



**Autoports Freight Terminal Limited v Kenya Ports Authority (Civil Case 5 of 2017) [2024] KEHC 16981 (KLR) (24 October 2024) (Ruling)**

Neutral citation: [2024] KEHC 16981 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT MOMBASA  
CIVIL CASE 5 OF 2017  
F WANGARI, J  
OCTOBER 24, 2024**

**BETWEEN**

**AUTOPORTS FREIGHT TERMINAL LIMITED ..... PLAINTIFF**

**AND**

**KENYA PORTS AUTHORITY ..... DEFENDANT**

**RULING**

1. This is a ruling in respect of the application dated 19<sup>th</sup> March, 2024 brought under the provisions of sections Order 8 Rule 3 of the Civil Procedure Rules. It sought as hereunder: -
  - a. The Plaintiff/Applicant be granted leave to amend its plaint at paragraph 22 and the prayers as more particularly shown in the Draft Amended Plaint exhibited hereto; and
  - b. Costs of the application be provided for.
2. The grounds in support of the application were that the plaint was filed within one year on 23<sup>rd</sup> January, 2017 from the occurrence of the event complained of which event occurred on 22<sup>nd</sup> January, 2016 when the Plaintiff was served by the Defendant a letter dated 21<sup>st</sup> January, 2016. At the time of filing the plaint, the losses incurred by the Plaintiff which were specifically pleaded at paragraph 22 of the said plaint were still continuing and that such losses had been specifically pleaded at the subject paragraph that they were still continuing.
3. The sums to be claimed by the Plaintiff were clearly specified as special damages to be to be particularized before the hearing of the suit. It was contended that on 13<sup>th</sup> February, 2019, the Defendant through an application of even date sought for orders to strike out the Plaintiff's plaint for failing to disclose any reasonable cause of action against the Defendant and for being scandalous, vexatious and frivolous. The Plaintiff thus had to wait for the determination of the said application before taking any other step.



4. The application dated 13<sup>th</sup> February, 2019 was determined on 7<sup>th</sup> July, 2023. Therefore, in the year 2023, the Plaintiff embarked on ascertaining the actual losses suffered which it has now done. It is stated that it has now become expedient to amend its plaint in terms shown at paragraph 22 and the prayers in the draft plaint.
5. The Plaintiff goes ahead to state that no new cause of action is being introduced in the intended amended plaint. The intended amended plaint only seeks to correct a misdescription of the claims made and to give the specific figures which were initially shown as continuing losses.
6. It is stated that the intended amendment is necessary and expedient to enable the court to determine the actual issues before it which were pleaded from the inception of the claim. The Plaintiff concludes that it is fair and just in the circumstances to grant the leave sought to amend the Plaint. The application is supported by the affidavit of Salim Sadru, the Plaintiff's director. Other than exhibiting the draft amended plaint, it adopts the entire grounds in support of the application.
7. The application is opposed. The Defendant filed grounds of opposition dated 8<sup>th</sup> May, 2024 and a replying affidavit dated 7<sup>th</sup> June, 2024 sworn by one Turasha J. Kinyanjui, its Corporation Secretary and General Manager, Legal Services. In the grounds of opposition, the Defendant contends that the application dated 19<sup>th</sup> March, 2024 is incompetent, bad in law, defective and an abuse of court process.
8. It is its position that the amendments sought offend the provisions of section 4 of the [Limitation of Actions Act](#), Cap 22 which provides that an action founded on contract may not be brought after the end of six years from the date on which the cause of action accrued. In the circumstances, it sought for the for the application to be dismissed with costs to the Defendant.
9. In the replying affidavit in considering an application to amend pleadings there are some factors to be considered. These were factors are; the amendment should not introduce new or inconsistent cause of actions or issues, the amendment should be done timeously and that the amendment should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
10. It is the Defendant's position that the Plaintiff has not adduced any or substantive evidence nor has it met the threshold set out in the grounds it enumerated in order to entitle it to the orders sought in the application. It goes ahead to point out that current suit was instituted on or about 2017 and contrary to the Plaintiff's assertion that the losses incurred were continuous, the purported losses (if any) at the time were ascertainable and quantifiable.
11. It points out that the Plaintiff's claim is based on the allegation that KPA breached a Licence Agreement dated 21<sup>st</sup> August, 2014 by suspending the nomination of containers to the Plaintiff's container freight station thereby occasioning loss and damage. It points out section 4 of the [Limitation of Actions Act](#) which provides that actions based on contract may not be brought after the end of six years from the date on which the cause of action accrued.
12. It is its contention that the Plaintiff expressly pleaded that the alleged cause of action in the present suit occurred and or accrued on or about 2016. As such, the Plaintiff had until 2022 to make any claim of losses. Therefore, if allowed, the intended amendment which in any event is inordinately late shall only occasion serious prejudice and injustice to the Defendant which has accrued the legal right on account of statutory time bar.
13. The Defendant further contends that its application dated 13<sup>th</sup> February, 2019 seeking orders to strike out the Plaintiff's suit did not in any way stop the computation of time within which the Plaintiff ought to have sought to amend its plaint.



