



Patronics Service Limited v EPCO Builders Ltd & another (Commercial Case 227 of 2017) [2023] KEHC 19429 (KLR) (Commercial and Tax) (14 June 2023) (Ruling)

Neutral citation: [2023] KEHC 19429 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 227 OF 2017
DO CHEPKWONY, J
JUNE 14, 2023**

BETWEEN

PATRONICS SERVICE LIMITED PLAINTIFF

AND

EPCO BUILDERS LTD 1ST DEFENDANT

PROCTOR & ALLEN (EA) LTD 2ND DEFENDANT

RULING

1. Before the court for determination is the 1st defendant's notice of motion dated October 26, 2022 seeking the following prayers:
 - a. The applicant be granted leave to amend its defence and counterclaim dated March 15, 2018.
 - b. The draft amended defence and counterclaim be deemed as duly filed and served.
 - c. An interlocutory injunction against the 2nd defendant be entered in alternative to prayers No 1 and 2.
 - d. Costs be provided for.
2. The application is supported by the annexed affidavit sworn by Ramji Devji Varsani on October 26, 2022, in which he deposes that he is the Managing Director of the applicant, who has filed a cross-claim against the 2nd defendant which should be a counter-claim. He states that there is a need to seek leave of the court to amend the cross-claim and refer to it as the counterclaim. He contends that the error is a genuine mistake not aimed at misleading the court. He further states that the amendment will enable the court to arrive at a just determination of the issues raised by the parties, hence will not prejudice the respondents.



3. The application is opposed by the 2nd defendant *vide* grounds of opposition dated November 11, 2022 which are as follows:-
 - a. That the application is hopeless, incompetent, totally misplaced grossly misconceived and thus an abuse of the court process and the same should be dismissed with costs.
 - b. That the counterclaim is a cross action and can only be against a plaintiff and not a co-defendant and that any claim against a defendant by a co-defendant can only be pursued by way of notice against a co-defendant but not as sought by the 1st defendant.
 - c. That in the circumstances, the 1st defendant's counterclaim dated March 15, 2018, against and 2nd defendant does not lie in law for being incongruent with the law on the counterclaim and the same should therefore be struck out with costs to the 2nd defendant.
 - d. That in view of the foregoing, the application dated October 26, 2022 which seeks to amend the said counter-claim be struck out with costs to the 2nd defendant.
4. On November 7, 2022, the court directed that the application be canvassed by way of written submissions. The applicants' submissions are dated January 23, 2023, while the respondents' submissions are dated March 6, 2023.

Analysis and Determination.

5. I have carefully considered the applicant's application, the grounds of opposition and the submissions by parties and find the main issue for court's determination are:-
 - a. Whether the applicant should be granted leave to amend its defence and counter-claim.
 - b. Whether the counter-claim dated March 15, 2018 as against the 2nd defendant can lie in law.
 - c. Whether the interlocutory judgment can be entered in respect of the counter-claim dated March 15, 2018.
6. As was stated by the court in the case of *Bosire Ogero v Royal Media Services* [2015]eKLR, the court is clothed with the discretion to allow for or deny the grant of an order to amend pleadings. The court's holding in that case was that:-

“In *Bullen Leak and Jacobs Precedents of Pleadings*, 12th Edition page 127 titled “amendment with leave –time to amend “ it is stated that the power to grant or refuse leave to amend a pleading is discretionary and it to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly, amendment may be allowed before or at the trial or after trial or even after judgment or an appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise”

7. The legal framework on amendment of pleadings is set out under order 8 rule 5 of the *Civil Procedure Rules* which provides 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

