



**Mwangi & another v Kassamali & 2 others (Commercial Case E896 of 2021)
[2024] KEHC 7479 (KLR) (Commercial and Tax) (14 June 2024) (Ruling)**

Neutral citation: [2024] KEHC 7479 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E896 OF 2021
MN MWANGI, J
JUNE 14, 2024**

BETWEEN

SAID ALI MWANGI 1ST PLAINTIFF

RODEX EAST AFRICA 2ND PLAINTIFF

AND

ZAMEER KASSAMALI 1ST DEFENDANT

MAHIR NAKURU AUTOMOTIVE LTD 2ND DEFENDANT

BANK OF BARODA 3RD DEFENDANT

RULING

1. The 1st defendant filed a Notice of Motion application dated 9th September, 2023 pursuant to the provisions of Sections 3A & 100 of the *Civil Procedure Act*, Cap 21 Laws of Kenya, Order 8 Rules 3 & 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Article 159 of the *Constitution of Kenya* 2010, and all enabling provisions of the law seeking the following orders –
 - i. That this Honourable Court be pleased to grant leave to the 1st defendant/applicant to amend his statement of defence to include a counter-claim as proposed in the draft amended 1st defendant's/applicant's statement of defence and counter-claim annexed to this application;
 - ii. That the drafted 1st defendant's/applicant's statement of defence and counter-claim annexed to this application be deemed to have been duly and properly filed upon payment of requisite fees; and
 - iii. That the costs of this application be provided for.



2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on the same day by Zameer Kassamali, the 1st defendant herein. In opposition thereto, the plaintiffs filed a replying affidavit sworn on 4th December 2023 by Said Ali Mwangi, the 1st plaintiff herein.
3. The application was canvassed by way of written submissions. The 1st defendant's submissions were filed by the law firm of Wachira, Wekhomba, Aim & Associates Advocates on 2nd February, 2024, whereas the plaintiffs' submissions were filed on 20th February, 2024, by the law firm of Quincy, Jesse, Kiptoo & Associates Advocates. On 5th February, 2024 learned Counsel for the 2nd & 3rd defendants informed this Court that the 2nd & 3rd defendants were not opposing the instant application.
4. Mr. Aim, learned Counsel for the 1st defendant submitted that upon service of the plaint and its accompanying documents to the 1st defendant by the plaintiff, the 1st defendant filed a statement of defence dated 14th February, 2023. That thereafter, the 1st defendant realized that the 1st plaintiff was out to defraud the 2nd plaintiff company from the monies he took out of the company without the requisite authority, thereby causing the 2nd plaintiff to suffer immensely. Counsel stated that the said circumstances prompted the 1st defendant to come to the conclusion that the 2nd plaintiff company where he is a Shareholder and the directing mind would need to recover the monies misappropriated by the 1st plaintiff. Counsel stated that it is necessary for the 1st defendant to amend his statement of defence to introduce a counter-claim seeking to recover all the monies misappropriated by the 1st plaintiff. Counsel further stated that the said counter-claim will bring out all the issues in controversy in the suit and will help this Court in adjudicating them.
5. Counsel concluded that the intended amendment will not prejudice the plaintiffs in any way and it will not introduce a new cause of action to the subject suit. He relied on the provisions of Section 100 of the *Civil Procedure Act* and Order 8 Rules 1, 3, 5 & 8 of the *Civil Procedure Rules*, 2010. He submitted that parties to a suit have a right to amend their pleadings at any stage of the proceedings, and Courts have the discretion to allow such amendments on terms that are just. He relied on the Court of Appeal case of *Central Kenya Limited v Trust Bank and 4 others* CA No. 222 of 1998 [2000] KLR and contended that it is a cardinal principle that all amendments should be freely allowed at any stage of the proceedings provided that the amendment is necessary for determining the real question in controversy or to avoid multiplicity of suits, and when the amendment will not be prejudicial or cause injustice to the other party.
6. Mr. Aim further relied on the case of *Central Kenya Limited v Trust Bank and 4 others*, CA No. 222 of 1998 [2000] KLR where the Court of Appeal set down the principles to be considered when determining whether or not to grant leave for amendment of pleadings and submitted that the issues raised by the plaintiffs in paragraph 11 and 12 of their replying affidavit are premature issues which ought to be raised and adjudicated at the trial of the main suit since they form the substantive part of the suit. Counsel further submitted that the plaintiffs have not sufficiently demonstrated to this Court how absurdity will come about in the event that the orders being sought are granted. He expressed the view that if the instant application is allowed, it will not lead to absurdity as parties in a suit can change roles in a counter-claim. Mr. Aim referred to the case of *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR and argued that the amendment sought herein is in line with the provisions of Article 50 of the *Constitution* which provides for the right to a fair hearing.
7. Mr. Kiptoo, learned Counsel for the plaintiffs cited the provisions of Order 8 Rule 5 of the *Civil Procedure Rules*, 2010 and submitted that the amendment sought in the instant application is intended to cause injustice and irreparable harm to the plaintiffs, and it is an abuse of the Court process. He



