



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 85 OF 2017

ONGATA WORKS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL...DEFENDANT/RESPONDENT

RULING

1. This ruling is in respect to the application dated 24th July 2020 wherein the applicant seeks orders that: -

- 1) THAT the plaintiff be granted leave to amend its plaint filed herein in the manner shown in the amended plaint annexed herewith.***
- 2) THAT the amended plaint annexed herewith be deemed" as filed and served upon payment of the requisite fees.***
- 3) THAT cost of this application be provided for.***

2. The application is brought Under Order 8 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules, is supported by the affidavit of **Gibson G. Wambugu** and based on the following grounds;

- 1) THAT the plaintiff filed this suit against the defendant to enforce payment of certified sums due and owing to the plaintiff.***
- 2) THAT the defendant has since terminated the contract and the sums due for work done and interest for delayed payments have since been computed and certified and are overdue for payment.***
- 3) THAT the defendant has also made payment for some of the certificates that were part of the original plaint and there is need to exclude the paid certificates as they are not part of the dispute currently.***
- 4) THAT in the interest of justice and to focus the pleadings towards issues in dispute, it is mete and just that the amendments sought herein be allowed.***
- 5) THAT the plaintiff will not be prejudiced if the orders are granted.***

3. The respondent opposed the application through the replying affidavit of its Chief Executive Officer **Dr. Mercy G. Karongo** who states that the application seeks to enhance the claim against the defendant to the sum of Kshs 413,675,268.29 yet the said payments are subject to an ongoing process of verification by the Ministry of Education, Kenya National Examination Council and the Auditor General.

4. She further states that the parties' contract provides that disputes be resolved through arbitration which dispute resolution mechanism has not been exhausted.

5. The application was canvassed by written submissions.

6. The applicant submitted that the application is merited as the plaintiff seeks to amend the plaint to capture all amounts due to it and that owing to the fact that the defendant had not filed a defence, no prejudice will be occasioned to it by the amendment should the same be allowed. Reference was made to the decision in **Sanyu International Limited vs Oriental Commercial Bank Limited** (2017) eKLR where the court stated that an amendment sought before the hearing should freely be allowed if there is no injustice to the other party.

7. The plaintiff submitted that the issue of referral of the matter to arbitration is *res judicata* as a similar application by the defendant to refer the case to arbitration had been dismissed in the ruling dated 4th June 2018.

8. The defendant, on the other hand, submitted that the plaintiff's claim is undergoing verification and that it is only upon the conclusion of the audit that the defendant could determine whether the said amounts are payable or not. Counsel further submitted that the contract stipulated that no dispute would be referred to arbitration until the matter was dealt with through reconciliation, mediation or adjudication.

9. I have considered the pleadings filed herein, the rival arguments made by the parties and the authorities cited. There two main issue for determination is whether this court has the jurisdiction, owing to the alleged existence of an arbitration clause, to hear and determine the instant application and depending on the answer to the first issue, whether the application is merited.

10. On jurisdiction the defendant submitted that the matter ought to be referred to arbitration in line with clause 37.1 of the contract while the plaintiff argued that the issue of jurisdiction is *res judicata* having already been decided by Justice Fred Ochieng. In the recent case of ***The Independent Electoral and Boundaries Commission v Maina Kiai & 5 others, Nairobi CA Civil Appeal No. 105 of 2017 ([2017] eKLR)***, the Court of Appeal held that:

“Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must be satisfied, as they are rendered not in disjunctive but conjunctive terms;

a) The suit or issue was directly and substantially in issue in the former suit.

b) That former suit was between the same parties or parties under whom they or any of them claim.

c) Those parties were litigating under the same title.

d) The issue was heard and finally determined in the former suit.

e) The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

11. The Court explained the role of the *res judicata* doctrine thus:

“The rule or doctrine of res judicata serves the salutary aim of bringing finality to litigation and affords parties closure and respite from the spectre of being vexed, haunted and hounded by issues and suits that have already been determined by a competent court. It is designed as a pragmatic and commonsensical protection against wastage of time and resources in an endless round of litigation at the behest of intrepid pleaders hoping, by a multiplicity of suits and fora, to obtain at last, outcomes favourable to themselves. Without it, there would be no end to litigation, and the judicial process would be rendered a noisome nuisance and brought to disrepute or calumny. The foundations of res judicata thus rest in the public interest for swift, sure and certain justice.”

12. A perusal of the court record reveals that in an application dated 6th October 2017, the respondent herein sought orders to refer the dispute to arbitration in line with the provisions of the contract. In his ruling dated 4th June 2018, the honourable judge declined to refer the dispute to arbitration. For this reason, I am in agreement with the plaintiff that this issue is *res judicata* as it has already been decided by a court of competent jurisdiction.

13. Turning to the merits of the instant application, the plaintiff seeks to amend its pleadings so as to bring all the matters in controversy between the parties for adjudication in one forum. The defendant, on the other hand, argues that the amount claimed by the plaintiff is undergoing verification and that it is therefore premature to bring it up in this suit.

14. In ***Abdul Karim Khan v Mohamed Roshan (1965) EA.289 (C.A)***, the court laid down the principles that guide the court when considering amendments and held that courts will not permit an amendment that is inconsistent with original pleadings or that entirely alters the nature of the defence or plaint.

15. In ***St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR*** the Court of Appeal set out the principles under which Courts may grant leave to amend the pleadings as follows: -

a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should be timeously applied for;

c) power to amend can be exercised by the court at any stage of the proceedings;

d) 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;

e) 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 Limitations Act subject however to powers of the court to still allow an amendment

notwithstanding the expiry of current period of limitation.

16. Applying the above principles to the circumstances of this case, I find that the plaintiff has brought the application in good time as the defendant is yet to file its defence, in which case, the amendment will cause no prejudice to the defendant. I therefore find that it will be in the interest of justice to allow the amendment. Consequently, I allow the application in the following terms: -

a. The plaintiff is hereby granted leave to amend the plaint.

b. The amended plaint attached to the application will be deemed as duly filed upon payment of the requisite fees.

c. The defendant to file the defence within 7 days from the date of the ruling.

d. The costs of the application shall abide the outcome of the main suit.

DATED, SIGNED AND DELIVERED VIA MICROSOFT TEAMS AT NAIROBI THIS 8TH DAY OF JULY 2021 IN VIEW OF THE DECLARATION OF MEASURES RESTRICTING COURT OPERATIONS DUE TO COVID-19 PANDEMIC AND IN LIGHT OF THE DIRECTIONS ISSUED BY HIS LORDSHIP, THE CHIEF JUSTICE ON THE 17TH APRIL 2020.

W. A. OKWANY

JUDGE

In the presence of:

No appearance for the parties

Court Assistant: Sylvia.