



REPUBLIC OF KENYA



KENYA LAW
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**Accredo AG v Salama Beach Hotel Limited & 4 others (Civil Suit
118 of 2009) [2023] KEHC 1022 (KLR) (15 February 2023) (Ruling)**

Neutral citation: [2023] KEHC 1022 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MALINDI
CIVIL SUIT 118 OF 2009
SM GITHINJI, J
FEBRUARY 15, 2023**

BETWEEN

ACCREDO AG PLAINTIFF

AND

SALAMA BEACH HOTEL LIMITED 1ST DEFENDANT

HANS JUERGEN LANGER 2ND DEFENDANT

ZAHRA LANGER 3RD DEFENDANT

STEFFANO LUCELLI 4TH DEFENDANT

ISAAC RODROT 5TH DEFENDANT

RULING

1. For determination is the Plaintiff's Notice of Motion dated 1st July seeking the following orders;
 1. Spent.
 2. That this honourable court be pleased to certify that the suit herein raises substantial questions of law and forward the case to his Lordship the Chief Justice for appointment of a bench of an uneven number of judges being not less than three (3) pursuant to Article 165 (4) of the *constitution*.
 3. That this honourable court be pleased to give directions on the hearing and final determination of this suit.
 4. That costs of this application be awarded to the Applicant.



2. The application is premised on the grounds on the face of the application and the sworn affidavit of Hans Juergen Langer the managing director of the plaintiff company. The defendants did not file any response to this application. There were no submission filed either.

Analysis and Determination

3. I have considered the application and the grounds it is founded on and the issues for determination are;
 1. Whether leave to amend the plaint should issue?
 2. Whether the suit has met the threshold for empanelment?

Whether leave to amend the plaint should issue?

4. 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.”

5. Further, Order 8, rule 5 gives the court the general power to amend.

“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.”

6. In [Institute for Social Accountability & another v Parliament of Kenya & 3 others](#) [2014] eKLR the court held: -

“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.”

7. The Court of Appeal outlined the principles in amendment of pleadings in [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) [2013] eKLR as follows: -

“The law on amendment of pleading in terms of section 100 of the [Civil Procedure Act](#) and Order VIA rule 3 of the repealed [Civil Procedure Rules](#) under which the application was brought was summarized by this Court, quoting from [Bullen and Leake & Jacob's Precedents](#)



of Pleading - 12th Edition, in the case of *Joseph Ochieng & 2 others vs First National Bank of Chicago*, Civil Appeal No 149 of 1991 as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

8. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party. The only way a court can determine the above tenets, is by perusal of an attached draft of the plaint showing the intended amendments. In the instant Application the Plaintiff has not attached a plaint showing the desired amendments. In the circumstance, I am unable to determine the effect of the intended amendments on the suit and whether the same will be in the interest of justice. The upshot is that the prayer for amendment lacks merit and is hereby declined.

Whether the suit has met the threshold for empanelment?

9. The question to be addressed in this ruling is whether the suit raises a substantial question of law warranting certification for empanelment of a bench under Article 165(4) of the *Constitution*.
10. The law as to what amounts to a substantial question of law is now well settled. In *Sir Chunilal V Mehta and Sons, Ltd v The Century Spinning and Manufacturing Co Ltd* 1962 AIR 1314 the elements of a substantial question of law were stated as follows:

“The proper test for determining whether a question of law raised in the case is substantial would, in our opinion, be whether it is of general public importance or whether it directly and substantially affects the rights of the parties and if so whether it is either an open question in the sense that it is not finally settled by this Court or by the Privy Council or by the Federal Court or is not free from difficulty or calls for discussion of alternative views. If the question is settled by the highest Court or the general principles to be applied in determining the question are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd the question would not be a substantial question of law.”

11. The meaning of the term “substantial question of law” was also defined in *Santosh Hazari v Purushottam Tiwari* [2001] 3 SCC 179 as follows:

“A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing



on the decision of the case, if answered either way, in so far as the rights of the parties before it is concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any lis.”

12. The guidelines for certification under Article 165(4) of the Constitution were provided by Court of Appeal in Okiya Omtatah Okoti & another v Anne Waiguru Cabinet Secretary, Devolution and Planning & 3 others [2017] eKLR as follows:

“There are, in our view, parallels to be drawn between certification for purposes of Article 163(4)(b) of the Constitution and certification for purposes of Article 165(4) notwithstanding that the drafters of the Constitution, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4) (b). In Hermanus Phillipus Steyn v Giovanni Gnechi- Ruscone [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4) (b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3) (b) or (d) of the Constitution;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

13. What the Court is required to do is to satisfy itself whether substantial questions of law that are unconventional and without precedent arise in the petition. The unconventionality or complexity of the issues raised in the petition is alone not sufficient reason for certifying the matter for empanelment of a bench. This statement finds support in the decision of J Harrison Kinyanjui v Attorney General & another [2012] eKLR where it was held that:

“Therefore, giving meaning to “substantial question” must take into account the provisions of the Constitution as a whole and need to dispense justice without delay particularly given



a specific fact situation. In other words, each case must be considered on its merits by the judge certifying the matter. It must also be remembered that each High Court judge, has authority under Article 165 of the Constitution, to determine any matter that is within the jurisdiction of the High Court. Further, and notwithstanding the provisions of Article 165(4), the decision of a three Judge bench is of equal force to that of a single judge exercising the same jurisdiction. A single judge deciding a matter is not obliged to follow a decision of the court delivered by three judges....

A matter may raise complex issues of fact and law but this does not necessarily imply that the matter is one that raises substantial issues of law. Judges are from time to time required to determine complex issues yet one cannot argue that it means that every issue is one that raises substantial questions of law. Thus, there must be something more to the “substantial question” than merely novelty or complexity of the issue before the court. It may present unique facts not plainly covered by the controlling precedents. It may also involve important questions concerning the scope and meaning of decisions of the higher courts or the application of well-settled principles to the facts of a case.”

14. The Plaintiff in its application has not pointed out what unconventional and complex issues are contained in the suit that would call for an empanelment. Events disclosed in the supporting affidavit do not raise any issues to justify empanelment. The affidavit only gives a history and chronology of what has been happening in the suit. That said, I do not find merit warranting referral of the suit to the Chief Justice for the constitution of a bench of uneven number of judges being not less than three. Special benches do not come in cheap in the administration of justice and must therefore be justified.
15. I have also taken note that this is a 2009 matter which hearing of the main suit has never proceeded as it has been eclipsed by counter interlocutory applications. As such, the matter will be mentioned on March 15, 2023 to issue directions on pretrial.
16. In the out run, the Plaintiff's application fails and the same is hereby dismissed with no orders as to costs.

RULING READ, SIGNED AND DELIVERED VIRTUALLY AT MALINDI THIS 15TH FEBRUARY, 2023.

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S.M. GITHINJI

JUDGE

In the absence of: -

1. All the parties.

They be notified. Mention on 15th March, 2023.

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S.M. GITHINJI

JUDGE

15.2.2023

