



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL SUIT NO. E049 OF 2020

INTER TROPICAL TIMBER TRADING LIMITED.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY LTD.....DEFENDANT

RULING

The Application

1. The application for consideration is the Plaintiff's Notice of Motion dated the 15th day of September, 2020 brought under Section 3A of the Civil Procedure Act, 2010, Order 8 and Order 51 Rule 11 of the Civil Procedure Rules, 2010 and enabling provisions of the law. The Application seeks the following orders **THAT**:

- a) The Honourable Court be pleased to grant leave to the Applicant to further amend its **Plaint**.*
- b) The further amended **Plaint** annexed hereto be deemed to have been filed.*
- c) The costs of the application be provided for.*

2. The application is based on the grounds on the face of it and supported by the Affidavit of one **THOMAS MBARIA KURIA**, a Legal Counsel for the Plaintiff sworn on even date and a Supplementary Affidavit sworn on the 13th November, 2020. The Application was opposed by the Plaintiff vide a Replying Affidavit sworn by **JUSTUS ODODA** a legal officer of the Defendant on the 12th October, 2020. The application was canvassed by way of written submissions.

The Applicant's Case

3. It is the Applicant's case that as at the time of filing the Amended **Plaint** dated the 12th day of November, 2019, it failed to particularize the breach of contract, damage suffered and did not specifically state some prayers thus it has become necessary that the Amended **Plaint** be further amended.

4. The Applicant having instructed two firms; M.M. Muriuki & Company Advocates as well as T.M. Kuria & Company Advocates, there was confusion of facts and the issue of estoppel which was communicated by the Plaintiff to its advocates was erroneously not pleaded.

5. It is the Applicant's averment that the amendment will not prejudice the Defendant but will ensure that justice is done as the real issues in dispute in this case shall be brought to the court for determination.

6. In response to the Replying Affidavit by the Respondent, the Applicant averred that the issue for determination by the court is breach of contract and not the issue of the tendering process as averred by the Respondent as the tendering process was concluded and the Applicant had partially performed its obligations under the said contract.

7. The Applicant further intimates that the Respondent only opposed the Application so as to delay fair and just conclusion of the matter.

8. The Applicant annexed its Draft Further Further amended **Plaint** dated the 13th day of November, 2020 which it averred raised the real

issues for determination by the Court.

The Respondent's Case

9. The Respondent's case was that the gist and consequential effect of the proposed amendments by the Applicant aims at substantially changing the character of the suit contrary to the provisions of the law. That the Applicant through the proposed amended plaint purports to invite the Court to make a determination as to the legality of Tender No. KPL/94.1A/RT/004/17-18.

10. It is the Respondent's case that the Court does not have the jurisdiction to entertain the matter as it relates to procurement and pursuant to the provisions of Sections 27 and 28 of the Public Procurement and Asset Disposal Act, 2015, the dispute ought to be entertained by the Public Procurement Administrative Review Board (PPARB) which is mandated to hear and determine asset disposal disputes.

11. The Respondent avers that the Applicant's claim being in relation to the tendering process ought to have been filed at the Public Procurement Administrative Review Board (PPARB) within 14 days of notification of award and not after a period of three years as in the instant case.

12. The Respondent is of the position that there is a strict procedure which ought to be pursued by the Applicant in pursuing its claim.

13. The Respondent intimates that the Applicant intends to introduce a cause of action that is time barred before a court that is divested of jurisdiction by attempting to disguise the procurement dispute as a commercial one that it failed to challenge in time. That the dispute would have on the first instance been dealt with at the Public Procurement Administrative Review Board (PPARB) thereafter the Applicant would have resorted to Judicial Review in the event that it would have been aggrieved with the decision of the said Board.

14. It is the Respondent's case that the amendments if allowed would be prejudicial as the court will provide the Applicant with a forum to litigate upon a matter which is time barred by statute thereby infringing on the Respondent's right to expeditious determination of disputes as the Applicant in doing so will be reverting to previously struck out issues thus continuous adjustment and readjustment.

15. The Respondent contends that there has been nothing to indicate that instructions by the Applicant as communicated to its advocates were not carried out accordingly and it was incumbent upon the two firms to execute in unison the instructions of the Applicant.

16. The Respondent intimates that the Application has neither been made in good faith nor clean hands.

17. The Respondent settled on two issues for determination as follows:

- i. That the application is an abuse of Court process
- ii. The application is prejudicial on the defendant.

18. **The Respondent cited the case of Satya Bhamu Gandhi v Director of Public Prosecutions & 3 others [2018] eKLR** where the court on abuse of court process held:

“The concept of abuse of court/judicial process is imprecise. It involves circumstances and situation of infinite variety and conditions. It is recognized that the abuse of process may lie in either proper or improper use of the judicial process in litigation. However, the employment of judicial process is only regarded generally as an abuse when a party improperly uses the issue of the judicial process to the irritation and annoyance of his opponents.

