



ABC Investments Limited v Co-operative Bank of Kenya Limited (Civil Suit 18 of 2018) [2024] KEHC 2132 (KLR) (5 March 2024) (Ruling)

Neutral citation: [2024] KEHC 2132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL SUIT 18 OF 2018
SM MOHOCHI, J
MARCH 5, 2024**

BETWEEN

ABC INVESTMENTS LIMITED PLAINTIFF

AND

CO-OPERATIVE BANK OF KENYA LIMITED DEFENDANT

RULING

1. The Plaintiff/Applicant moved Court vide Notice of Motion Application dated 19th July, 2023 under Section 3A of the [Civil Procedure Act](#) and under Order 8 Rule 3 of the Civil Procedure Rules seeking the following;
 - i. Spent
 - ii. That the Honourable Court be pleased to grant the Plaintiff/Applicant, leave before judgment, to further amend its Plaintiff in accordance with the draft further amended Plaintiff attached in the supporting Affidavit attached the Application.
 - iii. That costs of this Application be provided for in the cause of these proceedings.
2. The Application is supported by the sworn Affidavit of Daniel Munywoki Ndungia. He deponed that the suit is based on breach of contract and one of the issues arising is the quantum of damages payable by the Defendant/Respondent. He added that the suit being premised on breach of contract, one of the remedies available is restitution of monies incurred including the Kshs.116,390.05 that was applied to the project as special damages since general damages are not available for breach of contract. The amount has been specifically pleaded but in the prayers not sought.
3. That the mistake was an honest one attributed to the Plaintiff's advocate since the Applicant gave instructions to the advocate to recover monies applied to the project. That the error became apparent



to the advocate as he was preparing submissions. That the Applicant did not wish to introduce new evidence and was willing to allow the Respondent to introduce such further evidence.

4. The Respondent opposed the Application by way of Grounds of Opposition dated 11th September, 2023 on the following grounds: -
 - i. That the intended amendment introduces a new claim barred by the provisions of Section 4(1) (a) of the Limitations of Actions Act.
 - ii. That no useful purpose will be served in allowing the amendment to introduce a stale claim which can be defeated by a plea of limitation of actions, and whose basis is not established.
 - iii. That without prejudice to grounds No. 1 and 2 above:
 - a. The Applicant is guilty of laches in filing the Application herein over two years after the amendment on 23rd June 2021 and over 5 years after filing of the suit herein.
 - b. The Applicant has not presented any just or justifiable reason(s) for seeking the amendment after close of hearing of the suit.
 - c. The intended amendment is an afterthought devoid of any good faith and is an abuse of the Court process.
 - d. The Defendant/Respondent stands to suffer prejudice and disadvantage if the amendment sought is allowed.
5. The application was heard by way of written submission the Applicant filed its submissions on 3rd October, 2023. The Respondent filed its submissions on 16th November, 2023

Applicant's Submissions

6. The Applicant submitted that his Application should be allowed as it has the right to fair hearing as enshrined under Articles 50, and 159 (2) (d) and 20 (2) (a) and 20 (3) of *the Constitution* as well as under sections 1A, 1B and 3A of the Civil Procedure Rules.
7. The Applicant contends that Order 8 the Civil procedure rules should guide the Court in allowing the Application and relies in the case of Tropical Timber Trading Limited v Kenya Power and Lighting Company Ltd (2021) eKLR as well as Mahdi Ltd & Ano vs Kitale Shuttle Limited Civil Appeal E004 of 202 (2022) KEHC10457 (KLR).
8. The Applicant submitted that Section 4(1) of the Limitation of Actions is not applicable as alleged by the Respondent since the Applicant was not filing a fresh suit or introducing a new cause but amending its Plaintiff by amending its prayers as set out in the Plaintiff. The Applicant contended that the relief of general damages is not available under the circumstances and what was available is the relief of special damages and and relied in the case of Trans Mara Sugar Co. Ltd & another v Ben Kangwaya Ayiemba & Another (2020) eKLR.
9. The Applicant added that there would be no prejudice or injustice meted upon the Respondent and would not object to the Respondent introducing new evidence.

Respondent's Submissions

10. The Respondent on the other hand in opposing the Application submitted that the Applicant's further Amended Plaintiff seeks to introduce a claim for special damages for the sum of Kshs. 116,390,281.05 in that it had not been pleaded in the Plaintiff's Amended Plaintiff dated 23rd June, 2021.



11. That the Plaintiff's claim became stale pursuant to Section 4(1)(a) of the Limitations of Actions Act as it has been six years from the which the cause of action arose which according to the Respondent was 6th March 17 and urged the Court not to allow the amendment as it is statute barred. The Respondent argument was that if the Court allowed the amendment it would be of no purpose as it would have been a stale claim. Reliance was place in the case of Joseph Ochieng & 2 Others Trading as Aquiline Agencies vs First National Bank of Chicago (1995) eKLR.
12. It was also submitted that the Plaintiff is guilty of laches as the application for amendment is filed 2 years after the initial amendment and that not justifiable explanation has been given for seeking the amendment after close of hearing of the suit. The Respondent contended that the Plaintiff was aware or ought to have been aware of the need to plead the amendments sought.
13. The Respondent also accused the Plaintiff of actuating the amendments with bad faith, an abuse of the Court process and an afterthought. That the Respondent stands to suffer prejudice and disadvantage if the Court allows the amendments.