explained that the 2nd plaintiff in the main suit will become the primary plaintiff in the 1st defendant's counter-claim, thus shifting the dynamics of the case so that the 1st defendant can potentially gain leverage over the 1st plaintiff. Counsel argued that such a move could complicate the legal proceedings and alter the course of litigation. It was stated by Counsel that the proposed amendment will trigger procedural debates and require judicial scrutiny. He stated that this Court is duty bound to uphold the rule of law and safeguard the integrity of the judicial process against such attempts at manipulation and subversion.

8. Counsel contended that the 1st defendant had not produced a Board resolution to institute a suit in the name of Rodex East Africa in 2023-2024, which means that the amendment sought is meant to pursue personal grievances and private interest which have nothing to do with Rodex East Africa, the 2nd plaintiff herein. It was submitted by Mr. Kiptoo that if the application herein is allowed, the proposed amendments will fundamentally depart from the original pleadings and will inevitably introduce a totally new and inconsistent claim which will defeat the plaint filed herewith and shall highly be prejudicial to the plaintiffs. To buttress this argument he relied on the case of *Kassam v Bank of Baroda* [2002] eKLR.
9. Mr. Kiptoo stated that the 1st defendant has also not complied with the provisions of Order 8 Rule 7(2) of the *Civil Procedure Rules*, 2010 which states that all amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words. He further stated that since Order 8 Rule 7 (2) is couched in mandatory terms, and the 1st defendant's violation goes to the root of the amendment. He relied on the case of *Co-operative Insurance Company of Kenya Limited v Paem Agencies Company Limited* [2014] eKLR, cited with approval by the Court in *Tripat Singh Mangat (Suing on his behalf and on behalf of Mangat I.B. Patel (MIBP) Limited) v Manjeet Singh Bhachu & 3 others* [2021] eKLR and asserted that failure to comply with the provisions of Order 8 Rule 7 of the *Civil Procedure Rules*, 2010 cannot be cured by the provisions of Article 159(2)(d) of the *Constitution* since it is not a procedural technicality.

Analysis and Determination.

10. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also taken into account the replying affidavit by the plaintiffs and the written submissions by Counsel for the parties. The issues that arise for determination are –
 - i. Whether non-compliance with the provisions of Order 8 Rule 7(2) of the *Civil Procedure Rules*, 2010 is fatal to the instant application.; and
 - ii. Whether the 1st defendant should be granted leave to amend his defence and introduce a counter-claim.
11. The 1st defendant in his supporting affidavit deposed that he is the Executive Managing Director of the 2nd plaintiff company and the controlling mind, an active Shareholder and signatory of the 2nd plaintiff company. He averred that the 1st plaintiff is not an active mind of the company and is out to defraud the 2nd plaintiff monies he took from it without authorization.
12. It was stated by the 1st defendant that the plaintiff instituted this suit vide a plaint dated 2nd November, 2021 seeking several reliefs against the defendants. That the 1st defendant filed his statement of defence dated 14th February, 2023 but was not able to immediately file the counter-claim at the time since he did not have all the records and supporting documents. The 1st defendant indicated that he has since located all the relevant documentation that would support his counter-claim, thus necessitating this application.



