



REPUBLIC OF KENYA



KENYA LAW
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**Omwange v Gichana (Commercial Case E163 of 2022)
[2023] KEHC 24620 (KLR) (Commercial and Tax) (22 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24620 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E163 OF 2022**

**MN MWANGI, J
SEPTEMBER 22, 2023**

BETWEEN

WILSON OHURU OMWANGE PLAINTIFF

AND

PAPA PETERS GICHANA DEFENDANT

RULING

1. The plaintiff/applicant has filed a Notice of Motion application dated 6th March, 2023, pursuant to the provisions of order 8 rules 3(1) & 5 of the *Civil Procedure Rules, 2010* and all other enabling provisions of the law seeking the following orders –
 - i. That the Honourable Court be pleased to grant the plaintiff leave to amend his plaint in terms of the annexed draft; and
 - ii. That the costs of this application be in the cause.
2. The application is premised on the grounds on the face of the Motion and is supported by an affidavit sworn on March 6, 2023, by Wilson Ohuru Omwange, the plaintiff herein. In opposition thereto, the defendant filed grounds of opposition dated April 17, 2023 raising the following grounds of opposition –
 - i. The applicant has not disclosed any ground to merit the granting of the orders sought in the application;
 - ii. The application is devoid of bona fides; the applicant is just feigning ignorance because he has always had possession of the deposit slips and has been the holder of the bank account to which the deposits evidenced by the slips were made by the respondent at least since 2019;



- iii. The proposed amendments introduce a new and inconsistent cause of action which would change the action into one of a substantially different character that can only be subject to a fresh action;
 - iv. It is trite law that one cause of action cannot be substituted for another by way of amendment;
 - v. The application as taken out is misconceived and is an abuse of the Court process;
 - vi. The application is brought in bad faith, the same is frivolous and vexatious and craves to be struck out; and
 - vii. Such other grounds as shall be adduced at the hearing hereof.
3. The application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of Julius Nyakiangana & Company Advocates on April 25, 2023, whereas the defendant's submissions were filed on May 23, 2023 by the law firm of Kihara Njuguna & Co. Advocates.
 4. Mr. Nyakiangana, learned Counsel for the plaintiff submitted that the plaintiff seeks to amend the arithmetical figure from the original claim of Kshs. 52,564,122.50 to a reduced amount of Kshs. 41,093,427.00 on grounds that upon filing the original plaint he reconciled the accounts and the total claim was reduced to Kshs. 41,093,427.00. He further submitted that this matter is still at the pre-trial and case management stage which has not yet been concluded. He cited order 11 rule 7(1)(c) of the [Civil Procedure Rules, 2010](#) and stated that even without parties seeking leave of the Court to amend their pleadings, this Court has the power to grant automatic leave for parties to amend their pleadings.
 5. Counsel referred to the provisions of section 100 of the [Civil Procedure Act](#) and order 8 rule 3 of the [Civil Procedure Rules, 2010](#) and stated that parties to a suit have a right to amend their pleadings at any stage of the proceedings, and the Court has a wide unfettered discretion to grant the said leave, which means that this Court is seized of the power to either on its own motion or upon an application of any party to make an order for amendment of pleadings in any manner as it may direct and on such terms as to costs or otherwise as are just for purposes of determining the issues in controversy. Mr. Nyakiangana submitted that the amendment sought is in line with the original plaint and there is no new cause of action being introduced since the issue between the parties herein is whether the defendant is indebted to the plaintiff and if so, how much he owes.
 6. It was submitted by Counsel that the plaintiff has not demonstrated malice in filing the instant application and if there was any malice, the defendant ought to have filed a replying affidavit in order to demonstrate it to this Court. He stated that the application herein has been filed at the earliest opportunity when this matter is at the pre-trial and case conference stage. He stated that no prejudice will be occasioned on the defendant in the event the application herein is allowed, since he can be granted corresponding leave to respond to the amendment. In support of his submissions Mr. Nyakiangana relied on Bullen & Leake Jacobs' Precedents of Pleadings 12th Edition and the decisions in *Central Kenya Limited v Trust Bank Limited* [2000] EA p.365, *Eastern Bakery v Castelino* [1958] EA 461 (C.A.K) and *General Manager EAR & H.A. & Thiestein* [1968] 1 EA 354 (HCK).
 7. Mr. Munaawa, learned Counsel for the defendant submitted that the instant application seeks to change the subject matter of this suit which is the amount claimed from Kshs.52,564,122.50 to 41,093,427.00. He contended that the amendment is styled as arising from a purported 3rd friendly loan whose value is by dint of the application for amendment is being amended from Kshs.43,673,541.00 to 32,202,846.00. He referred to the provisions of section 100 of the [Civil Procedure Act](#) and order 8 rule 5(1) of the [Civil Procedure Rules, 2010](#) and stated that this Court has the discretion to allow amendment of pleadings at any stage before judgment for purposes of determining



