



Al Wakil Tranference & General Trading Company Limited v Sos-Kinderdoff International (Civil Suit 2277 of 1998) [2023] KEHC 19704 (KLR) (Commercial and Tax) (23 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19704 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 2277 OF 1998
EC MWITA, J
JUNE 23, 2023**

BETWEEN

**AL WAKIL TRANFERENCE & GENERAL TRADING COMPANY
LIMITED PLAINTIFF**

AND

SOS-KINDERDOFF INTERNATIONAL DEFENDANT

RULING

1. This is a notice of motion application dated 30th April 2021, brought under sections 1A, 1B and 3A of the *Civil Procedure Act*, section 3 of the *Law of Contract Act*, orders 8 rules 3, 5 and 51 rule 1 of the *Civil Procedure Rules*.
2. The application seeks leave to further amend the amended Defence dated 25th November 1998 in terms of the draft Further Amended Defence annexed to the affidavit in support of the application. The applicant also wants the annexed draft further amended Defence deemed as filed and served upon payment of the requisite court fees.
3. The motion is premised on the grounds that the plaintiff has claimed in the re-amended plaint, among other prayers, US Dollars 574,315, which it allegedly suffered due to the defendant's alleged breach of a verbal contract entered into on or about 1st April 1998. The plaintiff further states that pursuant to the contractual relationship between the parties, they entered into a written agreement dated 16th June 1998.
4. Although the defendant filed its amended defence on November 25, 1998 denying existence of the oral and written agreements, the amendments would make clarifications and include additional points of law in the further amended plaint.



5. The points to be included are, first; that if indeed there was a written agreement as alleged in the re-amended plaint, it would have been subject to Somali law which is considered foreign law and cannot be applied by this court unless expert evidence is presented to support its application.
6. Second; if there was an oral agreement, by dint of section 3 of the [Law of Contract Act](#), no suit could be brought against the defendant.
7. The defendant argues that the proposed amendments are necessary to enable the court properly determine the real questions in controversy between the parties. The defendant takes the view, that it is in the interest of justice that the court grants leave for further amendment as the plaintiff will not suffer any prejudice that cannot be compensated by costs
8. The defendant asserts that the application was filed within reasonable time in the circumstances, and even though the case has been partially heard and the plaintiff closed its case, the delay in concluding the case is not solely attributable to the present application as both parties have previously sought adjournments on several occasions and for various reasons.
9. The defendant contends that although delay is a relevant consideration, it cannot be the only reason for disallowing the application, unless it is demonstrated that the opposing party will suffer prejudice that cannot be compensated by costs.
10. The defendant relies on [Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited](#) (Civil Appeal 81 of 2004) [2013] eKLR for the proposition that however late the application for amendment is made, it should be allowed if made in good faith provided costs can compensate the other side.
11. The defendant also asserts that order 8 rule 3(1) of the rules allows a party to amend its pleadings at any stage of the proceedings.
12. The defendant takes the view, that the amendments sought are necessary for the determination of all issues in controversy in the suit. The proposed amendments are also not at variance with the original pleadings as they only further expound on a new cause of action that arises from the set of facts which is permitted. Reliance is placed on [Peter Opande v Ngaga Enterprises Limited](#) (Civil Appeal No. 59 of 2016) [2019] eKLR.

Response

13. The motion is opposed through a replying affidavit and written submissions. The plaintiff argues that the application has no merit because, first; it has been brought after inordinate delay given that the suit was filed in 1998. A statement of defence dated 9th November 1998 was filed and subsequently amended on November 25, 1998. The hearing commenced on 11th June 2003 and the plaintiff closed its case on August 9, 2019.
14. Second, the proposed amendment to introduce the issue of jurisdiction, will alter the substratum of the case. This is because, parties entered into an oral agreement in April 1998 which was formalized through a written agreement dated June 16, 1998. The plaintiff produced a copy of the agreement in court but the defendant objected to the production. In its ruling delivered on 11th November 2019, the court dismissed the objection. The Court pointed out that the relationship between the parties forms the substratum of the cause of action and, therefore, a substantive question to be determined in the suit.
15. The plaintiff argues that the proposed amendments are an afterthought and, if allowed, would prejudice its case and delay the early determination of the case. The plaintiff relies on [Kassam v Bank of](#)