13. He averred that the proposed amendments on the statement of defence are primarily intended to enable this Court determine the real issues in controversy as well as to enable this Court to finally adjudicate this matter in totality. He further averred that he intends to introduce a counter-claim in the statement of defence as seen in the draft amended statement of defence and counter-claim annexed to his affidavit.
14. He deposed that the contents of the intended counter-claim are facts that are within the 1st plaintiff's knowledge, thus the 1st plaintiff stands to suffer no prejudice in the event the instant application is allowed. The 1st defendant contended that the filing of the amended statement of defence and counter-claim will not delay the prosecution of this suit in any manner, since the proposed amendments are necessary for the effectual and just determination of this suit.
15. The 1st plaintiff in his replying affidavit averred that there has been inordinate delay in filing the application herein. That in as much as the 1st defendant claims not to have had access to documents, he did not disclose which documents he was referring to. The 1st plaintiff further averred that the instant application is untenable as it seeks to change the character of the case herein and introduce new facts and causes of action.
16. It was stated by the 1st plaintiff that the proposed amendment suggests a perplexing reversal, since the 1st defendant seeks to make the 2nd plaintiff in the main suit to be the primary plaintiff in the counter-claim, thus introducing a sense of absurdity into the legal proceedings as it deviates from the conventional roles of the parties involved.
17. The 1st plaintiff contended that the 1st defendant had not challenged the 2nd plaintiff's standing as a plaintiff, neither had he lodged an application seeking removal of the 2nd plaintiff as a plaintiff in the main suit. In the 1st plaintiff's view, the proposed amendments particularly those pertaining to the counter-claim lack a solid foundation and are therefore indefensible. He averred that he remains an active Director and Shareholder of the 2nd plaintiff company and the proposed amendments are intended to scuttle the plaintiff's suit, and are extremely prejudicial.

Whether non-compliance with the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules, 2010 is fatal to the instant application.

18. Order 8 Rule 7 of the [Civil Procedure Rules](#) 2010 states as hereunder-
 - “(1) Every pleading and other documents amended under this Order shall be endorsed with the date of the amendment and either the date of the order allowing the amendment or, if no order has been made, the number of the rule in pursuance of which the amendment was made.
 2. All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.
 3. Colours other than red shall be used for further amendments to the same document.”
19. It is not disputed that the 1st defendant's amended statement of defence and counter-claim annexed to the 1st defendant's supporting affidavit is not in compliance with the provisions of Order 8 Rule 7 of the [Civil Procedure Rules](#) 2010. The plaintiffs submitted that the said provisions are couched in mandatory terms, thus non-compliance with the said provisions goes to the root of the amendment and is not one that can be cured by the provisions of Article 159 of the [Constitution of Kenya](#), 2010.



This Court appreciates that the authority relied on by the plaintiffs to buttress this argument is a High Court decision, and this Court is not bound by findings and/or decisions emanating from the High Court or Courts of equal status to the High Court, as the said decisions can only be of persuasive value.

20. The amended defence and counter-claim annexed to an application for leave, such as the one before this Court is only meant to help the Court to appreciate the proposed amendments, consider whether they introduce a new cause of action, and whether the other party will be prejudiced by the said amendments. In deciding whether non-compliance with the provisions of Order 8 Rule 7 of the Civil Procedure Rules, 2010 is fatal to the instant application, I am guided by the holding in the case of Hunker Trading Company Limited v Elf Oil Kenya Limited [2010] eKLR, where the Court held that section 1A of the Civil Procedure Act came in to provide facilitation of just, expeditious and proportionate resolution of civil disputes in Kenya as the overriding objective of the Act. In undertaking their mandate under Section 1B of the Civil Procedure Act, Courts have to pay heed to -
- i. The just determination of the proceedings;
 - ii. The efficient disposal of the business of the Court;
 - iii. The efficient use of the available judicial and administrative resources;
 - iv. The timely disposal of the proceedings, and all other proceedings in the Court, at a cost affordable by the respective parties; and
 - v. The use of suitable technology.
21. Article 159(2)(d) of the Constitution 2010 provides that in exercising judicial authority, Courts and Tribunals shall administer justice without undue regard to procedural technicalities. In Adrian Kamotho Njenga v Cabinet Secretary, Ministry of Information, Communication and Technology & 8 others [2017] eKLR, the Court when addressing the oxygen principle held thus -

“Considering the above provisions which introduced the oxygen principle, in Deepak Chamanlal Kamani & another v Kenya Anti-Corruption Commission [2010] eKLR the court drew comparisons to the Wolf reforms which introduced similar provisions in England in 1998 by way of the Civil Procedure Rules and further considered the English case of Biguzzi v. Rank Leisure PLC [1999] 1 WLR 1926 in which Lord Woolf himself talked about the concept of overriding principle objective as follows: -

“Under the {Civil Procedure Rules} the position is fundamentally different. As rule 1.1 makes clear the {rules} is a new procedural code with the overriding objective of enabling the court to deal with cases justly. The problem with the position prior to the introduction of the {rules} was that often the court had to take draconian steps such as striking out the proceedings...”

