



REPUBLIC OF KENYA



Machiri Limited v Central Rift Valley Water Works Development Agency (Commercial Civil Case E002 of 2023) [2025] KEHC 5787 (KLR) (8 May 2025) (Ruling)

Neutral citation: [2025] KEHC 5787 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
COMMERCIAL CIVIL CASE E002 OF 2023**

HI ONG'UDI, J

MAY 8, 2025

BETWEEN

MACHIRI LIMITED PLAINTIFF

AND

**CENTRAL RIFT VALLEY WATER WORKS DEVELOPMENT
AGENCY DEFENDANT**

RULING

1. In the Notice of Motion dated 18th December 2024 the plaintiff/applicant prays for the following orders;
 - i. The plaintiff herein be granted leave to further amend its amended plaint as per the annexed copy.
 - ii. That the further amended plaint be deemed as filed and form part of the court records upon payment of the requisite court fees.
 - iii. The costs of the application be in the cause.
2. The application is premised on the grounds on its face as well as the affidavit of one of the plaintiff/applicant's directors sworn on even date. He deponed that on 12th November 2024, the court directed the plaintiff/applicant to file its application for enforcement of the Dispute Board decision delivered of 8th October 2024 and filed in court on 24th October, 2024. He further deponed that the proposed changes were necessary as the decision of the Dispute Board determined the substantive dispute between the plaintiff/applicant and defendant/respondent. That the decision was the basis for the application for enforcement and further amendments would enable the court to make a just determination on the application for enforcement. He added that the defendant /respondent would suffer no prejudice as it would have a chance to respond to the amendments to the plaint in its response to the application for enforcement. He urged the court to allow the application in the interest of justice.



3. The defendant/respondent in response filed a replying affidavit sworn on 31st January 2025 by its Chief Executive Officer who averred that the plaintiff/applicant's application was incompetent, inept, frivolous, vexatious, premature, a nonstarter and a total abuse of the court. That the suit pending before the honourable court was totally different with distinct facts from the proposed amendments. Further, that as the suit was ongoing there was a dispute pending before the Dispute Adjudication Board and the plaintiff/applicant was trying to sneak in the decision through the amendments.

He added that the issues being introduced to the suit totally deviate from the subject matter and are seeking to introduce new issues that were initially not pleaded.

4. In response, the plaintiff/applicant filed a further affidavit dated 19th February 2025. It reiterated the grounds in support of its application and deponed that the further amendments do not introduce new issues.
5. The application was canvassed by way of written submissions.

Plaintiff/applicant's submissions

6. These were filed by Njuguna & Partners advocates and are dated 19th February, 2025. Counsel submitted that the proposed amendments related to the same cause of action as the present suit and that the defendant/respondent would have a chance to amend its defence. He placed reliance on the decisions in *Kyalo v Baysuf Brothers Ltd* [1982] KECA 34 (KLR), *Julius Kabui Mwangi & another v Wangui Gatundu & 12 others* [2015] KEHC 4965 (KLR), *Inter Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd* [2021] eKLR, where the courts have held that an application for amendment of pleadings would normally be granted unless the amendment sought:

- i. Contains allegations completely inconsistent with the previous pleadings.
- ii. The amendment is sought late and will prejudice the other party.
- iii. Will delay the fair trial of the case

7. Counsel further submitted that the defendant/respondent's intention to appeal the board decision did not serve as a stay of the said decision or the present proceedings. Further, that clause 20.4.4 of the contract requires prompt implementation of the board's decision. He placed reliance on the decision in *SBI International Holdings AG v Kenya National Highways Authority* [2023] KEHC 20793(KLR), where after the dispute board delivered its decision and before the matter went to arbitration, the contractor moved to court to enforce the Board's decision and the employer raised the issue that the dispute is premature and ought to await the outcome of the arbitration. The court stated as follows;

“... The interpretation of clause 20.4 yields one view, that the DAB decision is binding and must be enforced. This view agrees with the decisions, both local and from other jurisdictions, that the decision of the DAB, though not final, confers a positive obligation to the paying party to promptly give effect to the DAB decision, thus making the decision immediately enforceable for the benefit of the successful part... The next stage of proceedings will not prevent implementation of the DAB decision and the final and binding decision from arbitration is not a condition precedent to enforcement of the DAB decision...”

8. In conclusion, counsel submitted that it was in the interest of justice that the application be allowed to enable the court give effect to the contract.



Defendant/respondent's submissions

9. These were filed by Caren Lagat advocate and are dated 4th March, 2025. Counsel gave a brief background of the case and identified two issues for determination.
10. On the first issue, whether the plaintiff/applicant's application is merited, counsel submitted that the proposed amendments introduced claims that were not part of the original pleadings. Thus, the same was contrary to established legal principles that prohibit the substitution of one cause of action for another through amendments. She placed reliance on Order 2 rule 6 (1) of the Civil Procedure Rules and the decision in *Eastern Bake v Castelino* 1958 EA462 CA where it was held at page 462 that: -

“The court will not refuse to allow an amendment simply because it introduces a new case... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character...”