Analysis and Determination.

14. The Court has carefully considered the Applicant's Application together with the supporting affidavit, the grounds of opposition by the Respondent and the extensive submissions by parties as well as the case law cited.
15. Summarily, the Applicant moved Court vide Plaint dated 18th April, 2018. The Applicant thereafter, filed an application dated 26th March, 2021 that sought to Amend the Plaint under Order 8 Rule 3 of the Civil Procedure Rules. The Application though opposed by the Defendant's vide Grounds of Opposition dated 18th June, 2021 was allowed by consent on 22nd June, 2021. The Defendant filed an Amended Defence dated 18th August, 2021 with parties thereafter complying with Order 11. The matter proceeded to hearing and both parties closed their cases. The matter was awaiting filing of submission when the Applicant filed the instant Application seeking to amend the prayer for special damages.
16. The amended seeks:
 - ac. special damages to findings under paragraph (a) and (c) above, of Khs. 116,390,281..05 being restitution of the monies that the Plaintiff expended and applied to the Project.
17. Therefore, the issues that come out are: -
 - a. Whether the amendments are statutorily time barred;
 - b. Whether the Applicant seeks to introduce a new claim;
 - c. Can the prayers sought issue;
 - d. Who bears the costs

Whether the amendments are statutorily time barred

18. According to the Respondent, the Applicant should have filed that particular claim for Kshs 116,390,281.05 any day before 6th March, 2023. The Respondent submitted that the amount was not pleaded and lacks basis for establishment. According to the Respondent the amendment is time barred and allowing the same will serve no useful purpose.



19. The applicable law in this regard is section 4(1)(a) of the *Limitation of Actions Act* which provides that:
- “The following actions may not be brought after the end of six years from the date on which the cause of action accrued-
- a. actions founded on contract;”
20. With regard to the purported letter, the letter emanates from the contract between the Applicant and the Respondent. The Applicant moved Court on the basis of that contract. The Applicant amended his plaint dated 18th April, 2018 and at paragraph 9C of the Amended Plaint dated 26th March 2021, the amount of Kshs 116,390,281.05 has been specifically pleaded by the Applicant.
21. The claim for special damages would ideally take effect from the date of the Amended Plaint since it was pleaded. The proposed amendment has thus been brought in an existing cause of action. I therefore hold that the said claim of special damages of Kshs 116,390,281.05 is not time barred under Section 4(1)(a) of the *Limitation of Actions Act*.

Whether the amendments seek to introduce a new cause of action

22. The Respondent submitted that the Applicant’s amendments intend to introduce a new claim. That the amount sought of Kshs. 116,390,281.05 from the letter dated 6th March, 2017 is a new claim and the Respondent having tendered no evidence since it was not pleaded in the Respondent’s Plaint dated 23rd June, 2023 was not necessary.
23. Looking at the said letter the Applicant sought payment for work done as at 14th February, 2017 as per Interim Works Certificates No. 5 for the sum of Kshs. 116,390, 281.05
24. The cause of action from the Plaint dated 18th April is on breach of contract the amendments are on breach of contract and the Applicant seeks payment for monies expended in performance of the contract. In the Courts opinion, the Courts does not see how the amendments introduce something that is outside the contract or outside what has been pleaded. The addition to the Amended Plaint does not depart from the claim in fact it adds on to the claim.

Can the prayers sought issue?

25. Order 8 Rule 3 of the Civil Procedure Rules on amendment of pleadings provides:
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.
 2. Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.
 3.
 4.
 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

26. Order 8 Rule 5 of the Civil Procedure Rules provides:

“(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.

(2) This rule shall not have effect in relation to a judgment or order.”

27. The power to allow or refuse a party to amend pleadings is a discretionary and in the same vein that discretionary power has to be exercised judiciously. The Court in *Bosire Ogero v Royal Media Services* [2015] eKLR, held:

“In *Bullen Leak and Jacobs Precedents of Pleadings*, 12th Edition page 127 titled “amendment with leave –time to amend “ it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise”

28. In the Supporting Affidavit, the Applicant intimates to particulars of breach of contract and in the Amended Plaintiff, at paragraphs 9A to D bring out the aspect of breach of contract resulting in unjust enrichment on the part of the Respondent. the Pleaded amount as stated by counsel cannot be awarded based on the way the prayers have framed.

