



REPUBLIC OF KENYA



**Noorany v Premier Flour Mills Limited & another (Civil Suit
26 of 2020) [2023] KEHC 18140 (KLR) (5 June 2023) (Ruling)**

Neutral citation: [2023] KEHC 18140 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 26 OF 2020
OA SEWE, J
JUNE 5, 2023**

BETWEEN

MOHAMMED NAQI NOORANY PLAINTIFF

AND

PREMIER FLOUR MILLS LIMITED 1ST DEFENDANT

PARAMAMBA LIMITED 2ND DEFENDANT

RULING

1. Before the Court for determination is the Notice of Motion dated 26th April 2023. It was filed by the 1st defendant, Premier Flour Mills Limited, pursuant to the provisions of Sections 1A, 1B, 3A and 63(e) of the *Civil Procedure Act*, Chapter 21 of the Laws of Kenya and Order 8 Rule 3 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, for orders that:
 - (a) The Court be pleased to grant leave for the 1st defendant to further amend its Amended Statement of Defence and Counterclaim dated 14th October 2020, and that the amendment be in the form and extent shown in the Draft Further Amended Defence and Amended Counterclaim produced as Annexure DHL-1 to the Supporting Affidavit filed therewith.
 - (b) That the costs of the application be provided for.
2. The application was premised on the grounds that it has become necessary for the 1st defendant to further amend its pleadings to properly align its case and plead its entire case before the Court for determination. The 1st defendant explained that the amendment has been necessitated by the fact of change of advocates by the 1st defendant; and the need for the Court to effectually and completely adjudicate upon and settle all the questions in issue between the parties.
3. The application is supported by the affidavit sworn on 26th May 2023 by the Chairman of the Board of Directors of the 1st defendant, Mr. Diamond Hasham Lalji. He reiterated the grounds set out herein



above and added that it has become necessary to further amend the 1st defendant's Defence to bring out the real issues in contest between the parties for determination by the Court. At paragraph 6 of the Supporting Affidavit, Mr. Lalji deposed that no prejudice will be suffered by the plaintiff since he will also have corresponding leave to amend the Plaintiff, should he wish to do so. Mr. Lalji annexed to his affidavit a copy of the Draft Further Amended Statement of Defence and Amended Counterclaim for the Court's perusal.

4. The plaintiff opposed the application and filed the Grounds of Opposition dated 8th May 2023, contending, inter alia, that:
 - (a) The application has been filed in blatant disregard of the expressed provisions of Section 1A of the Civil Procedure Rules;
 - (b) The proposed amendments are not necessary for the purpose of determining the real questions in controversy between the parties as the same may be addressed in evidence and/or the 1st defendant's written submissions.
 - (c) Since it has already closed his case, he stands to suffer prejudice should the instant application be allowed.
 - (d) The proposed amendments are based on the plaintiff's oral testimony from context derived at cross-examination; hence the 1st defendant intends to steal a march on the plaintiff by the introduction of the proposed amendments.
 - (e) In the absence of any reference to negligence claimed as against the 1st defendant's previous firm of Advocates, a mere change of advocates does not entitle it to the prayers sought.
5. In addition to his Grounds of Opposition, the plaintiff filed a Replying Affidavit sworn by the plaintiff. He pointed out that the 1st defendant has had a prior opportunity to amend its Defence; and that the 1st defendant has never expressed any inadequacies or paucity of the Amended Defence and Counterclaim. The plaintiff averred that the alignment referred to by the 1st defendant is a deliberate intention to respond to his oral evidence as given on 27th October 2022.
6. In respect of the proposed amendments, the plaintiff averred that they pertain to points of law which ought to be addressed in the 1st defendant's written submissions. He urged the Court to note that he has already testified and closed his case; and therefore that if the application is allowed the matter would have to revert to the pre-trial processes; thereby prejudicing his case. The plaintiff posited that had the plaintiff's counsel exercised due diligence, the instant application would have been averted. He concluded his affidavit by asserting that the interest of justice lies in disallowing the application and urged the Court so to do.
7. The application was urged by way of written submissions pursuant to the directions given herein on 11th May 2023. Hence, in his written submissions dated 19th May 2023, Mr. Mwangunya, learned counsel for the 1st defendant, made reference to Order 8 Rule 3 of the Civil Procedure Rules as well as the principles for amendment of pleadings as set out in the Court of Appeal decision in Civil Appeal No. 149 of 1991: Joseph Ochieng & 2 Others v First National Bank of Chicago, and Central Kenya Kenya Limited v Trust Bank Limited [2002] 2 EA 365.
8. On whether the amendment is necessary, Mr. Mwangunya relied on Institute for Social Accountability & Another v Parliament of Kenya & 3 Others [2014] eKLR and Ken Kauga & Another v Atlantis Gardens Limited & 3 Others [2018] eKLR and submitted that, in the instant case, the 1st defendant is apprehensive of a possible miscarriage of justice unless the proposed amendment is allowed, as the