14. It is the Defendant's position that it is not plausible that the Plaintiff had to await the determination of its application in order to embark on ascertaining the alleged losses suffered. In any event, the alleged losses (if any) are in the nature of special damages which were therefore ascertainable and quantifiable at the time the suit was filed.
15. It is the Defendant's contention that it is an abuse of court process particularly the court's discretion for the Plaintiff to seek to amend its plaint seven (7) years after instituting suit. In any event, any claim sought to be introduced past the statutory period is time barred and ought not to be considered by the court. It thus sought for the motion dated 19<sup>th</sup> March, 2024 to be dismissed with costs for lacking both legal and factual merits.
16. Directions were taken to dispose off the application by way of written submissions. Both parties duly complied by filing their submissions and cited various decided cases of this court and other superior courts in support of their rival positions. The Plaintiff's submissions are dated 13<sup>th</sup> May, 2024 while those of the Defendant's are dated 7<sup>th</sup> June, 2024.
17. In support of its position, the Plaintiff at paragraph 7 of its submissions categorically states that it is not introducing any new cause of action. Making reference to paragraph 22 of the plaint, it has set out what the intended amendments intends to achieve. Reliance has been placed on the case of IEBC & Another v Stephen Mutinda Mule & 3 Others [2014] eKLR on the issue of pleadings.
18. It submits that the Plaintiff is not raising or introducing a new cause of action but pleading the actual losses arising from the already pleaded cause of action. The case of Farell v Secretary of State [1980] All ER 173 has been cited in support of the purpose of pleadings. The Plaintiff has also made reference to the provisions of Order 8 Rule 3 (1) of the Civil Procedure Rules on the powers of the court to direct or allow any party to amend its pleadings at any stage of the proceedings. Reliance has been placed on Order 8 Rule 3 (2) of the Civil Procedure Rules.
19. On the power of the court to allow amendment of pleadings, the Plaintiff has cited the case of Kenya Cold Storage (1964) Ltd v Overseas Food Services Africa Ltd [1982] KLR 453 which had cited the Commentary by Mulla, Code of Civil Procedure. Several other decisions have been referred to among them Leroka v Middle East Finance Company Limited [1990] KLR, Daniel Ng'etich & Another K-Rep Bank [2013] eKLR and Central Kenya Ltd v Trust Bank Limited & 4 Others [2000] eKLR.
20. The Defendant's start point is section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) of the Civil Procedure Rules. It has cited the case of Lewar Ventures Limited v Equity Bank (Kenya) Limited [2022] eKLR on the parameters that the court ought to consider in determining an application to amend pleadings.
21. The factors identified in the above decision are inter alia; the amendment should not introduce new or inconsistent causes of actions or issues, the amendment should be made timeously, it should not affect any vested interest or accrued legal right and should not prejudice or cause injustice to the other party. According to the Defendant, time to seek leave for any amendments lapsed in the year 2022 and its application dated 13<sup>th</sup> February, 2019 did not stop time from running.
22. The Defendant submits that the exceptions at Order 8 Rule 3 (2), (3), (4) and (5) are not applicable to the Plaintiff's case. The case of John Mulwa Kang'atu v Pan African Insurance Company Ltd [2015] eKLR has been cited where the court declined to allow certain amendments.
23. Finally, the case of Rawal v Rawal [1990] KLR 275 has been cited for the proposition that the object of any statutory limitation is to prevent the Plaintiff from prosecuting stale claims which would



cause great prejudice and injustice to the Defendant. The Defendant concludes that the Plaintiff's application dated 19<sup>th</sup> March, 2024 lacks merit and the same ought to be dismissed with costs.

## Analysis

24. This Court has carefully considered the application, the grounds of opposition, replying affidavit, 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. If the answer to (a) above is in the affirmative, what orders ought to issue; and
- c. What is the order as to costs?

25. The application principally seeks to amend the plaint in the manner stated in the draft amended plaint annexed to the supporting affidavit. This intended amendment is strenuously opposed by the Defendant on two thematic areas. First, the Defendant contends that the intended amendment if allowed will introduce a new cause of action. Secondly, its position is that if allowed, it would have defeated its accrued legal right of statutory time limitation.

26. 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. 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.”

27. Further, Order 8, rule 5 gives the court the general power to amend in the following terms: -

“5.

- (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.”

28. 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...”

29. 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...”

30. Having now set out the guiding principles and decided cases, it is now the court’s duty to apply the same to the case at hand. The Plaintiff states that its proposed amendment does not introduce a new cause of action but rather makes the already pleaded cause more focused. The Defendant is of a contrary view. To resolve the issue, the court has to look at the contents of paragraph 22 of the draft amended plaint.

