



**Bsk Global Technologies Limited v Rural Electrification & Renewable Energy Corporation
& another; Sidian Bank Limited (Interested Party) (Commercial Case E347 of 2024)
[2025] KEHC 13577 (KLR) (Commercial and Tax) (18 September 2025) (Ruling)**

Neutral citation: [2025] KEHC 13577 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE E347 OF 2024
MN MWANGI, J
SEPTEMBER 18, 2025**

BETWEEN

BSK GLOBAL TECHNOLOGIES LIMITED PLAINTIFF

AND

**RURAL ELECTRIFICATION & RENEWABLE ENERGY CORPORATION 1ST
RESPONDENT**

**THE CHIEF EXECUTIVE OFFICER, RURAL ELECTRIFICATION &
RENEWABLE ENERGY CORPORATION 2ND RESPONDENT**

AND

SIDIAN BANK LIMITED INTERESTED PARTY

RULING

1. The genesis of the application dated 5th December 2024 filed by the defendants is that on 30th October, 2024, Mr. Kipyegon Advocate for the 1st and 2nd defendants and Mr. Muchemi Advocate for the plaintiff appeared before me for directions for the Notice of Motion dated 27th June 2024 which had been filed by the plaintiff.
2. In the course of the proceedings of 30th October 2024, Mr. Muchemi sought leave to amend prayer No. 3 of the Notice of Motion dated 27th June 2024 so as to read-

“ pending the hearing and determination of the Arbitration”.



3. Mr. Kipyegon did not object to the application and I granted leave to the plaintiff's Advocate to amend prayer No. 3 of the Notice of Motion dated 27th June 2024. I proceeded to give further directions and listed the case for mention on 16th December 2024 to take a Ruling date.
4. Come the said date, Mr. Kipyegon stated that they had filed an application seeking to stay the directions given relating to the amended application dated 5th November 2024. He prayed for the defendants' application to be dispensed with first because when the plaintiff prayed to amend its application, it added three (3) prayers for which leave had not been granted. I then gave directions to the effect that the application dated 5th December 2024 would be heard first. I also gave directions as to the filing of responses.
5. The Notice of Motion application dated 5th December 2024 has been brought under the provisions of Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 3A of the *Civil Procedure Act* (Cap 21) Laws of Kenya and all enabling provisions of the law. The defendants seek the following orders –
 - a. Spent;
 - b. Spent
 - c. Prayers 3, 5 and 6 of the Amended Notice of Motion dated 5th November 2024 be and is (sic) hereby struck off the record as being incompetent for having been amended and filed without leave of this Court;
 - d. That this Honourable Court do issue any such orders further and/or directions as it deems fit and appropriate in the circumstances of this case; and
 - e. That costs of this application be provided for in the cause.
6. The defendant's application is supported by an affidavit sworn on 5th December 2024 by Mr. Evans Kipyegon, the Legal Officer of the 1st defendant. He averred that on 30th October 2024 when the respondents' (defendants) application was set to be heard, the defendant sought for leave of the Court to amend prayer No. 3 of its Motion which reads – "That pending hearing and determination of the suit, the Honourable Court be pleased to issue temporary order of injunction" so as to read "That pending hearing and determination of the arbitration proceedings the Honourable Court be pleased to issue temporary order of injunction..."
7. He stated that given that the proposed amendments to the Notice of Motion application dated 27th June 2024 as set out by the defendant did not alter the nature of the Motion and did not introduce a new cause of action, the applicants did not object to the same and the Court granted the respondent (plaintiff) leave to amend prayer No. 3 of its Motion dated 22nd June 2024 as indicated in its oral application for leave in Court. He further stated that the Court subsequently issued directions to the parties and fixed the matter for mention to take a Ruling date on 5th November 2024.
8. Mr. Kipyegon deposed that upon perusal of the Amended Notice of Motion dated 5th November 2024, the defendants noted that the plaintiff had materially and substantially differed from the nature of the amendments it had set out in Court at the time of applying for leave, and for which leave of the Court was granted.
9. He further deposed that the plaintiff's application as set out in Court by its Counsel on record specifically sought to amend only prayer No. 3 of the Notice of Motion dated 27th June 2024 as captured in paragraph 1 of the defendants' affidavit, and as set out in paragraph 4 of the plaintiff's Amended Notice of Motion dated 5th November 2024.



