



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**MILIMANI COMMERCIAL & TAX DIVISION**

**CIVIL SUIT NO. 558 OF 2004**

**ROSELYN DOLA OUKO**

**AARON TAFARI OUKO**

**(suing as administrators of the Estate of Jason Atinda.....PLAINTIFF/APPLICANT**

**VERSUS**

**KENYA COMMERCIAL BANK LIMITED.....1<sup>ST</sup> DEFENDANT/RESPONDENT**

**KENYA AIDS NGO CONSOTIUM.....2<sup>ND</sup> DEFENDANT/RESPONDENT**

**PATRICK KAMUNYU.....3<sup>RD</sup> DEFENDANT/RESPONDENT**

**JAMES NJUGUNA.....4<sup>TH</sup> DEFENDANT/RESPONDENT**

**RULING**

1. This ruling relates to a notice of motion application dated 4<sup>th</sup> September 2019; brought under the provisions of; Section 1A, 1B, & 3A of the Civil Procedure Act (cap 21) Laws of Kenya, Order 8 rule 3; Order 51 rule 1 of the Civil Procedure Rules 2010 and all other enabling provisions of the law.

2. The applicant is seeking for orders;-

a. That paragraphs 12, 13, 14, 15, 16, 17 and 18 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants Further Amended Statement of defence be struck out;

b. That the defendants do bear the costs of the application.

3. The application is premised on the grounds on the face of it and an affidavit sworn by Aaron Tafari Ouko, the Co-administrator of the Estate of the late Jason Atinda Ouko, the Applicant herein. He deposed that, on 20<sup>th</sup> March 2019, his Advocates on record sought leave of the court to substitute Mr. Andrew Ouko, with the current administrators of the estate of the late; Jason Atinda Ouko. Upon being granted leave by a consent order, the Advocates filed the second further amended plaint dated 7<sup>th</sup> May 2019 substituting Mr. Andrew Ouko with Roselyne Dola Ouko and Aaron Tafari Ouko.

4. The second further amended plaint was solely for purposes of substituting Mr. Andrew Ouko, with the current administrators who were appointed pursuant to the grant of Letters of administration in 2006; as such the same did not raise any new issue.

5. However, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants in responding to the second further amended plaint have filed a further amended statement of defence dated 21<sup>st</sup> June 2019, that raises new issues vide paragraphs 12, 13, 14, 15, 16, 17 and 18 that were not canvassed in either the original defence or amended statement of defence.

6. The Applicant argues that, these issues cannot be raised in the further amended statement of defence, as they are not in response to any amended averment in the second further amended plaint. Thus they can only be raised with the leave of the court, which has not been sought

for herein. Hence, therefore, paragraphs 12, 13, 14, 15, 16 17 and 18 of the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> of the ought to be struck out from the further amended statement of defence.

7. However, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants filed grounds of opposition in response to the application and argued that; the application is unmerited and lacks any basis in fact and/or in law. That no sustainable and/or justifiable ground has been adduced before the court to warrant the draconian and mischievous orders sought for by the “1<sup>st</sup> defendant”. ( I believe they meant the Plaintiff)

8. That the plaintiff was granted corresponding leave to file a reply to 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendant’s further amended statement of defence and therefore there is no legal basis to warrant such as pre-emptive, prejudicial and unfounded orders as sought for at an interlocutory stage. The application is intended to delay, derail and prejudice prosecution of the proceedings herein. It is misguided, unconscionable, ill-advised, oppressive and grossly prejudicial to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants right to a just, impartial and/or fair. Further besides being unfair, unjust and inequitable it is made in utter bad faith, and ought to be dismissed in totality with costs in the interest of justice.

9. The application was disposed of vide written submissions wherein the Applicant reiterated that, on 20<sup>th</sup> March 2019, the parties appeared before Hon. Elizabeth Tanui and by consent the plaintiff was allowed to amend the plaint restricted to substituting the plaintiff with the duly appointed administrators of the estate of Jason Atinda Ouko; which culminated in the filing of the second further amended plaint.

10. However, whereas the defendants were entitled to amend their pleading on record in response to the amendments introduced by the plaintiff, any such amendments could only be restricted to responding to the amendments introduced by the plaintiff. The issues introduced through these purported amendments; were the subject of, suit ELC No. 48 of 2007: Kenya Aids Consortium vs Andrew Ouko which was dismissed for want of prosecution. The defendants then filed an application seeking to set aside the dismissal orders and a ruling on that application is scheduled to be delivered by Hon. Justice Okong’o, on the 28<sup>th</sup> November 2019.

11. It was further submitted that, the amendment changes the character of the defence earlier preferred by the defendants. That the defendants had the chance and/or opportunity to file a formal application seeking to amend their defence to introduce the issues they have now purported to introduce through the back door; but they made a conscious decision not to seek the court’s leave. In the circumstances, these amendments should be disallowed and/or struck out with costs to the applicant.

12. However, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants submitted that, the power of striking out pleadings or suit should only be exercised after the court has considered all facts and not the merits of the case. That the power to strike out pleadings has been held to be a draconian measure which ought to be employed only as a last resort and only in the clearest case.

13. That the court is mandated to determine matters before it without undue regard to procedural technicalities as espoused under Article 159 of the Constitution of Kenya 2010, and an application will not be defeated on a technicality or want of form. The Respondents lied on the provisions of; Order 2 Rule 13, 15, Order 8 Rule 1(1) of the Civil Procedure Rules, 2010 and the case of; D.T. Dobie & Co. (Kenya) Ltd vs Muchina (1982) KLR 1.