In the above cited case of Kamani v Kenya Anti-Corruption Commission (*supra*) the court had this to say: -

“It is, accordingly, clear to us that the amendment to section 3 of the Appellate Jurisdiction Act, did not, without more, come in to sweep away the well-known and established principles of law hitherto in place before the said amendment...-----This to our understanding means sections 3A and 3B of cap 9 cannot be invoked as a matter of course so as to excuse all and any kind of failing



on the part of a party to abide by the requirements of the rules made to regulate appeals to this court”(Emphasis added)

In this regard, I stand guided by the above quotation from the case of *Kamani v Kenya Anti-Corruption Commission (supra)* that the amendments did not come to sweep away the well-known and established principles of law hitherto in place before the said amendment, and that the said amendments cannot be invoked as a matter of course so as to excuse all and any kind of failing on the part of a party to abide by the requirements of the rules made to regulate conduct of cases.”

22. At this juncture, the 1st defendant’s amended statement of defence and counter-claim annexed to his supporting affidavit is not yet part of the Court record to warrant striking out and/or dismissal of the application herein. On perusal of the 1st plaintiff’s replying affidavit and written submissions in opposition to the application herein, it is evident that the 1st plaintiff was able to not only pick out the proposed amendments from the said amended statement of defence and counter-claim, but he was also able to understand the nature of the said amendments and their import to this suit.
23. This Court therefore finds that failure to comply with the provisions of Order 8 Rule 7 of the *Civil Procedure Rules*, 2010 at this stage of the proceedings is neither fatal nor does it make the application herein incurably defective, since the non-compliance affects the form rather than the substance of the amended statement of defence and counter-claim, which issue can be cured by the provisions of Article 159(2)(d) of the *Constitution of Kenya*, 2010.

Whether the 1st defendant should be granted leave to amend his defence and introduce a counter-claim.

24. Amendment of pleadings with leave of the Court is provided for under Order 8 Rule 3 of the *Civil Procedure Rules*, 2010 which states as hereunder –
 - “(1) (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 sub - rule (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 sub - rule if it thinks just so to do.
 3. An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
 4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.



5. An amendment may be allowed under sub - rule (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.”
25. From the foregoing provisions, this Court has the discretion to order for the amendment of any document pursuant to the provisions of Order 8 Rule 5 (1) of the *Civil Procedure Rules*, 2010 which provides as hereunder –
- “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.”
26. The 1st defendant states that he intends to introduce a counter-claim to his statement of defence which will not only bring out all the issues in controversy in this suit but will also assist the Court to determine and/or adjudicate on the real issues in controversy between the parties herein. He averred that the intended amendment will not prejudice the plaintiffs in any way and it will not introduce a new cause of action to the subject suit. The 1st plaintiff on the other hand contended that the proposed amendments will introduce new issues since it seeks to bring on board and/or introduce the 2nd plaintiff as the 1st plaintiff in the counter-claim. Further, that the proposed amendments seek to introduce a new cause of action thus if the instant application is allowed, the 1st plaintiff will be prejudiced since the 1st defendant will have an undue advantage over him.
27. On perusal of the plaint, the 1st defendant’s statements of defence and the 1st defendant’s amended statement of defence and counter-claim, I note that the 1st plaintiff and the 1st defendant are co-directors in the 2nd plaintiff company, and that the 2nd plaintiff through the 2nd defendant procured a financial facility from the 3rd defendant, which facility was secured by a charge over the 1st plaintiff’s matrimonial property being LR No. 209/12743/10 (IR 79061) Soledo Springs Estate, Mugoya south C area, Nairobi and the 1st defendant’s property being Nakuru Municipality Block 20/285 apartment Nos. E9 & E12.
28. The 1st defendant is the Director of the 2nd defendant. The 1st plaintiff contends that the 1st defendant converted the financial facility that was procured for the 2nd plaintiff through it and used it to import paint from Egypt for its own use, and as a result, the 2nd plaintiff was also forced to import its paints through the 2nd defendant. In the plaint, the plaintiff accuses the 1st defendant of embezzling the 2nd plaintiff’s funds and using the 2nd plaintiff to settle its debts and those of the 2nd defendant obtained from local shylocks. The 1st defendant on the other hand in its proposed amended statement of defence and counter-claim accuses the 1st plaintiff of collecting and/or utilizing money belonging to the 2nd plaintiff in a bid to defraud the 2nd plaintiff.
29. The common denominator in the plaint and the proposed amended statement of defence and counter-claim is Elegant Properties, one of the 2nd plaintiff’s clients, who paid the 2nd plaintiff through bank transfers, cash and property exchange, and the financial facility advanced to the 2nd plaintiff through the 2nd defendant. Given the said facts, I am not persuaded that the 1st defendant’s proposed amended defence and counter-claim introduces a new cause of action to this suit.