10. Mr. Kipyegon stated that the plaintiff in its Amended Notice of Motion dated 5th November 2024 introduced new prayers by way of amendments, to wit, prayers No. 3, 5 and 6 of the said application for which no leave was sought, as was set out in Court by the defendants during their application for leave to amend.
11. He deposed to being aware of the fact that where leave to amend pleadings had been granted, an applicant is only allowed to include matters for which such leave was granted and not introduce such matters that were not brought to the attention of the Court and the parties at the time of seeking leave to amend.
12. He averred that he was aware that where amendments are introduced without leave of the Court, such amendments are not properly on record, are a nullity and are liable to be struck off the record.
13. Mr. Kipyegon contended that the new prayers No. 3, 5 and 6 introduced in the Amended Notice of Motion without first seeking leave of the Court not only violate the Rules of procedure, but is also a sharp practice and a trial by ambush as it denied the defendants an opportunity to challenge or respond to the amendments introduced without leave, which is prejudicial to the defendants.
14. He deposed that paragraphs 3, 5 and 6 of the Amended Notice of Motion ought to be struck out as they have the effect of substantially altering the nature of the Motion and the suit.
15. Mr. Kipyegon contended that the prayers introduced by the Amended Motion without leave of Court are not anchored on the plaintiff's plaint and cannot be sustained since they are not sought in the main suit and ought to be struck out.
16. In opposition to the application, the plaintiff filed a replying affidavit sworn by Mr. Meshack Muhoho, the plaintiff's Director, on 7th February 2025. In the said affidavit at paragraph 3, the plaintiff withdrew prayer No. 3 of the Amended Notice of Motion dated 5th November 2024 that seeks a temporary injunction against the 1st and 2nd defendants from contracting or engaging any third party to undertaking, implementing, or completing the project that is the subject of these proceedings.
17. He averred that the reliefs sought in the plaintiff's Amended Notice of Motion dated 5th November 2024 including referral of this matter to arbitration and the appointment of an Arbitrator, are directly linked to the contractual dispute between the parties subject to Clause 43.2 of the Performance Bond Contract Agreement dated 6th May 2022, and are further within the purview of this Court under Section 7 of the *Arbitration Act*, 1995.
18. He contended that the amendments in the plaintiff's Notice of Motion dated 5th November, 2024 are necessary for the just and effective determination of the issues in dispute, as they do not introduce any new facts or cause of action as they only seek to enrich prayer No. 4, for the matter to be referred to arbitration.
19. He further contended that the 1st defendant's breaches, including refusal to provide a finance team, delay in sign offs, and wrongful recall of the performance bond, are the issues that have necessitated this urgent intervention.
20. Mr. Muhoho deposed that the plaintiff's application dated 5th December 2024 ought to be dismissed in order to align it with Article 159(2)(c) of *the Constitution* of Kenya which underscores the importance of arbitration.
21. He stated that granting additional reliefs supports the said constitutional imperative and that the balance of convenience tilts in favour of granting the reliefs sought to maintain the integrity of the Arbitration proceedings.