Court will not be in a position to effectively determine the substantive merits of the case. He urged the Court to be guided by Order 8 Rule 5 of the *Civil Procedure Rules* in which it is provided that an amendment can be allowed at any stage of the proceedings; and therefore that mere delay is not a valid ground for declining leave to amend. The cases of *Chandulal K. Vora & Co. Ltd v Kenya Revenue Authority* [2017] eKLR and *Banco Arabe Espanol v Bank of Uganda* [1999] 2 EA 22 were also cited in support of Mr. Mwangunya's argument.

9. On whether the proposed amendment introduces a new or inconsistent cause of action, counsel relied on *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* [2013] eKLR and *Joseph Ochieng & 2 Others v First National Bank of Chicago* (*supra*), among other authorities, to buttress his argument that the facts raised in the proposed Further Amended Defence and Amended Counterclaim do not raise any new issue, case or ground capable of changing the action into one of a substantially different character which could more conveniently be made the subject of a fresh action. He added that the proposed amendment simply desires, in the interest of justice, to have the Court adjudicate on all the matters related to the dispute; and that no prejudice will be occasioned to the plaintiff which cannot be properly compensated for in costs.
10. [10] On her part, Ms. Akwana for the plaintiff relied on her written submissions dated 17th May 2023. Her basic contention was that the proposed amendment is an afterthought intended to fashion the 1st defendant's pleadings in accordance with the oral testimony of the plaintiff as given before the Court during the hearing of the plaintiff's case. She relied on the plaintiff's Grounds of Opposition and the Replying Affidavit in urging the Court to find that the 1st defendant is merely out to steal a march on the plaintiff.
11. Counsel was of the view that a change of advocates is no reason for amendment and that some valid reason ought to have been given to warrant the exercise of the Court's discretion in favour of the 1st defendant. She relied on *Nicholas Kiptoo Arap Korir Salat v IEBC & 6 Others* [2013] eKLR and urged the Court to find that the 1st defendant ought to have been vigilant to ensure that its case was well articulated, including seeking additional legal opinions at the inception. She therefore urged for the dismissal of the 1st defendant's application with costs.
12. I have given due consideration to the application in the light of the averments set out in the 1st defendant's Supporting Affidavit, the plaintiff's Grounds of Opposition and Replying Affidavit, as well as the written submissions filed herein by their counsel. Needless to say that the discretion to grant leave for amendment of pleading is indeed a wide one. Nevertheless, the discretion is not intended to be exercised whimsically or capriciously. Accordingly, Order 8 Rules 3(1) of the *Civil Procedure Rules*, stipulates that:

“...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.”
13. The whole purpose of amendment of pleadings is to enable the Court to effectively and effectually determine the issues in controversy between the parties. Thus, in *Nyamodi Ochieng Nyamogo v Kenya Posts and Telecommunication Corporation* [2007] eKLR, it was stated:

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim.”