29. In the case of *Ochieng & Others v First National Bank of Chicago* Civil Appeal No. 147 of 1991 (unreported) where the Court in *as St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd* [2018] eKLR in which the Court of Appeal set out the principles governing amendment of pleadings as follows: -

- “a) The power of the Court to allow amendments is intended to determine the true substantive merits of the case.
- b) The amendments should be timeously applied for;
- c) Power to amend can be exercised by the Court at any stage of the proceedings.
- d) 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.
- e) The plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on limitations Act subject however to powers of the Court to still allow and amendment notwithstanding the expiry of current period of limitation.”



30. The particulars of the prayers sought in the Further Amended Plaint varies to the extent of special damages at prayer cc for the Applicant to be compensated for monies expended.

31. In the case of Angelina Chepng'etich Kimaiti v Tom Mong'are Nyariki & another [2021] eKLR the Court opined that:

“.....The purpose of amending pleadings was to ensure that nothing is left out of the case since should one not include all the causes of action in the suit, he cannot file another suit for the cause of action that ought to have been included in the suit. Such would be Res Judicata. Order 8 Rule (5) of the Civil Procedure Rules gives the Court powers to allow an amendment notwithstanding that its effect will be to add 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. The other purpose that was to be achieved had to do with the clerical mistakes such as I have mentioned above and inadvertent errors occasioned by the urgency attendant to drafting cases that have to be taken to Court to forestall certain injustices or to beat certain deadlines such as limitation of actions....”

32. From the pleadings it is very clear that the claim for Kshs 116,390,281.05 was specifically pleaded. The Applicant's counsel has admitted to making a mistake and failing to claim special damages. On the other hand, the Respondent submitted that the reasons forwarded by the Applicant were not justifiable for seeking amendment at the close of hearing. With that the Respondent attributes injustice and prejudice.

33. Now, therefore it is fair and just to allow the amendment sought and does the Respondent stand to suffer any prejudice that cannot be compensated by costs?

34. This is a case where a party is seeking to amend a claim before delivery of judgment. In Cheleta Coffee Plantations Ltd v Eric Mehlsen [1966] EA 203 and General Manager E.A.R & H.A v Thierstein [1968] EA 354 as cited with authority in Suleiman v Karasha [1989]eKLR the Court allowed amendment of pleading after conclusion of hearing on the grounds that, such amendment would assist the Court in arriving at a just decision. In this regard, the proposed amendment by the Applicant in the Courts considered opinion is not immaterial. The explanation by counsel of his mistake is plausible since the amount was specifically pleaded and demanded by the Applicant its correspondences with the Respondent. The mistake is one of omission by the drafter.

35. The general rule is that mistake of counsel should never be meted on an innocent litigant. Counsel has explained what led to the inadvertent mistake and only realizing the mistake at the time of preparation of submissions. The Application was brought in due time however; the Court has to consider the rights of the Respondent in this regard. The Court ought to certainly do whatever is necessary mitigate any loss or damage that the Respondent has been occasioned. In that regard, since counsel's mistake was not fraudulent or with an intention to overreach, there is no mistake that cannot be compensated by away of costs.

36. As to the delay involved in bringing the draft amendment, the Respondent submitted that the Applicant is guilty of laches.

37. In the case of Benjoh Amalgamated Limited & another v Kenya Commercial Bank Limited [2014] eKLR the Court of Appeal of Kenya observed as follows:

“ In dealing with laches, Halsbury's Laws of England, 4th ed. Vol. 16(2) at §910 has this to say;



“A claimant in equity is bound to prosecute his claim without undue delay. This is in pursuance of the principle which has underlain the statutes of limitation equity aids the vigilant, not the indolent’ or ‘delay defeats equities’. A Court of equity refuses its aid to stale demands, where the claimant has slept upon his right and acquiesced for a great length of time. He is then said to be barred by his unconscionable delay (‘laches’).”

38. Even after the Applicant had been given an opportunity to amend its Complaint, proposed further amendment have come 2 years later and further after hearing was concluded and parties were preparing submissions. Is that however sufficient reason to decline this application? I think not. Having established that the mistake was a drafting error on the part of counsel there is no sufficient cause to deny the Applicant claim what has been pleaded. The Respondent can be awarded costs to ameliorate any prejudice it may stand to suffer if the application is allowed.
39. The upshot is that I find the application dated the 19th July, 2023 has merit and make the following orders: -
- a. The Applicant is granted leave to amend its Amended Complaint to the extent of the prayer for special damages;
 - b. The Further Amended Complaint be filed and served within 7 days from the date of this Ruling
 - c. The Respondent is granted corresponding leave to amend, file and serve a Further Amended Defence and with any other corresponding evidence in respect to the allowed amendment in the Further Amended Complaint within 7 days from the date of service;
 - d. The costs of this Application will be awarded to the Respondent in the sum of Kshs. 15,000/- payable within the next 7 days to be borne by the Applicant’s counsel;
 - e. Matter shall be mentioned for directions on 4th April, 2024.

It is so ordered

DATED, SIGNED AND DELIVERED AT NAKURU ON THIS 5TH OF MARCH, 2024

MOHOCHI S.M.

JUDGE