14. That the plaintiff was granted leave to amend the plaint and the defendants were equally granted leave to amend the defence. That the further amended defence cannot be struck out simply because it raises new issues. The plaintiff exercised their right of response and filed a reply to defence and instead of addressing the issues raised in the further amended defence opted to file an application to strike out the defence.

15. The Respondents argued that, amendments should be freely allowed provided they are done in bad faith and they do not occasion injustice to the other party which cannot be compensated by way of costs. Reference was made to the case of; Daniel Ngetich & Another vs KRep Bank Limited (2013) KLR where the court held that:-

“normally the court should be liberal in granting leave to amend pleadings. But it must never grant leave 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.”

16. The Respondents further submitted that this matter was filed over ten years ago and at one point was listed for notice to show cause why it should not be dismissed for want of prosecution. The matter has dragged in court due to the plaintiff’s unwillingness to prosecute and this is one of the many unmerited tactics being employed to delay the hearing and final determination of this matter.

17. I have considered the application in the light of the arguments advanced and I find that the main issue to determine is whether; the subject amendments introduce a new cause of action and/or are prejudicial to the Respondent. The law on amendment of pleadings is settled. In that regard Section 100 of the Civil Procedure Act states that;

“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.

18. Similarly, Order 8 Rule 1(1) and (2); of the Civil Procedure Rules provides that;-

“1(1) A party may, without the leave of the court, amend any of his pleadings once at any time before the pleadings are closed.

(2)---

19. In the same vein; *Order 2 Rule 15 of the Civil Procedure Rules, 2010* stipulates that:-

“1. At any stage of the proceedings, the court may order to be struck out or amended any pleadings on the ground that:-

- a. It discloses no reasonable cause of action;
- b. It is scandalous, frivolous or vexatious;
- c. It may prejudice, embarrass or likely delay the fair trial of the action; or
- d. It is otherwise an abuse of the process of the court....

(2) No evidence shall be admissible on an application under subrule (1) (a) but the application shall state concisely the grounds on which it is made.

20. Similarly, in the case of; *D.T. Dobie & Co. (Kenya) Ltd vs Muchina (1982) KLR 1*, the Court of Appeal stated that, the power to strike out a pleading is a discretionary one that ought to be applied very sparingly. It should be exercisable only in very plain cases and set the conditions of striking out as follows:-

“(a) the court should not strike out if there is a cause of action with some chance of success;

(b) the power should only be used in plain and obvious cases with extreme caution;

(c) the power should only be used in cases which are clear and beyond all doubt;

(d) the court should not engage in a minute and protracted examination of documents and facts;

(e) if a suit shows a resemblance of a cause of action, provided it can be injected with real life by amendment, it ought to be allowed to go forward.”

20. I have considered these legal principles in the light of the facts herein and I find that first and foremost, the Respondents only filed grounds of opposition, they did not file a replying affidavit to rebut the averments in the affidavit in support of the application therefore generally the averments therein remains uncontroverted.

22. Be that as it were, a perusal of the plaintiff’s pleadings reveal that the initial plaint is dated 10<sup>th</sup> October 2004. The first amendment was effected on 29<sup>th</sup> November 2004, it was further amended on 26<sup>th</sup> May 2014 and the second further amendment effected on 7<sup>th</sup> May 2019. The Respondents initial defence is dated 16<sup>th</sup> December 2014, amended on 11<sup>th</sup> July 2014 and further amended on 21<sup>st</sup> June 2019.

23. The amendments reflected in the second further amended plaint were made on only two issues; names of the plaintiffs and the date of the amendment. However, the Respondents in response have made amendments on the following; the names of the plaintiffs, paragraph 1, 2, 3, 4, 5, 6, 7, 8, 10-18. The amendments at paragraphs 2-8 are minimal as they merely introduce the words “the second and/or the second further amended plaint”. I note that Paragraph 10 of the further amended defence responds to paragraph 20 of the second further amended plaint. Paragraph 11 does not indicate the corresponding paragraph in the plaintiff’s pleadings. However it is not one of the paragraphs the Applicants seek strike out.

24. The Applicants take offence with the averments at paragraphs 12-18 of the Respondents further amended statement of defence. I have considered the same and I find that, paragraphs 12, 13, 15 and 16 are introducing new issues that were not a subject of the amendment effected by the Respondents vide the amendments made on 7<sup>th</sup> May 2019. In fact they do not show to which of the paragraphs in the further amended plaint they are responding to. Neither did the Respondents swear an affidavit to justify why the same should be admitted. Being new matters that are being raised, and not the subject of the amendments as aforesaid, it will not be in the interest of justice to allow those amendments to stand. Even then, in my considered opinion, striking of this paragraph will not prejudice the Applicants as the issues raised therein can be sufficiently covered in evidence.

25. Finally, I find that paragraph 14 clearly indicates that it is responding to paragraph 21 of the second further amended plaint while paragraph 17 indicates that it is responding to paragraph 23 thereof and paragraph 18 purely pleads on the jurisdiction of the court. In that regard, I find that there will be no prejudice suffered if the same were to remain on record. I therefore decline to strike them out.

26. I therefore allow the application in terms of prayers (1) as it relates to paragraphs 12, 13, 15 and 16 of the further amended statement of defence dated 21<sup>st</sup> June 2019. The costs of this application will abide the outcome of the main suit.

27. Those are the orders of the court.

**Dated, delivered and signed in an open court this 13<sup>th</sup> day of February 2020.**

**G.L. NZIOKA**

**JUDGE**

In the presence of:

Mr. Ahmednassir SC for the plaintiff/Respondent

Ms. Mukami holding brief for Ms. Lubano for the 1<sup>st</sup> defendant

Mr. Gathemia for the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> defendants/Applicants

Dennis -----Court Assistant