



REPUBLIC OF KENYA



KENYA LAW

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China Wu-Yi Company Limited v Suraya Property Group Limited & 2 others (Civil Case 76 of 2019) [2023] KEHC 23710 (KLR) (Commercial and Tax) (19 October 2023) (Ruling)

Neutral citation: [2023] KEHC 23710 (KLR)

REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL CASE 76 OF 2019
DAS MAJANJA, J
OCTOBER 19, 2023

BETWEEN

CHINA WU-YI COMPANY LIMITED PLAINTIFF

AND

SURAYA PROPERTY GROUP LIMITED 1ST DEFENDANT

MUGA DEVELOPERS LIMITED 2ND DEFENDANT

EQUITY BANK LIMITED 3RD DEFENDANT

RULING

Introduction and Background

1. This is the 4th Ruling in this matter where the 2nd Defendant (“Muga Developers”) has filed the Notice of Motion dated 22.05.2023 made under Order 8 Rules 3 (1) of the *Civil Procedure Rules* (“the Rules”) seeking leave to amend its defence and consequently have the annexed draft written statement of defence be deemed as duly filed. The application is supported by the grounds on its face and supporting affidavit of its director, Peter Muraya, sworn on 22.05.2023. It is opposed by the 3rd Defendant (“the Bank”) through the replying affidavit of its Manager, Legal Services, Kariuki Kingori, sworn on 16.07.2023. The respective advocates made brief oral submissions which I have considered.
2. The facts of the case are as follows. Muga Developers is the registered owner of LR No 28223/33 situated on Kiambu (“the suit property”). It constructed a development thereon known as Fourways Junction Project comprising of housing units and ancillary facilities. In order to develop the suit property, it charged the suit property in favour of the 3rd Defendant (“the Bank”) to secure facilities by a Charge dated 28.03.2011, a Further Charge dated 04.04.2012 and a Second Further Charge dated



- 04.04.2012 in order to secure advances. It also appointed the 1st Defendant as its agent to sell units to prospective purchasers.
3. In March 2009, Muga Developers, through its Project Manager, advertised a tender for the construction of Phase I of the Fourways Junction Project. The Plaintiff, a contractor, successfully bid and was awarded the tender. Upon successful completion of the project at various stages, the project architect issued various certificates in favour of the Plaintiff amounting to Kshs 166,000,000.00. The final certificate of Kshs 116,261,185.94 was issued on 20.04.2015 out of which Plaintiff was entitled to Kshs 73,668,495.04 and the balance was payable to subcontractors and other suppliers.
 4. As Muga Developers was unable to pay the Kshs 166,000,000.00, it was agreed that the amount to be paid would be settled in kind by way of sale of certain houses in the project to the Plaintiff. In due course, the Plaintiff took possession of some of the Houses but did not receive the title documents from the 1st and 2nd Defendants. In the Amended Plaint dated 17.02.2020, the Plaintiff seeks specific performance of the sale agreements, delivery up of the titles to the Houses, mesne profits for the loss of income and rents from the Houses that were not handed over. In the alternative, it prays for judgment for Kshs 73,668,495.04 with interest thereon and general damages for breach of contract.
 5. Muga Developers avers that it seeks to amend its Statement of Defence to address the Plaintiff's claim specifically and sufficiently. It states that it obtained various loan facilities from the Bank for purposes of inter alia, development of the Fourways Junction Housing project but the said aspect of the loan facilities that was intended for construction and development purposes was not structured and intended to be disbursed to it by the Bank.
 6. It avers that the loan facilities were structured to be disbursed directly to the Plaintiff, as contractor, in stages upon presentation of the Architect's interim payment certificates issued upon every completed stage of construction certified by the Bank. Therefore, no actual disbursement of any amount under the loan facilities that was intended for construction and development was ever actually made to it by the Bank. It asserts that all the Architect's interim payment certificates that were raised for payment of the Plaintiff for construction and development of the estate were settled and paid to them directly by the Bank, save for the final certificate of the sum of Kshs 73,668,495.04 which they are claiming was not settled.
 7. In answer to the Plaintiff's claim, Muga Developers states that having provided the banking facilities, the Bank had the obligation to settle and pay by actual disbursement of the said amount to the Plaintiff. That the Bank has appointed receivers and sold certain portions of the suit property resulting in a scenario where the Bank is claiming the full amount from it while at the same time the Bank has failed to pay and disburse the said final payment which is unfair and unconscionable.
 8. Muga Developers further contends that the Plaintiff, who were at all material times paid their contractual amounts as raised in the Architect's Certificates by the Bank, have not made their claim for payment against the Bank. It therefore proposes to amend its defence to reflect the relationship between it and the Bank and the obligation of the Bank to settle the Plaintiff's claim.

