



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 7 OF 2018

BIASHARA MASTERS SAWMILLS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

KENYA POWER & LIGHTING COMPANY.....DEFENDANT/RESPONDENT

RULING

1. The **Notice of Motion** application dated **17th February 2020** by the plaintiff/applicant herein seeks for orders that leave be granted to amend the plaint dated February 2018. That the costs of the application be in the cause.
2. Grounds on the face of the application are that on **8th February 2018** plaintiff/applicant filed and served its plaint together with its list of witness, witness statement and bundle of documents where it sought for damages in the sum of Kshs. 360, 808,692.48. That the said claim for damages was based on the documents within its possession at the time of filing suit. That it had obtained additional documents that upon assessment establish that the loss and damage as a result of the fire incident was in the sum of Kshs. 671,892,332.50. That further, the proposed amendment is necessary to enable this court to make a just determination of the claims of the parties in the suit. In addition, the defendant/respondent will not suffer any prejudice by the proposed amendments.
3. The application is supported by affidavit sworn by one of the directors of the plaintiff/applicant Daniel Waithanji Mwangi on **19th February, 2020**. He restated grounds on the face of the application already captured above.
4. The defendant/respondent on the other hand opposed the application through the grounds of opposition dated **14th March 2020**.
5. The application was canvassed by way of written submissions filed by both parties.

Plaintiff/Applicant's Submissions

6. The plaintiff submitted that the issue for determination was whether this court should exercise its discretion to grant it leave to amend its plaint dated **8th February 2018**. The plaintiff/applicant quoted **Order 8 rule 3(1) of the Civil Procedure Rules, 2010** which provides that the court may at any stage of the proceedings direct or allow any party to amend his pleadings. That further **Order 8 rule 5(1)** provides for the purposes of amendment of pleadings and that the rationale for allowing amendment of pleadings was explained in the case of **Institute for Social Accountability & Another vs Parliament of Kenya & 3 others [2014] eKLR**.
7. The plaintiff/applicant placed reliance in the case of **Central Bank of Kenya Limited vs Trust Bank Limited [2000] 2 EA 365 at page 368** where the court held in part that it is trite law that as far as possible a litigant should plead the whole of his claim which he is entitled to make in respect to his cause of action. The plaintiff/applicant submitted that no prejudice will be occasioned to the defendant/respondent as hearing of the suit had not started and pre-trial directions were yet to be taken.
8. The plaintiff/applicant invited the court to exercise its discretion in allowing the amendment. It draws the courts attention to the case of **Gladys N. Muchena vs Aga Khan Education Services Kenya [2010] eKLR** and further the Halsbury's Law of England Fourth Edition Volume 36 at paragraph 69 which sets out the general principles applicable in the amendment of pleadings.
9. The plaintiff/applicant submitted that its application is not time barred and that the proposed amendments do not intent to amend or introduce a new cause of action but rather the amendment of the sum claimed. It urged the court to allow its application as prayed.

Defendant's/Respondent's Submissions

10. In opposing the application, the defendant/respondent submitted the plaintiff's/applicant's right under **Order 8 Rule 3(1) of the Civil**

Procedure Rules 2010 was not automatic and sufficient grounds for the amendments was to be rendered for consideration. That claim sought to be introduced is time barred by the Limitations of Actions Act. The court's attention is drawn to the case of **Dhanesvar v Mehta vs Manilal M. Shah [1965] 1 E. A 321** as cited in the case of **Delphis Bank Limited (Under Statutory Management) v Flystar Limited [2016] eKLR** where the court held that when the period of limitation for an application under **O. 23 r. 3** has expired the amendment should not be allowed unless there is a sufficient reason for the delay.

11. The defendant/respondent submitted that the burden of proof lies upon the party who invokes the aid of the law and substantially asserts the affirmed of the issue as per the provision of **Section 107 (i) of the Evidence Act**. The defendant/respondent submitted further that the applicant ought to have attached the document recently discovered as evidence to their application. It cited **Section 108 of the Evidence Act** which provides that the burden lies in that person who would fail if no evidence was given at all.

12. The defendant/respondent placed reliance on the case of **Dominic Ooko v Standard Group Limited & Another [2021] eKLR** and submitted that the object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on one hand, and on the other hand to protect a defendant after he had lost the evidence of his defence. He urged the court to dismiss the instant application with costs in its favour.

Analysis and Determination

13. I have considered the pleadings and submissions by parties and in my view the issue for determination is whether the plaintiff's/applicant's application is merited.

14. The general power to amend pleadings is donated by **Section 100 of the Civil Procedure Act** which is the substantive law and 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.”

15. **Order 8, rule 3 of the Civil Procedure Order** provides for amendment of pleading with leave;

(1) “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.”

16. **Further Order 8 rule 5 (1)** on general power to amend provides;

“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.”

17. In the instant case the plaintiff/applicant seeks to amend the special damages in its plaint filed in court on **8th February 2018** from **Kshs. 360,808,691.48** to **Kshs. 671, 892,332.50/=**. The defendant/respondent on the other argue that the new document recently discovered ought to have been annexed in the application and that the said application is time barred. The plaintiff/applicant has gone ahead to attached the proposed amended plaint.

18. Taking totality of the application and the draft amended plaint attached to the application, it is apparent that although the supporting documents are not exhibited the defendant/respondent will have the opportunity to respond to the amendment and be able to raise any objection in its defence including any claim bordering on the statute of limitation. Further, the defendant/respondents has not indicated what particular prejudice they are likely to suffer if the said for amendment is allowed.

19. This court's discretion in allowing the same is guided by the sections of law as cited above and moreover the request to amend ought to be freely given in the interest of justice. See the decision by the Court of Appeal in **Stephen Boro Githua v Family Finance Building Society & 3 others [2015] eKLR** where the court held: -

“We reiterate that where the intended amendments are geared to place full and clear case before the court so that it is effectively and finally determined on its merits, it ought to be allowed for that is the way justice is done”

20. **The application is therefore allowed.** The applicant shall amend its plaint and serve within 14 days from the date herein.

21. **Costs to the respondent.**

DATED SIGNED AND DELIVERED VIA VIDEO LINK AT NAKURU THIS 14TH DAY OF DECEMBER 2021.

H K CHEMITEI.

JUDGE