



Lavington Security Ltd v Commissioner for Co-op Development & 2 others (Civil Suit 61 of 2019) [2024] KEHC 5396 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5396 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 61 OF 2019
FG MUGAMBI, J
MAY 14, 2024

BETWEEN

LAVINGTON SECURITY LTD PLAINTIFF

AND

COMMISSIONER FOR CO-OP DEVELOPMENT 1ST DEFENDANT

LAVINGTON UNITED SACCO SOCIETY LTD 2ND DEFENDANT

COOPERATIVE BANK OF KENYA LTD 3RD DEFENDANT

RULING

1. Before the Court is an application dated 1st March 2023, brought under Order 8 rule 3 of the [Civil Procedure Rules](#), sections 1A, 1B, 3A, &100 of the [Civil Procedure Act](#) and Article 159(2) of the [Constitution](#) of Kenya. The plaintiff seeks leave to amend their plaint dated 12th February 2019 and to substitute their respective witness statements.
2. The gravamen of the application is that since the filing of this suit in 2019, circumstances of the suit had drastically changed and there was need for the pleadings to reflect those material changes and present the actual dispute between parties herein for determination. The specific changes are captured in the witness statement that the plaintiff seeks leave to substitute.
3. The application is opposed by the defendants through separate replying affidavits. The 1st defendant's replying affidavit is sworn by David Obonyo, the Commissioner the 1st defendant on 16th June 2023. The 1st defendant avers that plaintiff's application intends to amend a plaint whose suit was compromised by the parties through a consent that was adopted as the final orders of this Honourable Court on 27th February 2019.



4. According to the 1st defendant, the proposed amendments to the plaint are intended to retry the issue of whether the plaintiff is in breach of the terms of the consent order dated 27th February 2019 by failing to remit to the 2nd defendant the sum of Kshs. 48,026,779/= for the period running between January 2019 and July 2019, which issue was already determined by the Honorable Court in its ruling delivered on 4th September 2020.
5. These sentiments are reiterated in the 2nd defendant's replying affidavit dated 23rd March 2023 sworn by Raphael Kiptui, the Chief Executive Officer of the 2nd respondent. The 2nd defendant additionally argues that it is the plaintiff that breached its undertaking under the Arrears Repayment Agreement by failing to remain current in all future remittance. The 3rd defendant opposed the application on similar grounds vide grounds of opposition dated 21st June 2023.

Analysis

6. I have carefully considered all the pleadings, submissions, evidence and authorities cited by rival parties in support of their cases. The main issue for determination is whether the plaintiffs ought to be granted leave to amend their plaint as sought.
7. While the plaintiff argues that the suit has not been heard on its merits since it was filed in 2019, the defendants have been persistent that the suit was compromised by the parties and a consent adopted as a final order of this Court. Indeed, the plaintiff does not deny the existence of this consent order.
8. Section 100 of the [Civil Procedure Rules](#) 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.”
9. The same provision is replicated in the [Civil Procedure Rules](#) under Order 8 rule 3 in the following terms:

“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.”
10. It follows that the power to amend pleadings is only possible where there are existing proceedings. This is also in consonance with the decision in [Kiarie v Waiganjo](#), [2004] eKLR where the Court of Appeal held as follows:

“Under Order 6A Rule 3 of the *Civil Procedure Rules*, pleadings may be amended at any stage of the proceedings but not after judgment [Rule 5(2)]. The very purpose of the application before the lower Court was to seek amendment of the plaint after judgment, through an order 44 review application. This cannot be allowed and the lower Court was clearly wrong in allowing it.”
11. In my view, once parties have reached a compromise and recorded a consent, which is then adopted by the court, the case is generally considered to be resolved. Such a consent order carries the weight of a final judgment on the matter at issue. Consent orders are final and binding regarding the issues they



cover with the same respect and finality as a judgment after a full trial. I would say that the plaint is therefore spent and not capable of being amended.