See also:

- i. *Institute For Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR.
 - ii. *Daniel Ngetich & Another v K-Rep Bank Limited* [2013] eKLR.
11. On the second issue, whether the enforcement of ADR decision through amendment of pleadings is prejudicial to the defendant/respondent. Counsel submitted that it would defeat any purpose to have a clause in the contract providing for arbitration and proceed to enforce the decision of the Dispute Adjudication Board as binding and final. That all parties are equal in the contract and the rights reserved in the document are meant to protect the interests of each party fairly.
12. Counsel further submitted that the instant application was therefore asking to ask the court to rewrite the contract and ignore the dispute resolution mechanism. She placed reliance on the decision in *Pius Kimaiyo Langat v Co-operative Bank of Kenya Ltd* [2017] eKLR, where the court after reviewing case law on the subject it reiterated as follows;

“alive to the hallowed legal maxim that it is not the business of Courts to rewrite contracts between parties as the said parties were bound by the terms of their contracts, unless coercion, Fraud or undue influence are pleaded and proved.”

13. Counsel submitted that according to Clause 20.4 of the contract, the court should consider that adjudication was meant to assist the settlement of issues while parties continued to execute the demands of the contract where the contract has been terminated. That the disputes on the Dispute Adjudication Board decision touched on the finality of the matter. Thus, parties were at liberty to proceed for arbitration for determination of the disputes before proceeding to seek implementation of the said decision.
14. She placed reliance on the decision in *SBI International Holdings (Kenya) v Kenya National Highway Authority* (Commercial Civil Case E374 of 2020) [2021] KEHC 31 (KLR) (Commercial and Tax) (14 September 2021) where the court held as follows;

“Arbitration is a private dispute resolution mechanism whereby two or more parties agree to resolve their current or future disputes by an arbitral tribunal, as an alternative to adjudication by the courts or a public forum established by law. Parties by mutual agreement forgo their right in law to have their disputes adjudicated in the courts/public forum.



Arbitration agreement gives contractual authority to the arbitral tribunal to adjudicate the disputes and bind the parties. The decision of the DB is binding. The arbitration agreement is the product of a consensual contract, so, this court must refrain from readily acceding to the invitation to “rectify the arbitration clause” by giving it an interpretation which was not contemplated by the parties. The applicant is inviting the court to venture into the forbidden sphere of re-writing contracts wilfully signed by consenting parties. To the extent that these proceedings seek to enforce the DB decision, this court cannot intervene except in situations contemplated by section 10 of the Act.”

15. Counsel further submitted that amendments must comply with procedural rules and should not be used to circumvent legal requirements. That if the amendments are allowed the defendant/respondent’s right to pursue arbitration having given a notice of dissatisfaction would be waived as it won’t be able to seek redress through the final dispute resolution process as stipulated in the contract. Further, that the amendments were prejudicial to the defendant/respondent as it sought to take away the right to follow the established dispute redress mechanisms. She added that enforcement of the dispute resolution board decision was a separate proceeding. She urged the court to dismiss the plaintiff/ applicant’s application with costs.

Analysis and Determination

16. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 18th December 2024 is in line with the law and whether it is merited.
17. The instant application has been brought under the provisions of Sections 1A & 3A of the [Civil Procedure Act](#), Order 8 rules 5 (1) and Order 51 rule 1 of the Civil Procedure Rules.
18. The legal provision governing amendment of pleadings is Section 100 of the [Civil Procedure Act](#) which provides as follows;

“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”.
19. Further, Order 8 Rule 1 (1) of the Civil Procedure Rules stipulates that;

“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.”
20. The Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR observed as follows;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided 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.”

21. The court further identified the factors to be considered in an application for amendment of pleadings and stated as follows;

“That the amendment is necessary for determining the real questions in controversy.

To avoid multiplicity of suits provided there has been no undue delay.

Only where no new or inconsistent cause of action is introduced “ie” if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

That no vested interest or accrued legal rights are affected.

So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.”

22. I have looked at the amendments sought by the plaintiff/applicant from the “draft” further amended plaint attached to the application. It is evident from the contents of paragraphs 9 to 14 that the plaintiff/applicant seeks to have the court adopt the decision by the Dispute Adjudication Board and judgment be entered in its favour against the defendant/respondent for a sum of kshs. 345, 849, 580/40. The plaintiff/applicant has abandoned its initial prayers in the plaint save for costs of the suit.
23. In light of the provisions of the law and authority cited above, it is clear that the main aim of an application for an amendment is to ensure that the court determines the real issues in controversy between the parties. It is not disputed that there exists a decision by a Dispute Adjudication Board as to what is owed to the plaintiff/applicant by the defendant. In my humble view, there is nothing left for this court to determine other than to adopt the said decision as judgment of the court unless the same is challenged. The plaintiff opted to file an application seeking to amend the plaint instead of an application for the enforcement of the decision by the adjudication board. The plaintiff/applicant has not laid any basis for amending of the plaint.
24. For the above reasons, I find the application dated 18th December 2024 to be misplaced and the same is hereby struck out with costs to the defendant/respondent.
25. Orders accordingly.

DELIVERED VIRTUALLY, DATED AND SIGNED THIS 8TH DAY OF MAY, 2025 IN OPEN COURT AT NAKURU.

H. I. ONG’UDI

JUDGE

