



SBM Bank Kenya Limited v Petroleum & Industrial Services Limited & 2 others (Commercial Case E793 of 2021) [2025] KEHC 4990 (KLR) (Commercial and Tax) (24 April 2025) (Ruling)

Neutral citation: [2025] KEHC 4990 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E793 OF 2021**

AA VISRAM, J

APRIL 24, 2025

BETWEEN

SBM BANK KENYA LIMITED PLAINTIFF

AND

PETROLEUM & INDUSTRIAL SERVICES LIMITED 1ST DEFENDANT

BIPINCHANDRA HIMATLAL VORA 2ND DEFENDANT

VASANI BIPINCHANDRA HIMATLAL VORA 3RD DEFENDANT

RULING

Introduction and Background

1. Before the Court for determination is the Defendants' Notice of Motion dated 18th April, 2022, made under Order 8 rules 3 and 7 of the Civil Procedure Rules ("the Rules") and Section 3A of the [Civil Procedure Act](#) (Chapter 21 of the Laws of Kenya) seeking leave to amend their defence and consequently have the annexed and amended Statement of Defence be deemed as duly filed. The Application is supported by the grounds on its face and supporting affidavit of the 2nd Defendant sworn on 18th April, 2022. It is opposed by the Plaintiff through the replying affidavit of its Legal Officer, Kevin Kimani, sworn on 3rd March, 2025. The application was disposed by way of written and oral submissions by the parties' respective Counsel.

Analysis and Determination

2. I have considered the grounds on the face of the Application; the rival depositions; submissions of the parties; and the applicable law.



3. The sole issue for determination is whether the Defendants ought to be granted leave to amend their defence as per the statement of defence annexed to the supporting affidavit.
4. Section 100 of the *Civil Procedure Act* and Order 8 rule 5 (1) of the Civil Procedure Rules gives the court power to amend pleadings. The said provisions provide as follows:-

100. General power to amend

The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding.

Order 8 Rule 5(1):

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.” (Emphasis mine)

5. The Court of Appeal, in Joseph ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago [1995] KECA 31 (KLR) set out the principles under which Courts may grant leave to amend pleadings as follows:-

“...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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.” (Emphasis mine)

6. I note that the Defendants filed the present Application just over five months after filing their defence, which I find timely, considering that such an application can be made at any time before the suit is concluded.
7. I further note that the Defendants seek to introduce a new Defendant and a counterclaim against the Plaintiff and the said Defendant. However, I note that the Defendants have not filed any application to join the said Defendant in the counterclaim as a party to the proceedings. It should not be lost that



an application for amendment is not the same as an application for joinder of a party. In my opinion, the application for joinder ought to have been canvassed prior to the application seeking to introduce a counter claim against that party. The Rules also provide for different procedures in respect of each of the applications. Order 1 rule 10 (2) provides for the latter, whereas Order 8 rule 3 provides for the former. I do not think it would be appropriate for the Defendants to introduce a new party to the proceedings and make a claim against the said party, without that party being informed of the same and being given an opportunity to make representations in respect to the proposed joinder. Such an action would undermine its right to due process and is an abuse of the court process.

(See *Ndegwa v Kirui & 53 others* [2023] KEELC 22409 (KLR)).

8. Looking at the proposed amendment, it is also evident to me that the substance of the same relates to the party that has not been joined to the proceedings. I do not think it would be appropriate for this Court to consider the merits of the same without the benefit of representation from the affected party.
9. However, based on a plain reading of the amended defence, from paragraphs 34 to 45, in particular, the Defendants seek to introduce claims relating to illegality, breach of duty of care, and defamation arising out of actions carried out by the proposed Defendant on 10th April, 2016, namely the action of listing the parties on its Credit Reference Bureau list (CRB list).
10. Section 4(2) of the Limitation of Action Act states that an action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued. It further states that an action for libel or slander may not be brought after the end of 12 months from such date.
11. The matters relating to defamation were therefore time barred within a year from the above date, and the claims in relation to negligence and breach of duty of care were similarly time-barred within a period of three years from 10th April, 2016. At the very latest this would have been 9th April, 2019.
12. In Civil Case No. 1 of 2000, *Visram, J* (as he then was) stated as follows:-

“The general principle stated in that case is that an amendment should not be allowed if it causes injustice to the other side. At the time of the *Castelino* case, our order VIA rule 3(2) and (5) above had not been enacted...

That rule clearly allows for amendments outside the period of limitation and which introduce a new cause of action in stated situations. It is unclear whether *Castelino* excludes all amendments outside the period of limitation but I think this is catered for by the new rule. (See also *Motokov v Auto Garage Ltd & others (No 2)* [1971] EA 353). *Chanan Singh, J* in deciding a similar application in *Barclays Bank DCO v Shamsudin* [1973] EA 451 substantially followed the provisions of order VIA rule 3 at a time when those provisions had not been enacted. 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. (emphasis mine)

13. The Learned Judge goes to question the effect of amendment in the follow terms:-

“So, then, should the proposed amendment be allowed? Does it seek to introduce a new cause of action? What prejudice, if any, will the Defendant suffer if the amendment were allowed?”



The Defendant has objected to the application on the basis that it seeks to introduce a new cause of action and will prejudice his defence. Is that really so? (Emphasis mine)

14. Guided by the above, I ask myself, will there be prejudice if the amendment is allowed?
15. Looking at the facts in the present matter; the application for amendment was made on 18th April, 2022, this means that as at the time of making the application, it had already been five years since the cause of action in relation to the claim for defamation had expired, and about three years since the various claims in relation to negligence and breach of duty of care has similarly expired.
16. Given the said facts, I am of the view that it would be unjust to allow the amendment to now include a time-barred counterclaim, given both the prolonged delay in applying for the same, and in circumstances where the affected party has not first been joined to the proceedings and is unable to make representations in relation to the same.
17. To allow such an amendment would be akin to sending a message to litigants that neither the statute of limitations, nor the doctrine of laches, are relevant in civil proceedings. Such a view would not be proper, or fair, and in my opinion may open up the floodgates to timeless litigation, and prolonged delay, undermining the administration of justice.
18. Based on the reasons set out above, I find that the proposed amendment would be unjust and unduly prejudice the Plaintiff and proposed Defendant.

Conclusion and Disposition

19. I find and hold that the Defendants’ Application dated 18th April, 2022, lacks merit and the same is dismissed with costs to the Plaintiff.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 24TH DAY OF APRIL, 2025

ALEEM VISRAM, FCIArb

JUDGE

In the presence of;

.....Court Assistant
.....for Plaintiff
.....for 1st Defendant
.....for 2nd Defendant
.....for 3rd Defendant