The Bank's Reply

9. The Bank opposes the application on the ground the issues Muga Developers seek to raise are the subject of pending litigation between the parties.
10. The Bank avers that Muga Developers accepted at para. 20 of the draft amended defence that the allegations that the Bank did not disburse the facilities for the completion of the Fourways Junction Project is the subject matter in High Court Comm Case No E082 of 2020; *Muga Developers Limited*



v Equity Bank of Kenya Limited & Others. That in this case, Muga Developers alleged that the Bank failed to consistently disburse the approved loan amounts as per the various letters of offer. In response, the Bank denied the claim and stated that from a reconciliation of Muga Developers loan account, Kshs 3,474,533,373.18 had been disbursed. The Bank further also denied that it frustrated the Contractor and it is Muga Developers that failed to make payment to the Contractor as required despite the loan being disbursed.

11. In summary, the Bank's case is that the issue of whether Bank disbursed the loan to Muga Developers is an issue for determination in High Court Comm Case No E082 of 2020 which is still pending in court and that the proposed amendments by the 2nd Defendant as set out in the draft amended defence are an attempt by the 2nd Defendant to improperly introduce issues that are currently pending in that case to these proceedings.

Analysis and Determination

12. Section 100 of the *Civil Procedure Act* and Order 8 Rule 5 (1) of the *Civil Procedure Rules* gives the court power to amend pleadings in order to assist the court determine the real question or issues in controversy between the parties. The Court of Appeal, in *Joseph ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* NRB CA Civil Appeal No 149 of 1991 [1995] eKLR summarized the general principles under which the courts may grant leave to amend the pleadings as follows:

[The] 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 exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed ; 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 but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation: that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.

13. The thrust of Muga Developers defence as proposed in the amended Statement of Defence is that the Bank's rather than itself is liable for the amount due to the Plaintiff as the Bank failed to disburse the entire loan that it had sought from the Bank and which was to be used by Muga Developers to pay the Plaintiff, hence the reason why the Plaintiff has sued them.



14. Muga Developers admit that the issue of whether the Bank disbursed the entire loan is a live issue before the court in HCCOMM No E082 of 2020. It is therefore not an issue that can be determined in this matter. Introducing this issue in these proceeding would violate the sub-judice rule contained in section 6 of the *Civil Procedure Act* which provides that “No court shall proceed with the trial of any suit or proceeding in which the matter in issue is also directly and substantially in issue in a previously instituted suit or proceeding between the same parties, or between parties under whom they or any of them claim, litigating under the same title, where such suit or proceeding is pending in the same or any other court having jurisdiction in Kenya to grant the relief claimed.”
15. I therefore find and hold that introducing a sub-judice claim against the Defendants will not determine the real issue in controversy between the parties which is whether the Plaintiff is owed inter alia Kshs 73,668,495.04 by the Defendants.

Disposition

16. For the reasons stated above, I dismiss the Plaintiff’s application dated 22.05.2023 with costs to the 3rd Defendant.

DATED AND DELIVERED AT NAIROBI THIS 19TH DAY OF OCTOBER 2023.

D. S. MAJANJA

JUDGE

