



Savani & another v Estate of Bhagwanji Tribhovanbhai Patel & 2 others (Civil Case 130 of 2014) [2024] KEHC 5457 (KLR) (Commercial and Tax) (14 May 2024) (Ruling)

Neutral citation: [2024] KEHC 5457 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 130 OF 2014
FG MUGAMBI, J
MAY 14, 2024**

BETWEEN

JITU TRIBHOVANBHAI SAVANI 1ST PLAINTIFF

RAJENDRA TRIBHOVAN HANSRAJ SAVANI 2ND PLAINTIFF

AND

ESTATE OF BHAGWANJI TRIBHOVANBHAI PATEL 1ST DEFENDANT

MANJULA BHAGWANJI TRIBHOVAN PATEL 2ND DEFENDANT

PARAG BHAGWANJIBHAI SAVANI 3RD DEFENDANT

RULING

Background

1. This ruling determines the application dated 16th May 2023 filed by the defendants under the provisions of Order 8 rule 2 of the Civil Procedure Rules.
2. It seeks to strike out paragraphs 10, 16, 20, 27, 28, 35 and 36 of the Further Amended Plaint dated 8th May 2023. It further seeks to have the 1st and 2nd plaintiffs' Substituted Witness Statements by Jitu Tribhovanbhai Savani and Rajendra Tribhovan Hansaraj Savani both dated 8th May 2022 and the Plaintiffs' Further Supplementary List of Documents dated 8th May 2023 marked J--19, J—20 and J-21 expunged from the Court's record. The application is supported by an affidavit sworn by the 3rd defendant, Parag Bhagwanjibhai Savani on 16th May 2023.
3. The defendant's case is that this Court, vide a ruling dated 28th April 2023 (the 2023 ruling) had allowed the plaintiffs an extension of time to comply with the directions given by Hon. Nzioka J on 29th April



- 2020 (the 2020 ruling) granting the plaintiffs leave to amend their plaint as well as substitute their witness statements.
4. The defendants argue that although the documents were filed within the time stipulated and the length was limited as directed by the Court in the 2023 ruling, the plaintiffs were in breach of other directions of this Honourable Court.
 5. In particular, the defendants argue that the further amended plaint contains new allegations which only the 1st defendant who is deceased, would have been in a position to respond to and which the Court had directed the plaintiffs to desist from making. These allegations had either been moved to or retained in the 2nd and 3rd witness statements.
 6. The defendants further take issue with the introduction of matters which were not in the draft amended plaints that were before the court including the error alleged in paragraph 6 thereof.
 7. The application is opposed vide a replying affidavit sworn by Jitu Tribhovanbhai Savani, the 1st plaintiff on 6th June 2023. The plaintiffs deny that the new averments in the plaint which were introduced pursuant to this Court's leave were issues which only the 1st defendant had personal knowledge of.
 8. According to them, these issues were also within the knowledge of the 2nd and 3rd defendants as the deceased's son, wife and executrix of the estate. The plaintiffs deny having introduced any new cause of action and wondered why the defendants had to wait until their time to respond to the further amended plaint had lapsed to file this application.
 9. The plaintiffs vehemently oppose the expungement of the substituted witness statements arguing that no case has been made for this.

Analysis

10. I have carefully considered the pleadings herein, the evidence, submissions and evidence presented by rival parties. At the heart of this application are two rulings issued by this Honourable Court. The first of these is the 2020 ruling (Nzioka J).
11. The Court allowed the plaintiff's further amendment of the plaint but on specific terms. It is imperative to note that the following excerpts from the April 2020 decision have been expressly highlighted by the defendants in their submissions to this Court, and these excerpts remain unchallenged:

“ Paragraph 32:

I have gone through the entire draft plaint and I find that, as a matter of fact, the Plaintiffs have introduced a lot of factual issues not pleaded in the initial plaint. In addition, they have introduced new prayers in the plaint that were not pleaded and/so sought for earlier. It is therefore not in vain, when the Respondents submit that, there is a new cause of action. Further as rightfully observed by the Respondent, a lot of the averments refer to alleged acts of commission and/or omission by “the deceased”

Paragraph 33:

Further, as much the Plaintiffs allege there have been new developments necessitating the amendments and list the same, there is no indication as to where the documents referred to were at the time of filing the suit and when they were discovered. / have considered these matters, mainly relating to annual general meetings, the Jacob trust and the brothers agreement and find that as can be properly deduced therefrom, those that should have been



within the knowledge of the Plaintiffs at the time of filing the suit had due diligence been exercised and, should have been included in the pleadings then...