The situation that may give rise to an abuse of court process are indeed in exhaustive, it involves situations where the process of court has not been or resorted to fairly, properly, honestly to the detriment of the other party. However, abuse of court process in addition to the above arises in the following situations:-

- (a) Instituting a multiplicity of actions on the same subject matter, against the same opponent, on the same issues or multiplicity of actions on the same matter between the same parties even where there exists a right to begin the action.***
- (b) Instituting different actions between the same parties simultaneously in different court even though on different grounds.***
- (c) Where two similar processes are used in respect of the exercise of the same right for example a cross appeal and respondent notice.***
- (d) Where an application for adjournment is sought by a party to an action to bring another application to court for leave to raise issue of fact already decided by court below.***
- (e) Where there no iota of law supporting a court process or where it is premised on recklessness. The abuse in this instance lies in the inconvenience and inequalities involved in the aims and purposes of the action.***
- (f) Where a party has adopted the system of forum-shopping in the enforcement of a conceived right.***

(g) Where an appellant files an application at the trial court in respect of a matter which is already subject of an earlier application by the respondent at the Court of Appeal.

(h) Where two actions are commenced, the second asking for a relief which may have been obtained in the first. An abuse may also involve some bias, malice or desire to misuse or pervert the course of justice or judicial process to the irritation or annoyance of an opponent.”

19. The Respondent submits that the Applicant having previously been granted leave to amend the Plaintiff, ought to have seized the opportunity jealously rather than making adjustments and readjustments to its claim. It relied on the case of *John Mulwa Kang'atu v Pan African Insurance Co. Ltd [2015] eKLR* to buttress the submission.

20. On the issue of prejudice, the Applicant invited the court to consider the threshold laid down in the case of *Kassam v Bank of Baroda (Kenya) Ltd[2002] eKLR* where the court stated:

“ In some of these instances there is no practical way to allow the amendment and at the same time avoid the prejudice. In others an adjournment may be necessitated. In its turn this may, however, bring with it other evils, such as further delay of the case and concomitant expense, disruption of the court calendar, and so on. The problem may call for the balancing of several factors. In the exercise of the court’s discretion one or more of the following factors may be considered.

1. Whether the amendment sought embodies a legally valid claim or defence (the situation in the instant case concerns defence). This is because there is not much point in wasting time and effort over a new claim or defence which has no legal merit.

2. The reason why the subject matter of the amendment was not included in the original pleading or offered sooner than it was. These reasons range over a wide field, some good, and some bad. The subject matter may not have been in existence when the original pleading was filed, e.g. the defence of res judicata may arise only after judgment in another action after the written statement of defence was filed; other reasons may reveal bad faith, e.g. an intent to obstruct the proceedings by deliberately withholding allegations in order to offer them by amendment at a strategic time. In other cases the reason may be that the applicant did not know or appreciate the new fact when he drafted the original pleading. Such ones depend on the degrees of diligence and the lack of it, and whether amendment would work prejudice to the opponent or disrupt judicial administration.

3. Delay or disruption of judicial administration. If prejudice to the opponent can be prevented only by delay in the progress of the case, the extent of the hardship which this delay imposes upon the opponent and the system of judicial administration is a factor to be considered in deciding whether to allow the amendment.

4. The extent to which the amendment departs from the original claim or, as in our case, defence, or tends to complicate the issues.

5. Whether the amendment is offered by the plaintiff or defendant. Thus, if an amendment will necessitate delay in bringing the case for trial, there may be undue hardship to the plaintiff. Delay more often works against a plaintiff’s interests than against those of a defendant.”

21. It is the Respondent’s case that all the pertinent issues to the claim, *inter alia*, estoppels were available to the Applicant at the time of institution of the suit and on being granted leave to amend the Plaintiff in the previous instances. The Respondent further submits that the Applicant failed to demonstrate why the items were not raised and allowing the Application would delay the matter and cause injustice to the Respondent who has a legitimate expectation that litigation should come to an end.

22. The Respondent prayed that the application be dismissed with costs based on the foregoing.

Analysis and Determination

23. I have carefully considered the Applicant’s application, the affidavits filed by parties and the extensive submissions by parties as well as the case law cited. I find that the only issue for determination is whether the application is merited.

24. **Order 8 Rule 5 of the Civil Procedure Rules** on amendment of pleadings provides:

“(1) 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.

(2) This rule shall not have effect in relation to a judgment or order.”

25. The power of the Court to allow or refuse a party to amend pleadings is discretionary as was held in the case of *Andrew Wabuyele Biketi vs. Chinese Centre for The Promotion of Investment Development & Trade in Kenya Limited & 2 Others [2015] eKLR*, where the court in disallowing an application for amendment stated as follows;

“...the court has discretion to order amendment at any stage before judgment. And amendment should be freely allowed provided it is not done mala fide, and does not occasion prejudice or injustice to the other party which cannot be compensated by award of costs”.