22. He stated that he had been informed by his Advocate that Courts have been slow to strike out documents filed in Court proceedings as deviations from, or lapses in form and procedure do not go to the jurisdiction of the Court or prejudice the adverse party in any fundamental respect and ought not to be treated as nullifying the legal instrument so effected.
23. He further stated that the defendants have failed to demonstrate or particularize the kind of prejudice they would suffer should the plaintiff's amendments be allowed.
24. He stated that the amendments do not seek to introduce new facts or inconsistencies through the back door, but rather to clarify and support the claims already presented before Court.
25. Mr. Muhoho urged this Court to dismiss the defendants' application dated 5th December 2024, seeking to strike out the additional reliefs sought in the amended application which do not introduce any new cause of action as they seek to uphold the contractual clause of Arbitration in the contract Agreement hence it is not a new fact, and it would not therefore prejudice the defendants in any way.
26. He urged this Court to uphold the plaintiff's amended application of 5th November 2024 and refer the dispute to arbitration as per the contract. He prayed for appointment of an Arbitrator by the Chairperson of the Chartered Institute of Arbitrators (Kenya), and for this Court to grant any further relief as it deems just and equitable in the circumstances.
27. The defendants filed a further affidavit sworn by Mr. Evans Kipyegon on 3rd March 2025 to support their application dated 5th December 2024. He stated that since the plaintiff had withdrawn prayer No. 3 of its Amended Notice of Motion dated 5th November 2024, the remaining amendments that the defendants were seeking to have struck out were prayers No. 5 & 6 of the said application.
28. The defendants reiterated that the leave granted by the Court on 30th October 2024 limited the plaintiff to amend its Notice of Motion dated 27th June 2024 but did not include introducing prayers No. 5 and 6 of the Amended Notice of Motion.
29. He further reiterated that whereas he was aware that Courts have the discretion to allow parties to make amendments after pleadings have closed, parties must first seek leave of the Court before making such amendments. He contended that the impugned amendments were introduced post facto, after leave had been granted, which is procedurally and legally improper.
30. He averred that Courts have time and again held that it is presumptive, inappropriate and a nullity for a party to file documents out of time without leave, and thereafter seek the Court's indulgence to allow them to be deemed as properly filed. He expressed the view that such an action cannot be regarded as a procedural technicality as alluded to by the plaintiff.
31. Mr. Kipyegon deposed that the amendment sought to be introduced by the plaintiff through prayers 5 and 6 of the Amended Notice of Motion has the effect of reviewing the contract between the parties as in the said contract, they agreed specifically on the choice of Arbitrator. He added that there has been no dispute that has been presented to the Court by the plaintiff that is capable of being referred to Arbitration, thus there is no cause for the Court to appoint an Arbitrator.
32. He averred that whereas the plaintiff in these proceedings intimated about its intention to institute arbitral proceedings against the defendant for breach of contract, the plaintiff has not taken any steps to refer its grievances to arbitration or to commence the arbitration proceedings in accordance with the terms of the contract between the parties.
33. He averred that the Court's intervention would not be of necessity in the circumstances herein, as the process of the aggrieved party referring any dispute under the contract to Arbitration is already



