



**Modern Truckers Limited & another v Kenya Commercial Bank Limited  
(Civil Case E049 of 2021) [2025] KEHC 12088 (KLR) (23 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 12088 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE E049 OF 2021  
F WANGARI, J  
JUNE 23, 2025**

**BETWEEN**

**MODERN TRUCKERS LIMITED ..... 1<sup>ST</sup> PLAINTIFF**

**HAROON SHAHID BUTT ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**KENYA COMMERCIAL BANK LIMITED ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of the Notice of Motion application dated 29/04/2024 brought under the provisions of sections 1A, 1B, 3, 3A & 63 of the Civil Procedure Act and Order 42 Rule 6 (2) of the Civil Procedure Rules. It sought as hereunder: -
  - a. Leave be granted to the Defendant to amend its Defence to include a Counterclaim.
  - b. The Amended Defence and Counterclaim dated 29/02/2024 be deemed as properly on record, filing fees having been paid for it.
  - c. The costs be in the cause.
2. In support of the application, it was stated that the Plaintiffs having sued for special damages and an order directing the Defendant to discharge the charge over LR No. MN/1/5706. The Defendant states that the Plaintiffs owes it money and have a duty to repay the same. Instead of bringing a fresh suit to recover the same, it was necessary to amend the Defence and file a Counterclaim in this suit. It was prayed that the Amended Defence and Counterclaim already filed be deemed as properly filed.
3. The Plaintiffs/ Respondents filed their Grounds of Opposition dated 11/10/2024. They stated that the proposed amendment was res-judicata pursuant to the ruling dated 04/11/2021, as the issues being raised in the proposed amendments have been heard and determined. The application was said to have been brought in bad faith and ought to be dismissed with costs.



4. Directions were taken to dispose off the application by way of written submissions. Both parties duly complied by filing their submissions and cited various authorities in support of their rival positions. The Plaintiffs submissions are dated 24/05/2025 while those of the Defendant are dated 06/11/2024.

### **Analysis**

5. This Court has carefully considered the application, the Grounds of Opposition, parties' rival submissions, the authorities cited and the law and the issues that fall for this Court's determination are as follows: -
  - a. Whether the orders sought are merited;
  - b. What is the order as to costs?
6. The application principally seeks to amend the Defence and Counterclaim in the manner stated in the Amended Defence filed. The Applicant relied on Order 46 rule 6 (2) of the Civil Procedure Rules. None of the parties noticed this this mistake as the order relied on is in respect to stay in cases of appeals. This must be a case of copy and paste as this application has got nothing to do with stay of proceedings or execution.
7. Back to this matter, the general power to amend pleadings draws from Section 100 of the *Civil Procedure Act*. Parties to a suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.
8. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleadings with leave of court 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."
9. Further, Order 8, Rule 5 gives the court the general power to amend in the following terms: -
  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."
10. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's Precedents of Pleading, 12<sup>th</sup> Edition, which provides as follows concerning amendment of pleadings: -

"...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..."



11. In *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR, the court held as follows: -

“...The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings...The court will normally allow parties to make such amendments as may be necessary for determining the real questions in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, no new or inconsistent cause of action is introduced, and no vested interest or accrued legal right is affected and that the amendment can be allowed without an injustice to the other side...”

12. The Plaintiffs/ Respondents states that the issues raised had been decided upon in the ruling dated 04/11/2021. I have perused through the said ruling. I do disagree that the application is *res judicata* as the issues were not heard and determined in the said ruling. The issue being addressed then was whether the Defendant was to discharge the charge pending hearing and determination of this suit.

13. The matters being raised in the proposed amended Defence and Counterclaim are matters of fact and can only be dealt with upon hearing of the evidence in support of the case. Further, the amended Defence will not change the cause of action nor introduce a total new cause of action.

14. If the application by the Defendant is denied, it would lock out the Defendant from exercising its rights to be heard as enshrined in Article 50 of *the Constitution* of Kenya. In the end, I do not see any prejudice that the Plaintiff stands to suffer if the amendments are allowed.

15. The Plaintiffs have a right to file their Reply to Amended Statement of Defence and Counterclaim, file documents to counter those the Defendant intends to rely on, call its witnesses and cross examine the Defendant and its witnesses. The application is therefore merited.

16. On costs, the same follows the event. This is an interlocutory application and I direct that the costs shall abide the outcome of the main suit.

17. The upshot of the foregoing is that the court renders itself as hereunder: -

- a. The Notice of Motion Application dated 29/04/2024 has merits and the same is allowed as prayed.
- b. Costs to abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 23<sup>RD</sup> DAY OF JUNE, 2025.**

.....

**F. WANGARI**

**JUDGE**

In the presence of;

Mr. Agwara Advocate for the Plaintiff;



Mr. Kongere Advocates for the Defendant;

Ms. Getrude, Court Assistant