- (2) This rule shall not have effect in relation to a judgment or order.”
8. With regard to the first issue, the provisions under order 8 rule 3(4) and 5 and order 8 rule 5 of the Civil Procedure Rules, together with the above with the above cited case of Bosire Ogero (supra), the court has unfettered discretion to allow for any amendment sought in pleadings as long as the same does not prejudice or cause injustice to the other party. Therefore the applicant herein is entitled to leave to amend its defence and counter-claim.
9. In its submissions with regard to the second issue, the 2nd issue has sought refuge in order 7 rule 8 of the Civil Procedure Rules which allows for a counter-claim to be filed by a defendant against the plaintiff or any other party. Hence, a defendant is not excluded from filing a counter-claim against a co-defendant. The 2nd defendant on the other hand has challenged the application for amendment on the ground that the 1st defendant is seeking to bring a counter-claim against a co-defendant. The position of the 2nd defendant is the applicant ought to file a separate suit and not a counterclaim. Hence, submit that the application is frivolous and should be dismissed.
10. A quick perusal of the draft amendment, the court finds the issues in dispute are similar to the issues raised in this suit and the parties are similar. What the applicant seeks is to amend the heading from cross-claim to counter- claim and properly name the parties so as to avoid controversies at trial. There is no new cause of action that has been raised. It is the court’s view that leave to amend a defence would generally be granted if no prejudice or injustice will be occasioned to the other party and notes that filing a separate suit will occasion a multiplicity of suits and different decisions that could be conflicting. Afterall, as was held in the case of Bilba Njeri Kabiru & another v Onesmus Karina & 3 others [2017] eKLR:-
- “Order 7 rule 8 gives a defendant the leeway to file a counter-claim against a person already a party to the suit including a co-defendant.”
11. In the case of Emerge Development Limited v Chestnut Uganda Limited & another [2020] eKLR, the court held that:
- “I find that the proposed amendments do not introduce a new cause of action or change the character of the case, but arise from the same set of facts and are necessary so as to provide clarity of issues that will enable the court to conclusively determine all the issues between the parties to the suit.”
12. Furthermore, in the instant case the respondents have not demonstrated the prejudice or injustice they are likely to suffer if the amendment is allowed.
13. Order 7 rule 8 of the Civil Procedure Rules, 2010 provide as follows:-
- “Title of counterclaim.
8. Where a defendant by his defence sets up any counterclaim which raises questions between himself and the plaintiff, together with any other person or persons, he shall add to the title of his defence a further title similar to the title in a plaint, setting forth the names of all persons who, if such counterclaim were to be enforced by cross-action, would-be defendants to such cross-action, and shall deliver to the court his defence for service on such of them as are



parties to the action together with his defence for service on the plaintiff within the period within which he is required to file his defence.

23. From the wording of this a defendant is allowed to raise a counterclaim either between it and the plaintiff or any other person or persons not in the plaint. This does not limit a defendant to filing a suit against a co-defendant, as held by the 2nd respondent. therefore, this court is of the considered view that the plaint and counterclaim can be determined together without occasioning any prejudice or injustice to either party, let alone the 2nd defendant.

14. In regard to the third issue, the 1st defendant has urged the court to enter an interlocutory judgement against the 2nd defendant. As stipulated under order 7 rule 11 of the *Civil Procedure Rules*, it is stated that:-

“Any person named in a defence as a party to a counterclaim thereby made may, unless some other or further order is made by the court, deliver a reply within fifteen days after service upon him of the counterclaim and shall serve a copy thereof on all parties to the suit.”

15. In the circumstances, since this court has allowed the applicant to amend the defence and counterclaim, it is in the interest of justice that the respondent be allowed time to respond to the defence and counterclaim. The respondent cannot be condemned unheard as it is alive to the issue at hand, having vigorously opposed the application. Thus, the prayer by 1st defendant for interlocutory judgment to be entered against the 2nd defendant fails.

16. The upshot is the notice of motion application dated October 16, 2022 partially succeeds in the following terms:

- a. Leave be and is hereby granted to the applicant/2nd defendant to amend its defence and counterclaim dated March 15, 2018.
- b. The draft amended defence and counterclaim be deemed as duly filed and served.
- c. The 2nd defendants be at liberty to amend and serve an its reply to defence within seven(7) days from the date of the ruling.
- d. Mention on June 13, 2023 before the Deputy Registrar, Commercial and Tax Division, Milimani Nairobi for further directions.
- e. Costs be in the cause.

Orders accordingly.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT KIAMBU THIS 14TH DAY OF JUNE, 2023.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Eugene Odhiambo holding brief for Mr. Samuel Njuguna counsel for Plaintiff

M/S Kimemia holding brief for Mr. Nyachoti counsel for 2nd Defendant

Court Assistant - Martin