31. I am not persuaded that the figures introduced have the effect of changing the cause of action or introducing a total new cause of action. What the intended amendment is simply to focus the parties on exactly what is in issue. The reliefs being sought at the said paragraph were pleaded in 2017 when the plaint was filed.

32. It is clear that the Plaintiff was well aware of what relief it was seeking back in 2017 and the mere fact of focusing its relief in terms of particularizing each item cannot be deemed to change the structure of the pleadings in a material way. The Defendant has not stated what prejudice it stands to suffer if the amendment is allowed.

33. The fact that a claim has been amended does not mean that the court will allow it without it being subjected to procedures and rules of proof. A party who alleges must prove hence the Defendant will still have an opportunity to subject the Plaintiff to cross examination and strict proof. I do not find the amendment to be introducing a new cause of action or altering substantially that which was pleaded.

34. On the issue of limitation under section 4 of the *Limitation of Actions Act*, it is the Defendant’s view that if the amendment is allowed, it would affect their accrued legal right to plead limitation. The Plaintiff is of a contrary view. The beginning point is Order 8 Rule 3 (2) of the Civil Procedure Rules. It provides as follows: -

“(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.”



35. Sub rules 3 and 4 are not applicable in the circumstances as they relate to amendments to correct the name of a party or to alter the capacity in which a party sues whether as Plaintiff or Defendant. The relevant provision is sub rule 5 of Order 8 Rule 3 which provides as follows: -

“(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.”

36. Though there is no new cause of action strictly construed, the amendments sought to be introduced are arising from substantially the same facts as the cause of action in which relief was claimed on 23<sup>rd</sup> January, 2017. Therefore, I do not find that the intended amendments are intended to defeat the Defendant’s accrued legal rights. In the case of *Eric Kennedy Okumu Ogola v Nation Media Group & Another* [2021] eKLR, this court had an opportunity to consider an almost similar application and this is what the court observed: -

“...It is evident that the plaintiff does not seek to introduce and/or enjoin a new defendant as alleged by the defendants in their submissions, thus the issue of the Limitations of Actions Act does not arise. In determining the issue at hand, this Court has to consider whether the information the plaintiff seeks to introduce was available to him at the time he filed the plaint and that the amendment shall not occasion any prejudice to the defendants that cannot be compensated by way of costs...This Court after a careful reading of the plaint dated 17<sup>th</sup> December, 2019, alongside the draft amended plaint, finds that the proposed amendment does not in any way alter the cause of action of the suit and/or introduce a new cause of action. The case by the plaintiff and reliefs sought against the defendants are expressly pleaded in the plaint. Whether a reaction from the social media which included a viral video/photo/film/picture of the plaintiff dramatizing the defamation on a film was as a result of social media players reading the alleged false publication by the defendants, can only be decided at the hearing of the main suit or the plaintiff will forever lose the opportunity to address the said issue before the Trial Court...In this Court’s considered view, the proposed amendment is meant to assist this Court in making a determination on the issues raised in the suit herein on merit as the defendants can be granted leave to amend their statement of defence in response to the new claims and/or allegations by the plaintiff and set the record straight through cross-examining the plaintiff and his witnesses, if any, and also by the defendants calling their own witnesses to rebut the plaintiff’s claims. As such, no prejudice shall be occasioned against them. This Court therefore fails to see how the defendants herein will be prejudiced if the amendment is allowed and how the same may defeat their defence...”

37. I ascribe to this school of thought. If the amendments sought to be introduced by the Plaintiff are rejected, this court will never have a chance to fully, effectually and completely adjudicate over the real issue in controversy. It would have equally locked out the Plaintiff 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 Defendant stands to suffer if the amendments are allowed.

38. As stated above, the Defendant has a right to file its amended statement of defence, get documents to counter those the Plaintiff intends to rely on, call its witnesses and cross examine the Plaintiff and its



witnesses. The same cannot be said of the Plaintiff if the amendment is declined. I have said enough to show that the application is merited.

39. 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.

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

- a. The Notice of Motion Application dated 19<sup>th</sup> March, 2024 has merits and the same is allowed in terms of prayer (a) of the said application;
- b. Consequent to (a) above, the Draft Amended Plaint attached to the supporting affidavit be deemed as duly filed within the next fourteen (14) days upon payment of requisite fees if any and the same be served upon the Defendant immediately forthwith;
- c. Upon service of the Amended Plaint, the Defendant shall have twenty-one (21) days to file and serve its Amended Statement of Defendant if necessary; and
- d. Costs to abide the outcome of the main suit.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT MOMBASA THIS 24<sup>TH</sup> DAY OF OCTOBER, 2024.**

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**F. WANGARI**

**JUDGE**

In the presence of;

Mr. Buti Advocate for the Plaintiff;

Mr. Mutua Advocate h/b for Miller & Co. Advocates for the Defendant;

Brian, Court Assistant

