



REPUBLIC OF KENYA



KENYA LAW
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**Biashara Master Sawmills Limited v Kenya Power & Lighting Company Limited
(Civil Case 7 of 2018) [2024] KEHC 14132 (KLR) (14 November 2024) (Ruling)**

Neutral citation: [2024] KEHC 14132 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAKURU
CIVIL CASE 7 OF 2018
HI ONG'UDI, J
NOVEMBER 14, 2024**

BETWEEN

BIASHARA MASTER SAWMILLS LIMITED PLAINTIFF

AND

KENYA POWER & LIGHTING COMPANY LIMITED DEFENDANT

RULING

1. In the Notice of motion application dated 21st August 2024 by the plaintiff herein prays for the following orders;
 - i. That, that leave be granted to the plaintiff to amend the amended Plaintiff dated 8th February 2018 in terms of the draft further amended plaintiff.
 - ii. That, the costs of this application be in the cause.
2. The application is premised on the grounds on its face on its face as well as the affidavit of one of the plaintiff's directors sworn on even date. He deponed that on 8th February 2018, the plaintiff filed and served its plaintiff together with its list of witnesses, witness statements and bundle of documents where the it sought special damages in the sum of Kshs. 360,808,691.48.
3. He further deponed, that pursuant to leave granted on 14th December, 2021, the plaintiff amended the special damages from Kshs. 360,808,691.48 to Kshs. 671,892,332.50 as a result of the plaintiff obtaining additional documents establishing the loss and damage. He added that the claim for damages did not include the professional fees paid to the Claims Adjuster, the firm of Cunningham Lindsey of Kshs. 2,786,700.00 for assessment of the damages incurred by the plaintiff as a result of the fire incident.
4. He stated that the proposed amendment sought to amend the special damages from Kshs. 671,892,332.50. to Kshs. 674,679,032.50/=. Further, that the proposed amendment was necessary to



enable this court make a just determination of the claims of the parties. He added that the defendant will not be prejudiced by the proposed amendment. He urged the court to grant the orders sought in the application.

5. The defendant in response filed a replying affidavit sworn on 5th September 2024 by the defendant's Chief Officer Insurance Services. He averred that on the 19th February 2020, the plaintiff made an almost identical application which was heard and allowed on the 14th December 2021 pursuant to which the plaintiff amended its claim to the current status.
6. He further averred that the plaintiff was aware of the claim but did not include the same in the original claim or the claim mounted after the first amendment. He further averred that the issue of amending the plaint further to include the same item was res judicata to the order of the court dated the 14th December 2021. That the instant prayer ought to have been made and canvassed in the application addressed by the said order.
7. He deponed that the plaintiff's claim in respect of the said alleged payment was statute barred and the same was being introduced by way of amendments to circumvent the defence of limitation to which the defendant was entitled by statute. He added that while the court is vested with the discretion to allow amendments, such leave should be sought and obtained timeously to avoid derailing and disrupting expeditious disposal of suits.
8. He further deponed that the plaintiff had not explained why the amendment was not effected when the court granted the initial leave when it admittedly knew all along about this aspect of the claim. He added that the application herein was brought in bad faith and was characterised by an unreasonable delay which is only aimed at prejudicing the respondent. He urged the court to strike out or dismiss the said application with costs to the defendant.
9. Parties agreed to argue the application orally.
10. Mr. Issa for the plaintiff/applicant submitted that they had earlier amended the plaint and the same is dated 21st December 2021. That in the application dated 21st August 2024 they seek to further amend the plaint to include Kshs. 2,786,700/= being fees paid to the firm of Cunningham Lindsey. Further, that the invoice, receipt and instructions to the bank for payment of the said amount was part of the documents on record (Volume 3 at pages 1448, 1452 and 1453 of the plaintiff's documents). He added that the defendant had been served on 17th May 2023.
11. He further submitted that they had filed a supplementary bundle of documents and no new item was being introduced. That it was an inadvertent miss out and they only noticed it as they were preparing for hearing of the case.
12. Mr. Kisilah for the defendant strongly opposed the application and submitted that they had filed a replying affidavit sworn by one Peter Ohanya on 5th September 2024. He further submitted that the application herein was not merited since the suit had been brought on behalf of the insurer and the amount paid could not be sworn on by the deponent. He added that the court has the jurisdiction to exercise its discretion judicially.
13. He submitted that considering that the cause of action in this suit was a tort, the claim ought to have been made within three (3) years. That the claim herein has been pending for eight and half years (8½) and so there was no intention by the plaintiff of claiming the aforementioned amount. He placed reliance on Order 8 rule 5 and 6 of the Civil Procedure Rules, the Whitebook Vol 1 at page 396 and the decisions in HCC No. 5 of 2019 (Migori), He urged the court to disallow the application with costs.