14. Similarly, in *Institute for Social Accountability & Another v Parliament of Kenya & 3 Others* [2014] eKLR it was 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.”

15. The principles that guide the exercise of discretion in an application of this nature were aptly discussed by the Court of Appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (*supra*), thus:

“The law on amendment of pleading ... 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 v. 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.” (see also *Central Kenya Ltd v. Trust Bank Ltd & 5 Others* [2000] eKLR)

16. Hence, the issues that emerge for determination, can be summarised as hereunder:

- (a) Whether the proposed amendment is necessary and sought in good faith;
- (b) Whether the application for leave to amend was brought without undue delay;
- (c) Whether the proposed amendment will prejudice the plaintiff;

17. The essence of the 1st defendant’s contention is that there is need to further amend its Amended Defence and Counterclaim to align them and bring out the real issues in controversy between the parties for purposes of an effectual determination. The plaintiff on the other hand took the posturing that the proposed amendment is not sought in good faith; and that the 1st defendant’s true intention is to steal a march on it. In particular, the plaintiff averred that the alignment referred to by the 1st defendant is a deliberate intention to respond to his oral evidence as given on 27th October 2022, and therefore that the application has not been made in good faith.

18. Having looked at the proposed amendments, it is manifest from paragraphs 10A, 10B, 12A and 12B that the 1st defendant merely seeks to refine its cause of action in response to the Further Amended Plaint. In the same vein, the proposed amendments to the Counterclaim to my mind, are merely intended at pleading the 1st defendant’s cause of action against the plaintiff with more clarity. Whereas at paragraph 13 of the proposed Further Amended Defence and Amended Counterclaim the 1st



defendant proposes to raise the issue that the plaintiff's claim is time-barred, it is nevertheless tenable from the standpoint of Rule 3(2) of Order 8, Civil Procedure Rules, which recognizes that:

“Where an application to the court for leave to make an amendment such as is mentioned in subrule (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 subrule if it thinks just so to do.”

19. Moreover, Rule 5(1) of Order 8, Civil Procedure Rules, is explicit that:

“

“(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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

...

(5) An amendment may be allowed under subrule (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.”

20. On whether the application is belated, I note that the plaintiff's concern was that the application has been brought after his testimony had been recorded; and therefore that if the application is allowed the matter would have to revert to the pre-trial stage; thereby prejudicing his case. It is however instructive that Order 8 Rule 3(1) of the Civil Procedure Rules provides that such an application can be made at any stage of the proceedings, if serves the interest of justice. Thus, in Cenral Kenya Limited v Trust Bank Limited (*supra*) it was held that:

“mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation. In my view, if no prejudice which cannot be compensated by an award of costs will be visited upon the Defendants if the application for amendment is allowed as the Defendants will have the opportunity to the amendment if they so wish.”

21. Indeed in Eastern Bakery v Castelino [1958] EA 461 it was held thus:

“...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”

22. And, as aptly pointed out by Apaloo, JA in Philip Chemwolo v Augustine Kubende [1985] KLR 492, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

23. I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often



said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline.”

24. In the result, I find merit in the 1st defendant’s application dated 26th April 2023. The same is hereby allowed and orders granted as hereunder:

- (a) That leave be and is hereby granted to the 1st defendant to further amend its Amended Statement of Defence and Counterclaim dated 14th October 2020, and that the amendment be in the form and extent shown in the Draft Further Amended Defence and Amended Counterclaim produced as Annexure DHL-1 to the Supporting Affidavit filed therewith. The same be done within 14 days from the date hereof.
- (b) Corresponding leave be and is hereby granted to the plaintiff to likewise amend his pleadings if need be, within 14 days of the date of service of the Further Amended Defence and Amended Counterclaim.
- (c) Costs of the application be in the cause.

It is so ordered.

DATED, SIGNED AND DELIVERED VIRTUALLY AT MOMBASA THIS 5TH DAY OF JUNE 2023.

OLGA SEWE

JUDGE