12. Be that as it may, I have looked at the plaint dated 12th March 2019 against the proposed amendments. The former had sought orders for accounts to be taken to determine what was due from the plaintiff to the 2nd defendant and for orders that the plaintiff be allowed to pay the undisputed amount of Kshs. 18,009,950/= in instalments.
13. The consent order addressed the dispute with finality. Parties agreed that the amount due from the plaintiff to the 1st defendant was Kshs. 32,009,985.85. The plaintiff was to pay Kshs. 6,009,985.85 by 31st March 2019 and 26,000,000/= in 5 instalments of 5,200,000/= on or before 31st August 2019. The plaintiff submits that this amount was paid in full compliance of the consent order, a fact that has been confirmed by the 1st and 2nd defendants.
14. The 1st defendant confirms that the amount subsequently demanded from the plaintiff was arrears of deductions. The 2nd defendant avers at paragraph 10 of its replying affidavit as follows:

“THAT pursuant to the consent order, the applicant made payments of KShs. 32,009,985.85 by 29th August 2019 being money owed as arrears prior to filling of the suit. However, breached its undertaking under clause 5 of the arrears repayment agreement by failing to remain current in all future remittance.”

15. This Court notes that the demand of KShs. 48,026,779/= originated from arrears covering the period January 2019 to 31st September 2019 being the principal amount of Kshs 30,833,933.70 and a compounded interest at 10% per month amounting to KShs 17,192,845.30. It is common ground that this demand was made after the consent judgment had been entered.
16. By the draft amended plaint the plaintiff denies owing this monies and states that its employees had withdrawn their membership from the 2nd defendant and it was not therefore possible to make deductions from them. To further compound the matter, the parties confirm that the amount of KShs. 48,026,779/= continues being held in a joint interest earning account in the names of the parties' advocates as directed by this Court and that the rightful owner of this amount is yet to be determined.
17. To my mind, the disputed facts surrounding the demand of KShs. 48,026,779/= were not contemplated at the time of the consent order and thus could represent a new cause of action rather than an amendment to the spent plaint.
18. That said, it would appear that even in a new cause of action this argument is no longer open to the plaintiff to pursue. I say so noting that this Court has already pronounced itself on the question of the withdrawal of the plaintiff's employees from the 1st defendant's membership. Parties have referred to a ruling of this Court delivered on 4th September 2020 which reads in part as follows:

“There is no evidence that in withdrawing as members of the 2nd defendant any of the plaintiff's employees complied with the above provisions of the law. Apart from claiming that its employees had withdrawn their membership, the plaintiff/applicant has not provided any documentary proof of such withdrawal e.g. by way of affidavits sworn by the said employees (or letters written by the said employees withdrawing their membership in the 2nd defendant).

This remains a mere allegation which is not proven. The plaintiff/applicant did not approach the court seeking to vary the Arrears Agreement. The same including clause 5



binds the plaintiff. It is manifest that the plaintiff/applicant has clearly breached Clause 5 of the Arrears Agreement and so I find.”

19. This Court effectively determined this outstanding issue as an issue relating to the execution of the consent order of 27th February 2019 as to whether the plaintiff had remained current in future remittances.
20. I note that an application for review of this ruling was equally dismissed on 23rd June 2022. This can only mean that this Court is now functus officio and cannot entertain the same prayers save to add that the Court declined to make any finding on the declaratory orders that had been sought, that the demand for payment of Kshs. 48,026,779/= is ultra vires the Agreement of 21st February 2019 and that the amount claimed is not due to the 2nd defendant. This is perhaps within the plaintiff’s right to therefore pursue in a full hearing.
21. For the avoidance of doubt, this Court therefore finds that the consent order resolved the initial dispute with finality. The principles of justice and finality in litigation preclude the amendment of a plaint that has been rendered spent by such an order. Nonetheless, the Court acknowledges that the plaintiff would be at liberty to approach the Court for a determination of a new dispute arising from circumstances not anticipated by the consent order but these would be subject to section 7 of the Civil Procedure Act which provides that:

“No court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

Disposition

22. In light of the above, the application dated 1st March 2023 is hereby dismissed with costs to the 1st and 2nd defendants.

DATED, SIGNED AND DELIVERED IN NAIROBI THIS 14TH DAY OF MAY 2024.

F. MUGAMBI

JUDGE

