



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 6 OF 2016**

**CITY CLOCK LIMITED.....PLAINTIFF**

**-VERSUS-**

**COUNTY CLOCK KENYA LIMITED.....1ST DEFENDANT**

**BONIFACE MUANGE KITIVO.....2ND DEFENDANT**

**RULING**

1. Through the application dated 1<sup>st</sup> June 2020 which application is supported by the affidavit of **Mr. Tillmann W. Proske**, the plaintiff seeks leave to amend its plaint in order to introduce further evidence in support of its case.
2. The defendants opposed the application through the replying affidavit of **Paul Muimi Mutemi**.
3. Parties canvassed the application by way of written submissions which I have considered. Order 8 Rules 3 and 5(1) of the Civil Procedure Rules stipulates as follows: -

***“(3) (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.”***

***“(3) (5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”***

***General power to amend***

***“(5) (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 documents to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”***

4. In ***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 the Court of Appeal set out the principles governing the 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.*

5. In *Harrison C. Kariuki v Blueshield Insurance Company Ltd* [2006] eKLR the court referred to the Court of Appeal decision in *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365 and held that: -

***“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”***

6. In the present case, the plaintiff listed the following reasons/grounds in support of its application for leave to amend plaint: -

***i. The need to implead how the use of the word ‘Country Clock’ has led to confusion with the plaintiff’s mark.***

***ii. The need to include specific details relating to the plaintiff’s advertising units.***

***iii. The need to particularize the claim relating to confidential information.***

***iv. The need to have the court effectively determine the real questions/issues in controversy.***

7. On their part, the defendants listed the following grounds for opposing the application: -

a) That the application has been brought late in the day and is an afterthought.

b) That there is an appeal that has been filed against the decision by the Tribunal which the plaintiff seeks to rely upon.

c) That the plaintiff seeks to introduce a claim relating to an employment dispute.

d) That the application is not brought in good faith.

8. On the aspect of delay, the defendants submitted that the application has been brought after a delay of 4 years which delay is, in their view, unreasonable, unconscionable and in excusable.

9. It was also submitted that the proposed amendment seeks to introduce new prayers that will necessitate the court to make a finding not within its mandate. The defendants argue that the proposed amendments seek to have the court make determination outside its scope of jurisdiction.

10. I have considered the reasons advanced by the plaintiff for seeking leave to amend the plaint alongside the reasons advanced by the defendant for opposing the same.

11. I note that while it is true that the application has been brought at least 4 years after the filing of the suit, the delay cannot be wholly attributed to the fault of the plaintiff. I say so because a perusal of the court file shows that the parties herein at some point attempted mediation process as a way of resolving the dispute. It is clear that it was not until 23<sup>rd</sup> October 2019 that the court was informed of the failure in mediation and the matter thereafter listed before the Deputy Registrar for Case Management. It is also clear that as at the time of filing the instant application, the Case Management Conference had not been conducted.

12. Having regard to the proceedings so far conducted in this matter and taking into account the fact that the Case Management Conference has not been done, I find that the proposed amendment of the plaint will not prejudice the defendant’s case as they will still have the chance to amend their pleadings should they deem it necessary.

13. 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.

14. For the above reasons and having regard to the above cited authorities on amendment of pleadings, I find that the application in the following terms: -

***a) The plaintiff is granted leave to amend its plaint.***

***b) The amended plaint to be filed and served within 7 days from the date of this ruling.***

***c) The defendants are granted corresponding leave to amend file and serve an amended defence within 14 days from the date of service with the amended plaint.***

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

**Dated, signed and delivered via Microsoft Teams at Nairobi this 15<sup>th</sup> day of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17<sup>th</sup> April 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Kiamba for the applicant.

No appearance for the defendant.

Court Assistant: Sylvia