



**Vaghadia v Plasma Diagnostics Limited & another (Civil Suit
E064 of 2022) [2023] KEHC 24143 (KLR) (19 September 2023) (Ruling)**

Neutral citation: [2023] KEHC 24143 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E064 OF 2022
DKN MAGARE, J
SEPTEMBER 19, 2023**

BETWEEN

NILESH GOPAL VAGHADIA PETITIONER

AND

PLASMA DIAGNOSTICS LIMITED 1ST RESPONDENT

CHE'TNADEVI NILESH VAGHADIA ALSO KNOWN AS HIMATLAL

MANEK 2ND RESPONDENT

RULING

1. The applicant filed a petition various orders against the respondents seeking the following orders.
2. By its application dated 11/6/2023 she filed an application seeking the following orders: -
 - a. Thatthe Petitioner/Applicant be granted leave to amend the Petition as set out in the Draft Amended Petition annexed herein out of time.
 - b. Thatthe Draft Amended Petition be deemed as duly filed once paid for.
 - c. Thatthe costs of this application be provided for.
3. He reasons given are that: -
 - a. Respondent to this suit and by seeking remedies on its behalf.
 - b. Thatthe error in filing the suit against the 1st Respondent was a bona-fide and genuine mistake, which was not intended to mislead the court or the parties herein.
 - c. Thatthe said amendment will not prejudice the Respondents in any way but it will enable the Court to determine the real question or issues between the parties.
 - d. Thatthe delay in filing this application for amendment was not intentional



Petitioner's Submissions

4. The petitioner filed submissions dated and stated that the Respondents did not file any response to the Application, therefore the same is not opposed. They urged the court to allow the application as prayed. They relied on Order 1 Rule 10 (2) of the [Civil Procedure](#) provides as follows: -

“The court may at any stage of the proceedings, either upon or without application to either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to be joined whether as plaintiff or defendant, or whose presence before court may be necessary in order to enable court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

5. They also relied on Order 1 Rule 9 of the [Civil Procedure Rules](#), which provide as follows: -

“No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

6. This was buttressed by the decision of the Court of Appeal in [William Kiprono Towett & 1597 others v Farmland Aviation Ltd & 2 others](#) (2016) eKLR where they stated as doth: -

“...Most critically Order 1 Rule 9 of the *Civil Procedure Rules* (2010) makes it abundantly clear that misjoinder or non-joinder of parties cannot be a ground to defeat a suit. We reproduce the same hereunder: No suit shall be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every suit deal with the matter in controversy so far as regards the rights and interests of the parties actually before it.”

7. Finally, they relied on Order 8 Rule 3(1) of the [civil Procedure Rules](#) provides as follows: -

“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” Order 8 Rule 5 of the *civil Procedure Rules* provides a

8. They submitted that the Applicant had shown that the amendment was necessary. It was their case that it was made in good faith. They stated that the 1st respondent is not a necessary party to the case. They placed reliance in the case of [Bosire Ogero v Royal Media Services](#) [2015] eKLR, where the court stated as doth: -

“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”.



9. It was the Petitioner’s case that there is no need of refusing amendments unnecessarily. They relied on the case of *Eastern Bakery v Castelino*[1958] EA 461 where, Sir Kenneth O. Conner the President of the then Court of Appeal for Eastern Africa said the following: -

“It will be sufficient to say that amendments 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.

10. There was no response to the application by the 2nd respondent. On the other hand, the Advocate for the 1st Respondent supported the Application.

Analysis

11. An application for amendment is one of those run of them ills applications. If the plaintiff wished to amend and withdraw the suit against the 1st respondent, who are we to begrudge her. It is her case. Though I had given timelines for amendment applications, they were not obeyed. This is not time for recriminations.

12. In the case of *Lewar Ventures Limited v Equity Bank (Kenya) Limited* [2022] eKLR, the court, R. Wendoh J, states as doth; -

“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 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.”

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 part.”

13. In *Institute for Social Accountability & Another v Parliament of Kenya & 3 others* [2014] eKLR the court I. Lenaola, Mumbi Ngugi, D. S. Majanja JJ as they then were 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.”

14. In *John Nyagaka Osoro v Reynold Karisa Charo & 5 others* [2021] eKLR, the court, M.A. Odeny stated as doth: -

“The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per Bullen and Leake & Jacob's *Precedents of Pleading*, 12th Edition, which provides as follows concerning amendment of pleadings:

“...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...”

Similarly, in *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 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...”.

15. I have said enough to show that I have not seen mala fides to the application. I will therefore allow the amendment and withdrawal of the Suit against the 1st Defendant. Orders that:



Determination

16. The upshot of the foregoing is that the Application dated is allowed in the following terms:-
- a. Leave to amend is granted and as such the Petitioner to file an amended petition within 10 days.
 - b. The petitioner to file a response if any, within 10 days of service.
 - c. Mention before the deputy registrar to confirm compliance and place the matter before me for directions.
 - d. The effect of the amendment is to withdraw the case against the 1st respondent. There will be no order as to costs of the 1st Respondent
 - e. Costs of the Amendment in the cause.

**DELIVERED, DATED AND SIGNED AT MOMBASA ON THIS 19TH DAY OF SEPTEMBER 2023.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:-

Kibe for the Petitioner/Applicant

Ms Koki for the 2nd Respondent

Mr. Omwanza for the 1st Respondent

Court Assistant - Brian