26. In the same vein, the discretionary power of the court in granting or refusing an application for amendment of pleadings should be exercised judicially and in consideration of the facts of the case in particular. The Court in **Bosire Ogero v Royal Media Services [2015] eKLR**, held:

“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”

27. In ascertaining the requirements for exercising the discretion to grant or refuse amendment of pleadings, I borrow from the decision in the case of **Daniel Ngetich & Anor V K-Rep Bank Limited [2013] Eklr** where it was stated that:

“...Normally the court should be liberal in granting leave to amend a pleading. But it must never grant leave for amendment if the court is of the opinion that the amendment would cause injustice or irreparable loss to the other side or if it is a device to abuse the process of the court. The power to allow amendments is intended to do justice; for, all amendments ought to be allowed which (a) do not work injustice to the other side, and (b) are necessary for the purpose of determining the real question in controversy between the parties; and all the authorities lay down precisely the same doctrine, that amendment should be refused only where the other party cannot be placed in the same position as if the pleading had been originally correct, but the amendment would cause him an injury which could not be compensated in costs. The court must aim at seeing that a multiplicity of suits is avoided, the real matters in controversy between the parties are clearly brought out, the other party is not prejudiced, the character of the suit or defence is not altered, and the object of the amendment is not to abuse the process of the court or unnecessarily delay justice or work a clear injustice”.

28. The foregoing position speaks the same language as in the case of **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991** (unreported) as cited with approval in **St Patrick’s Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR** in which the Court of Appeal set out the principles governing amendment of 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 and amendment notwithstanding the expiry of current period of limitation.”

29. In the annexed Further Further Amended Plaintiff, the Applicant introduces particulars of breach of contract, the doctrine of estoppel with regards to the contract, the particulars of damages and varies the amount prayed for as a result of the amendment of the particulars of damages suffered.

30. In the case of **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR** where the Court was faced with establishing whether amending the Plaintiff would occasion substantial injustice and prejudice, the court held that:

“On the contention by the Respondent that if the amendment sought, substantial injustice will be occasioned on them and the same would defeat its defence, this court finds to the contrary. As I have mentioned earlier, the amendment sought herein is not a novel issue and it’s not at all introducing a new cause of action which is substantially different from the already existing one. The case by the plaintiff and reliefs sought against the defendant is expressly pleaded in the plaint.”

31. Further in the case of **Emerge Development Limited v Chestnut Uganda Limited & another [2020] eKLR** the Court held that:

“I find that the proposed amendments do not introduce a new cause of action or change the character of the case, but arise from the same set of facts and are necessary so as to provide clarity of issues that will enable the court to conclusively determine all the issues between the parties to the suit.”

32. In my considered opinion, I do not see how the amendments proposed in the Further Further Amended Plaintiff dated 13th November, 2020 departs from the original claim and the Further Amended Plaintiff filed on the 3rd day of September, 2019. All the issues being added in the amendment do not depart from the original claim or change the character of the suit. Instead, they are issues that crystalize the Plaintiff’s

case and will accordingly aid that court in determining the case.

33. Further, no substantial injustice will be suffered by the Respondent which cannot be compensated by away of costs as the matter is still at the preliminary stages and hearing of the same is yet to commence.

34. The Respondent has raised the issue of jurisdiction of the Court to entertain the matter in terms of the proposed Further Further Amended Plaintiff. In briefly addressing the same, I concur with the position of the court in the case of **City Clock Limited v County Clock Kenya Limited & another [2020] eKLR** where the court held:

“I further find that the questions regarding the jurisdiction of this court to entertain the suit, with the proposed amendments, is an issue that the defendants can raise in their defence for the court’s determination at the appropriate time.”

35. On this, I find and hold that the issue has been raised prematurely. The Defendant will definitely have an opportunity to make a rejoinder in its Defence.

Deposition

36. The upshot is that I find the application dated the 15th day of September, 2021 meritorious and make the following orders –

- 1. THAT the plaintiff is granted leave to amend its Further Amended Plaintiff.**
- 2. THAT the Further Further Amended Plaintiff be filed and served within 7 days from the date of this Ruling.**
- 3. THAT the defendant is granted corresponding leave to amend, file and serve a Further Further Amended Defence within 14 days from the date of service with the Further Further Amended Plaintiff.**
- 4. THAT the costs of the application are granted to the Defendant.**

37. It is so ordered.

DATED AND DELIVERED AT NAIROBI THIS 13TH OCTOBER, 2021

G.W.NGENYE-MACHARIA

JUDGE

In the presence of:

- 1. No appearance for the Plaintiff/Applicant.**
- 2. Mr. Muyuri for the Defendant/Respondent.**