30. This Court is alive to the fact that the 1st defendant intends to introduce the 2nd plaintiff in the main suit, as the 1st plaintiff in the counter-claim. In as much as the 1st plaintiff contends that this situation will bring about an absurdity and give the 1st defendant an undue advantage over him thus causing him prejudice, he has neither explained nor tendered in any evidence of the nature of the absurdity, and the prejudice he stands to suffer in the event the instant application is allowed. The essence of a counter-claim is to reduce and/or prevent a multiplicity of suits arising from the same cause of action, and more often than not, between the same parties, as is the case herein. To allay the 1st plaintiff's apprehension, it is not uncommon for parties to interchange roles in a counter-claim. Additionally, even if the 1st defendant was to file a separate suit, and the said suit ends up being consolidated with this suit, the 2nd plaintiff in the main suit would still be a plaintiff in the 1st defendant's suit.
31. As a result, this Court neither sees nor finds any absurdity that may be occasioned and/or prejudice that will be suffered by the 1st plaintiff in the event the instant application is allowed.
32. It has been held time without number that amendments should be allowed freely at any stage of the proceedings as long as the amendments do not cause prejudice or injustice to the opposing side which cannot be remedied by costs. In the case of *Kassam v Bank of Baroda (Kenya) Limited* [2002] 1 KLR 294, the Court laid down the factors to be considered when dealing with an application for amendment of pleadings as hereunder –
- a. The party applying is not acting mala fides;
 - b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
 - c. The amendment is not a device to abuse the court process;
 - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
 - e. And that the amendment will not alter the character of the suit.”
33. In the case of *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR, the Court held that –
- “The Learned Authors of *Halsbury's Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -
- “.... The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”
- ...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...” (Emphasis added).
34. From the record, it is evident that the parties herein are yet to take pre-trial directions, and this suit has not yet been certified ready for hearing. Based on the foregoing, I am persuaded that the proposed amendments are not only in tandem with the original cause of action but will also facilitate the



determination of the real questions in controversy between the parties herein. Further, the plaintiffs will have an opportunity to file an amended reply to the defence and defence to counter-claim, once the 1st defendant files and serves them with an amended statement of defence and counter-claim.

35. The upshot is that the application herein is merited and is allowed in the following terms;
- i. The 1st defendant is hereby granted leave to amend his statement of defence to include a counter-claim as proposed in the draft amended 1st defendant's statement of defence and counter-claim annexed to the instant application within thirty (30) days from the date of this ruling;
 - ii. The 1st plaintiff is hereby granted leave to file an amended reply to the amended defence and a defence to the counter-claim within thirty (30) days of service of the 1st defendant's amended statement of defence and counter-claim; and
 - iii. Costs are awarded 1st plaintiff as the 1st defendant is the one who has sought to amend his defence to include a counter-claim.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 14TH DAY OF JUNE, 2024. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.

NJOKI MWANGI

JUDGE

In the presence of:-

Ms Kimuge h/b for Ms Kavraj for the 2nd defendant & Mr. Aim for the 1st defendant/applicant

Mr. Kiptoo for the plaintiff

Ms Aoko for the 3rd defendant

Mr. Luyai – Court Assistant.