Paragraph 39:

With due utmost respect, the pleadings herein are over lengthy. Therefore, the issues by the Respondent cannot even be considered in the light of such a plaint. Taking into account the need to uphold substantive just and the legal principles referred to herein, I shall grant the Plaintiffs fourteen (14) days to reconsider intended amendments, in the light of the laid down principles of law and set out the material facts only.”

12. From these excerpts it therefore follows that this Court had already pronounced itself on the parameters of the intended amendments and issued directions in this instance and specifically that:
 - i. The plaintiffs would consider keeping the plaint succinct, encapsulating only the material facts necessary for the determination of the case;
 - ii. Any facts not previously pleaded in 2014, when the deceased was still alive and sought to be introduced by later amendments upon his death were prejudicial to the defendants as the deceased was not able to respond to them;
 - iii. The amendments, to the extent that they introduced the Jacob Trust, the Annual General Meeting (AGM), and the agreement among the brothers, which ostensibly should have been within the plaintiffs' awareness in 2014 when the initial plaint was filed were considered to have been omitted from the initial pleadings due to a lack of due diligence. These matters, had due diligence been exercised, ought to have been included in the pleadings at that juncture.
13. The plaintiffs failed to comply with the 2020 orders within the time frame allowed giving rise to the 2023 ruling. This subsequent ruling allowed an application for extension of time for the compliance with the 2020 directions. The 2023 ruling was clear that:

“The plaintiff shall abide by the directions of the Learned Judge given vide the ruling of 29th April 2020 more specifically to desist from amendments which introduce a new cause of action, desist from amendments that would be difficult to prove being in the personal knowledge of the 1st defendant who is since deceased and finally to reconsider the prolixity of the plaint.”
14. The applicants invite this Court to examine the proposed further amended plaint dated 8th May 2023 and particularly paragraphs 10, 16, 20, 27, 28, 35 and 36 in light of these directions. I have therefore looked at these impugned paragraphs in isolation as they are the issues that are before the Court.
15. The plaintiffs propose to amend paragraph 10 by introducing the alleged allotment of 199 shares to the 1st plaintiff and the 3rd defendant by the deceased, on 18th May 1993. This claim should have been within the plaintiffs' knowledge at the time the original plaint was filed. Such an amendment contravenes the directives established in the 2020 ruling.
16. The proposed amendment to paragraph 16 seeks to include details pertaining to the personal vision, thoughts, and activities undertaken by the deceased in a personal capacity during the 1930s. Furthermore, paragraph 20 aims to introduce information regarding financial decisions and investments made by the deceased in 1975 on behalf of the family.
17. In line with the 2020 ruling of this Court, such matters were ostensibly within the knowledge of the plaintiffs at the time the original plaint was filed, and while the deceased was still alive. Given that these



issues necessitate the personal testimony of the deceased, which is now unattainable, their inclusion is deemed to be prejudicial to the defendants.

18. In paragraphs 27 and 28, the plaintiff proposes to introduce content pertaining to the brothers' agreement executed on 11th August 1988, which led to the establishment of a discretionary trust, referred to as the Jacobs Trust, established on 3rd March 1989. The 2020 ruling had explicitly stated that such amendments could not be sanctioned as new developments given the absence of a cogent explanation for their omission in the initial pleadings.
19. Paragraphs 35 and 36, which allege fraudulent actions by the deceased, including the approval of share transfers and the instruction for a valuation of the company's businesses, are prejudicial to the defendants. This is because such allegations should have been presented in the pleadings before the passing of the 1st defendant, thereby providing him an opportunity to respond and defend himself against these claims.
20. Based on the reasons outlined above, I am persuaded that the applicant has adequately demonstrated that the aforementioned paragraphs in the plaint warrant striking out. However, I find no justifiable grounds for striking out the substituted witness statements by the 1st and 2nd plaintiffs in their entirety.
21. Given that witness statements are not pleadings and, as such, derive their legal standing from the averments articulated through the pleadings, it logically follows that the portions of the witness statements that correspond to the paragraphs struck from the plaint cannot be sustained. Consequently, these sections are also effectively expunged and so are the further supplementary list of documents in support of the averments that have been struck out.

Disposition

22. For the avoidance of doubt, the application dated 16th May 2023 is hence successful in the following terms:
 - i. That paragraphs 10, 16, 20, 27, 28, 35 and 36 of the draft Further Amended Plaint dated 8th May 2023 are hereby disallowed and struck out;
 - ii. Consequently, specific paragraphs of the 1st and 2nd plaintiffs Substituted Witness Statements dated 8th May 2023 which are associated with the averments in paragraphs 10, 16, 20, 27, 28, 35 and 36 of the Further Amended Plaint are hereby expunged;
 - iii. The matter will be mentioned before this Court for further directions on the expeditious hearing and determination of the suit.

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

F. MUGAMBI

JUDGE