the real question or issue in controversy between the parties, but the said discretion must be exercised Judiciously.

8. He relied on *Halsbury's Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, Odgers *Principles of Pleadings and Practice* 20th Edition at p. 170. He cited the decisions made in *Lawrence Owino Omondi v Kenneth Inea Muyera* [2017] eKLR and *Central Kenya Limited v Trust Bank Limited* (*supra*) and stated that the legal parameters governing amendment of pleadings are that the amendment should not introduce a new or inconsistent cause of actions or issues, it 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.
9. Mr. Munaawa contended that upon filing his defence and bundle of documents, the defendant demonstrated that he had paid over Kshs14,451,850.00 in full settlement of the loans he received. He contended that the plaintiff upon seeing the merit in the defendant's defence now seeks to shift goal posts by attempting to change the claim. He stated that the plaintiff seeks to amend his plaint not because there is any mistake or error made in his pleadings but because he desires to unjustly or stealthily defeat the defendant's defence by denying the defendant the benefit thereof. He also stated that the plaintiff has not demonstrated to this Court that he was not aware of the payments made by the defendant as demonstrated in the defendant's bundle of documents.
10. He submitted that the only reasonable conclusion is that the application herein is only meant to defeat the defendant's defence, and more particularly, the amount of Kshs.14,451,850.00 by cleverly attributing it to a perceived loan. Mr. Munaawa asserted that after sighting the defendant's successful defence, the plaintiff has resorted to litigation in instalment wherein he believes he can change his claim as and whenever he wishes upon service of the defendant's defence. He submitted that other than indicating that the amendment is necessary for determining the real questions in controversy between the parties, the plaintiff has made no attempt to offer an explanation as to what the real issues in this case are. Mr. Munaawa stated that apart from changing the figures, the plaintiff has not disclosed any ground to warrant grant of the orders sought in the application herein

Analysis And Determination.

11. I have considered the application filed herein, the grounds on the face of it and the affidavit filed in support thereof. I have also considered the grounds of opposition by the defendant and the written submissions by Counsel for the parties. The issue that arises for determination is whether the plaintiff should be granted leave to amend the plaint.
12. In the affidavit filed by the plaintiff, he deposed that he filed this suit on 16th May, 2022 and the pleadings filed were served on the defendant on 2nd June, 2022. Thereafter, the defendant filed a memorandum of appearance on 6th June, 2022, a statement of defence on 14th June, 2022, its witness statement on 28th September, 2022 and list of documents on 3rd December, 2022.
13. The plaintiff averred that upon receipt of the defendant's list of documents, he reconciled his accounts to include payment received from the defendant hence it became necessary to amend the plaint to bring on board the reconciled accounts. He contended that the amendments he seeks to make are meant to determine the real issues in controversy in this suit once and for all.
14. It was stated by the plaintiff that a party has a right to amend his pleadings at any time before judgment and even on appeal, and that this Court has the discretion to allow the amendments sought.