- provided for under Clause 23 of the special conditions of contract dated 6th May 2022 and Clause 12 of the special conditions of the contract dated 26th September 2019.
34. He stated that the amendments sought to be introduced in prayers 5 and 6 of the Amended Notice of Motion dated 5th November 2024 are not essential for the effective determination of the dispute between the parties and the Court ought to strike them out.
 35. The law firm of Sharon Tugee Advocates filed written submissions dated 24th February 2024 for the defendant. Some of the contents of the said submissions are contained in the defendant's supporting affidavit and there is no need to regurgitate the same. The law firm of Muchemi & Co. Advocates filed written submissions dated 7th February 2025 for the plaintiff.
 36. Mr. Kipyegon, learned Counsel for the defendants stated that amendment of pleadings is provided for under Section 100 of the Civil Procedure Act and Order 8 Rule 1 of the Civil Procedure Rules and that where pleadings have closed, leave of the Court must be sought so that the other party can be given an opportunity to respond to the application. He cited the case of Kenneth Kibimiru Kigalo v Mastermind Tobacco (K) Limited & another [2020] KEELRC 658 (KLR) and Public Trustee v Pius M. Katambo [2018] KEELC 2937(KLR), where different Courts struck out amended pleadings in a suit filed after close of pleadings and an amended application, respectively, filed without leave of the Court.
 37. He also relied on the case of Republic v Chief Land Registrar & another, Criticos & another (Exparte applicants); Seva & 446 others (Intended Interested Party) [2024] KEELC 111 (KLR), to show that it was incumbent on the plaintiff herein to seek leave of the Court before proceeding to introduce additional amendments to the application in issue.
 38. Mr. Muchemi, learned Counsel for the plaintiff gave a brief background of the contract between the plaintiff and the 1st defendant. He submitted that the plaintiff has carried out the works under the contract diligently and regularly despite multiple breaches of contract by the 1st defendant which made it difficult for the plaintiff to fulfil its obligations therein. It was stated that the 1st defendant by way of a letter dated 26th June 2024, purported to call in the on-demand payable immediately performance guarantee issued by the interested party on behalf of the plaintiff.
 39. He contended that the actions of the 1st defendant in calling up the Performance Security Bond, being payment of the sum of Kshs.15,986,888.00 and Kshs.5,985,576.00 pending commencement of the hearing and determination of the suit by the Arbitral Tribunal constitutes bad faith on the part of the 1st defendant hence the plaintiff's invocation of Section 7 of the Arbitration Act seeking interim relief pending arbitration.
 40. The plaintiff's Counsel submitted that the amendments sought emanate from, and are directly linked to the contractual dispute between the parties subject to Clause 43.2 of the Performance Bond Contract Agreement dated 6th May 2022, and are further within the preview of this Court under Section 7 of the Arbitration Act, 1995.
 41. Mr. Muchemi stated that the amendments made to the plaintiff's Notice of Motion dated 5th November 2024 are necessary for the just determination of the issues in dispute; as they do not introduce any new facts or cause of action as they only seek to enrich prayer No. 4 for the matter to be referred to Arbitration. He referenced the case of St. Patrick's Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR, to bolster his submissions. He also cited the case K.K. Lodgit Limited v Geminia Ltd & another [2021] eKLR, on the issue that Courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute and if prejudice or injustice is to be occasioned, it must be one that cannot be compensated by an award of costs.



42. Mr. Muchemi contended that since the amendments made in the plaintiff's application will not change the nature of its case, and will not prejudice the defendants in any way, as the same is captured in the Performance Bond Contract which is the main subject of the suit between the parties herein, the onus then shifts to the defendants to show that the amendments sought would result in prejudice to them, which cannot be compensated in costs and/or that the amendments sought would introduce an inconsistent cause of action and/or that the amendment if allowed would take away interests or legal rights that have accrued to them and/or that the amendment would cause injustice to them, which they had not done. He prayed for the defendants' application to be dismissed.

Analysis and Determination.

43. I have considered the averments made by the parties in their affidavits and the submissions made by their Counsel. The singular issue for determination is if paragraphs No. 5 and 6 of the plaintiff's Amended Notice of Motion dated 5th November 2024 should be struck out.

44. This Court granted leave to the plaintiff to amend its Notice of Motion dated 27th June 2024 vide an oral application that was made by Mr. Muchemi, the Counsel for the plaintiff. Having disclosed the nature of the amendments, Mr. Kipyegon, Counsel for the defendants did not oppose the oral application seeking leave to amend prayer No. 3 of the said application. The said prayer reads as follows –

“That pending the hearing and determination of this suit, this Honourable Court be pleased to issue a temporary order of injunction restraining the interested party/3rd respondent or its agents from effecting any payments with respect to Performance Security Bond reference MD2336168303 in the sum of Kshs.15,986,888.00 and Kshs.5,985,576.00 respectively, issued by the interested party/3rd respondent, on behalf of the plaintiff/applicant in favour of the 1st defendant/respondent (sic) or its agents from recovering or making any claim arising from the said Performance Security Bond.”

45. The bone of contention as espoused by the defendants is that instead of only amending prayer No. 3 of the said application, which prayer has been replaced by paragraph 4 in the Amended Notice of Motion dated 5th November 2024, the plaintiff introduced two additional prayers for which no leave was sought from this Court.

46. The defendants pray for paragraphs 3, 5 and 6 of the amended application to be struck out for having been introduced into the Amended Notice of Motion without leave of the Court. The plaintiff's Counsel however withdrew prayer No. 3.