14. In a rejoinder, Mr. Issa for the plaintiff submitted that the claim was not a new cause of action and they were only giving particulars of a matter already pleaded. Further, that the cause of action was filed on time and they already had a claim for special damages. He added that there could be no claim for limitation on their claim as they only seek to amend particulars in the said claim.
15. He further submitted that pursuant to the provisions of Order 8 Rule 5 of the Civil Procedure Rules, this court has wide discretion to grant the orders sought. He added that this was a subrogation suit and the insurer had the authority to sign the affidavit. He urged the court to have a look at the Migori case and exercise its discretion.

Analysis and Determination

16. I have considered the application, the affidavits and the submissions by both parties. I opine that the main issue for determination is whether the application dated 21st August 2024 is merited.
17. The instant application has been brought under the provisions of Sections 1A & 3A of the [Civil Procedure Act](#), and Order 8 rules 1 and 5 of the Civil Procedure Rules.
18. The legal provision governing amendment of pleadings is Section 100 of the [Civil Procedure Act](#) which provides as follows;

“The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.
19. Further, Order 8 Rule 1 (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.”
20. The Court of Appeal in *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] eKLR observed as follows;

“The settled rule with regard to amendment of pleadings has been concisely stated in Vol.2, 6th Ed. at P.2245, of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao, in which the learned authors state:

that a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”
21. The said court further identified the factors to be considered in an application for amendment of pleadings and stated as follows;

“That the amendment is necessary for determining the real questions in controversy.

To avoid multiplicity of suits provided there has been no undue delay.

Only where no new or inconsistent cause of action is introduced “ie” if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.



That no vested interest or accrued legal rights are affected.

So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.”

22. I have looked at the amendments sought by the plaintiff from the draft further amended plaintiff attached to the application. It is evident from the contents of paragraph 13 that the plaintiff seeks to introduce a claim of the sum of Kshs.2,786,700/= being assessment fees paid to the firm of Cunningham Lindsey by APA Insurance Limited. The said amount is alleged to have been paid for the assessment of loss incurred by the plaintiff.
23. In light of the provisions of the law and authority cited above, it is clear that the main aim of an application for an amendment is to ensure that the court determines the real issues in controversy between the parties. The defendant argued that the application herein is not merited and that the plaintiff had taken too long to raise the claim which was an indication that it had no intention of claiming the aforementioned amount. Further, that the cause of action being a tort ought to have been filed within three (3) years. They also argued that by the proposed amendments the plaintiff sought to increase the amount claimed and should have filed a separate suit.
24. It was admitted by the plaintiff that they amended the plaintiff in 2021 and the application for further amendment is dated 21st August 2024. There is no doubt that there has been undue delay on the plaintiff's part in filing the said application. However, I find that though there has been undue delay in seeking to further amend the plaintiff, the amendment sought would enable the court determine all the questions in the suit and the real controversy between the parties and avoid a multiplicity of suits. The particulars of the amendment sought and the cause of action in the initial plaintiff arise from the same chain of facts.
25. In addition, from the nature of the amendment sought, I do not see any prejudice that will be occasioned to the defendant if the same is allowed, since it will still have a chance to respond to the further amended plaintiff. Further still, this suit has not proceeded for hearing and the parties shall have the chance to challenge and interrogate the sum introduced by the plaintiff, during the hearing.
26. The upshot is that the application dated 21st August 2024 has merit and is allowed. The further amended plaintiff to be filed and served within seven (7) days. The defendant is granted leave to further amend its defence if need be within ten (10) days upon service of the further amended plaintiff. Costs in the cause.
27. Orders accordingly.

DELIVERED, VIRTUALLY, DATED AND SIGNED THIS 14TH DAY OF NOVEMBER, 2024 IN OPEN COURT AT NAKURU.

H. I. ONG'UDI
JUDGE