Whether the plaintiff should be granted leave to amend the plaint.

15. Amendment of pleadings with leave of the Court is provided for under order 8 rule 3 of the Civil Procedure Rules, 2010 which states as hereunder –

- “(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.
- (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.
- (3) An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
- (4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
- (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.”

16. This Court has the discretion to order for the amendment of any document pursuant to the provisions of order 8 rule 5(1) of the Civil Procedure Rules, 2010 which states as hereunder –

“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.”

17. On perusal of the plaint, it is evident that the plaintiff's claim against the defendant is for special damages of Kshs.52,564,122.50. I have perused and draft amended plaint dated 10th May, 2023 filed by the plaintiff and it is evident that the cause of action between the parties herein arose out of a lender and borrower relationship. The plaintiff contended that it advanced various friendly loans to the defendant on diverse dates between the years 2017 and 2021 but the said loans have not been repaid to date.

18. The plaintiff now seeks leave of Court to amend the total value of special damages from 52,564,122.50 to Kshs. 41,093,427.00 on grounds that he reconciled his accounts to include the payment received from the defendant on receipt of the defendant's list of documents, hence it became necessary to amend



the plaintiff, to bring on board the reconciled accounts. The plaintiff stated that the amendment sought is meant to determine the real issues in controversy between the parties herein, once and for all.

19. On the other hand, the defendant submitted that the instant application seeks to change the subject matter of this suit which is the amount claimed from Kshs.52,564,122.50 to 41,093,427.00.

20. As correctly submitted by Counsel for the parties, amendments should be allowed freely at any stage of the proceedings as long as they do not cause prejudice or injustice to the opposing side which cannot be remedied by costs. In the case of *Kassam v Bank of Baroda (Kenya) Limited* [2002] 1 KLR 294 the Court laid down the factors to be considered when dealing with an application for amendment of pleading as hereunder –

- “(a) The party applying is not acting mala fides;
- (b) The amendment will not cause some injury to the other side which cannot be compensated by costs;
- (c) The amendment is not a device to abuse the court process;
- (d) The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
- (e) And that the amendment will not alter the character of the suit.”

21. In the case of *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR, the Court held as follows –

“The Learned Authors of *Halsbury’s Laws of England*, 4th Ed (Re-Issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings –

“.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

...The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

22. It is not disputed that this matter has not yet been certified ready for hearing and it is still at the pre-trial stage. In addition, I note that the net effect of the amendment sought by the plaintiff will be to change the value of the alleged 3rd friendly loan from Kshs.43,673,541.00 to Kshs.32,202,846.00 making the total sum of money claimed from the defendant by the plaintiff to be Kshs.41,093,427.00. Based on the foregoing, I am persuaded that the proposed amendment will not change the trajectory of the original cause of action but will facilitate the determination of the real questions in controversy between the parties herein, which is whether the defendant is indebted to the plaintiff as a result of various friendly loans allegedly advanced to him by the plaintiff on diverse dates between the years 2017 and 2021 and if so, the extent to which the defendant is indebted.

23. My finding is that the defendant will not be prejudiced in any way, in the event the instant application is allowed since this matter is still at the pre-trial stage and he can always respond to the amended plaintiff



by way of an amended statement of defence. Additionally, it is in the interest of justice to allow the plaintiff to amend the plaint in order for this Court to determine the real issue in controversy between the parties.

24. Having said so, the upshot is that the application dated 6th March, 2023 is merited and it is allowed in the following terms-
- i. The plaintiff is granted 14 days to file and serve an amended plaint;
 - ii. The defendant will be at liberty to file and serve his amended statement of defence within 14 days of service;
 - iii. The plaintiff will have 14 days within which to file a reply to the amended statement of defence, if need be; and
 - iv. Costs shall be in the cause.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 22ND DAY OF SEPTEMBER, 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