47. Paragraphs 5 & 6 of the Amended Notice of Motion read as follows –

“5. That this Honourable Court refer the dispute to Arbitration.

6. That this Honourable court direct that the chairperson of Chartered Institute of Arbitrators (Kenya) be the sole appointing authority of the Arbitrator in the dispute between the parties herein”

48. I have gone through the affidavit in support of the Amended Notice of Motion in a bid to understand why the plaintiff deemed it necessary to introduce additional amendments without leave of the Court.



49. Attached to the affidavit in support of the said application is the Agreement between the parties herein. Clause 23 thereof provides for settlement of disputes in the following terms –

“The Appointing Authority for the Adjudicator is not applicable”, any dispute between the Procuring Entity and the supplier arising in connection with the present Contract shall be referred to arbitration in accordance with the laws of Kenya. The same shall be referred to the Nairobi Centre for International Arbitration (NCIA) which offers a neutral venue for the conduct of national and international arbitration with commitment to providing institutional support to the Arbitral process”.

50. Having gone through the above Clause, I am in agreement with Counsel for the defendants that paragraphs 5 and 6 of the Amended Notice of Motion should not have been introduced to the said application without leave of the Court.

51. In my considered view, it would be prejudicial to allow the amendments in paragraphs 5 and 6 of the said application at this point as the defendants’ Counsel was not informed by the plaintiff’s Counsel of their intention to introduce the said amendments. Had the plaintiff’s Counsel intimated of their intention to do so, the defendants’ Counsel would most likely have referred this Court to the provisions of Clause 23 of the Agreement between the parties herein which provides for arbitration and the procedure to be followed and the seat of Arbitration if a dispute arose between the parties herein.

52. I do concur with the holding in Republic v Chief Land Registrar & another; Criticos & another (Exparte applicants); Seva & 446 others (Intended Interested Party) (supra), where the Court stated thus –

“.... To my mind, it was incumbent upon the Applicants herein to seek for (sic) and obtain leave of the court, Prior to and before the filing of the Impugned amended Notice of Motion Application. Be that as it may, my humble view is that the Applicants herein could not proceed to and Amend the Application and thereafter seek to validate the amended application ex-post facto. Suffice it to point out that such kind of conduct where a litigant proceeds to undertake an action without leave of the court; and thereafter seeks to procure leave, is irregular and cannot be countenanced by a Court of law ... to my mind it was incumbent upon the Applicants to obtain leave beforehand and in so far as no such leave was procured beforehand, the impugned amended Notice of Motion Application is vitiated and thus rendered a nullity.”

53. In this matter, inasmuch as the plaintiff and its Counsel tried to justify the amendments introduced in paragraphs No. 5 and 6 without leave of the Court, no explanation was given to show if they met any bottlenecks in trying to move this Court either by way of seeking a mention date to make an oral application or vide a formal application to seek leave of the Court before introducing additional amendments to the application dated 27th June 2024. It then follows that the plaintiff took this Court for granted by its mistaken belief that additional amendments would be allowed as a matter of course.

54. I have said enough to demonstrate that I am not persuaded that paragraphs No. 5 and 6 of the Amended Notice of Motion dated 5th November 2024 should not be struck out.

55. Since the plaintiff withdrew prayer No. 3 of the said application, the order that commends itself to me is to allow the application dated 5th December 2024. The resultant effect is that prayers No. 5 and 6 of the Amended Notice of Motion dated 5th November 2024 are hereby struck out for having been



introduced into the said application without leave of the Court. Prayer No. 3 of the said application stands withdrawn.

56. Costs of the application dated 5th December 2024 are awarded to the defendants/applicants.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 18TH DAY OF SEPTEMBER 2025.
RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

NJOKI MWANGI

JUDGE

In the presence of:-

Mr. Kipyegon for the defendants/applicants

Ms Kyumu holding for Mr. Muchemi for the plaintiff/respondent

Ms B. Wokabi – Court Assistant.

