral highlights set. The application was only filed after the court had set the date for highlighting of submissions.
29. I have read the application as well as the draft amended plaint. The plaintiff intends to add the intended 4<sup>th</sup> and 5<sup>th</sup> defendants to this suit. In the application, the plaintiff also prays that upon granting leave to amend, the new parties should be given time to file appearances, defences and documents. Although the applicant states that it does not intend to lead new evidence, the parties to be added would still have the right to file their defences and call evidence if they wish to answer the plaintiff's claim against them.



30. The question here is whether the court should grant leave to amend. The plaintiff's main concern regards the share purchase agreements dated 10<sup>th</sup> December 2014. These agreements have at all material times been in the plaintiff's possession. The parties sought to be added to this suit are parties in the consolidated suits. Parties' cases were pleaded in their respective plaints and defences which was at all material times in the plaintiff's knowledge.
31. Further, parties called witnesses who led evidence in respect of their positions in the consolidated suits and were extensively cross examined. The plaintiff's witnesses were cross examined on the issues to be introduced in the amendments such as whether a claim had been raised against some of the parties sought to be added.
32. Whereas the law gives the court wide discretion to allow amendment, that discretion is not absolute. It must be exercised judiciously and where circumstances permit. The party applying to amend must also satisfy the court the application has made without delay; in good faith and is not intended for filling gaps in his case.
33. In this case, although the suit was filed in 2016 and the hearing commenced in 2023 concluding in January 2025, the application was only filed in February 2025 after parties had closed their cases. In my respectful view, it cannot be said that the application was filed without delay. The plaintiff was required to explain why the application to amend was not made between the time the suit was filed in 2016 and before the hearing concluded given that the facts relied on in seeking to amend were well within the plaintiff's knowledge.
34. Further, an amendment should not be allowed at a late stage of the proceeding if it is intended to fill gaps in the party's case or will cause prejudice to the other party. In *Eastern Bakery v Castelino* [1958] 1 EA 461 the court stated:
- [A]mendments to pleadings sought before 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 to allow an amendment simply because it introduces a new case.....but there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit...the court will refuse leave to amend where the amendment would change the action into one of a substantially different character...or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the writ...the main principle is that an amendment should not be allowed if it causes injustice to the other side.
35. Halsbury's Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, states as follows on the issue:
- The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion....The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side.
36. As already stated, the hearing of this case came to a close after all parties' witnesses testified. The plaintiff's witnesses testified and were extensively cross examined on some of the issues that prompted



this application. Although the plaintiff stated that the application was filed without delay, that cannot certainly be true.

37. The court will exercise its discretion and allow a party to amend but will not do so where the amendment will cause prejudice to the other party. In this case, parties having closed their cases and directions on filing of written submissions given, including a date for oral highlights, this court is not persuaded that the application to amend is deserved at this late stage of the proceedings. Doing so, will also cause prejudice to the defendants which may not be compensated by costs.
38. Consequently, the application is declined and dismissed. Costs will be in the cause.

**DATED AND DELIVERED AT NAIROBI THIS 2<sup>ND</sup> DAY OF APRIL 2025**

**E C MWITA**

**JUDGE**