- Baroda* (Civil Case No. 2122 of 1999) [2002] eKLR where the court disallowed amendments because they would facilitate abuse of the court process.
16. The plaintiff again relies on *Centrol Kenya Ltd v Trust Bank Ltd & 5 others* [2000]eKLR on the conditions for amendment of pleadings; *Municipal Council of Thika and another v Local Government Workers Union Thika Branch* CA No. Nai. 41 of 2001 for the proposition that to allow the amendments sought at this late stage would occasion great prejudice that cannot be made good by costs; *Philomena Ingosi Lumala v Jackton Mwanzi* Kakamega (HCCC No. 209A of 1991) [2006] eKLR, that a party who negligently fails to take steps to amend before the close of the plaintiff's case should not be granted leave if the effect of such amendment is to do injustice to the other side.
 17. The plaintiff urged that the application be dismissed with costs.

Determination

18. I have considered the application, the response and arguments by parties. I have also considered the decisions relied on and read the record of proceedings in this matter.
19. The defendant seeks leave to further amend the amended statement of defence to enable the court fairly adjudicate on all the issues in the suit. The plaintiff opposes the application on grounds that the application has been brought after a long delay; has not been made in good faith and is intended to delay a fair determination of the suit.
20. The law allows a party to seek leave to amend his pleadings and the court has wide discretion to grant such leave on terms it considers just. Like all other discretions, the court should exercise this discretion judiciously. Decisions on the issue are clear and I need not advert to them, save state that an application for leave to amend should be made without delay and should not be made with the sole aim of delaying the hearing and determination of a suit.
21. The record shows that the suit was filed in 1998 and a statement of defence was filed the same year. Pleadings were then amended the same year with the amended defence filed on November 25, 1998. The hearing of the suit commenced on June 11, 2003 and the plaintiff closed its case on August 9, 2019. Between the time the amended defence was filed and when the application was made is about 24 years. It is also about 3 years since the plaintiff closed its case.
22. The plaintiff has argued that the application has been made after an inordinate delay which the defendant has not denied. The defendant has also not justified the delay except stating that no prejudice will be suffered.
23. I have read the supporting affidavit and defendant's submissions. The defendant has not explained when it discovered that there was need to further amend the amended statement of defence. The defendant took part during the hearing of the plaintiff's suit and cross examined the witness. All the while, the defendant was aware of the facts intended to be introduced through the proposed amendments.
24. The defendant raised objection to the plaintiff producing a copy of the agreement/contract but was overruled. The defendant did not see the need to further amend the statement of defence then and no application was made for leave to amend until April 21, 2021.
25. Although the law allows a party to amend pleadings at any time, leave to amend is at the discretion of the court. The court must take all circumstances into account in deciding whether or not to grant leave to amend.



26. The plaintiff has taken the view and, I am inclined to agree, that this application, if granted, will be prejudicial to its case. This is because having closed its case, the amendments may force the plaintiff to reopen the case which will not only be prejudicial but also delay the conclusion of the case taking into account its age.
27. The defendant has not shown that it was not aware of the issues it now wants to introduce through the intended amendments to persuade this court that it deserves exercise of the court's discretion in its favour. The defendant, in my view, is surreptitiously trying to circumvent the court's ruling overruling the objection raised against production of documents as exhibits.
28. In the circumstances, I am not persuaded that the application for leave to further amend has been made in good faith given the time lapse, and the plaintiff's concerns that the amendments will delay the fair determination of the suit.
29. Consequently, and for the above reasons, the application is declined and dismissed with costs.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 23RD DAY OF JUNE 2023

E C MWITA

JUDGE

