

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
COMMERCIAL AND TAX DIVISION
CIVIL CASE NO. 356 OF 2005

D. CHANDULAL K. VORA & COMPANY ADVOCATES.....
PLAINTIFF

-VERSUS-

KENYA **REVENUE**
AUTHORITY.....**DEFENDANT**

RULING

1. This is a Ruling in respect of the Notice of Motion dated 9th May, 2024.
2. The Plaintiff/Applicant filed the Notice of Motion dated 9th May 2024 seeking the following orders;
 - a) *The Court to allow the Plaintiff to amend the Plaint dated 19th April 2005.*
 - b) *Costs of and/or incidental to this application be costs in the cause;*
3. The Application was supported by the grounds on the face of it and by the Affidavit of **RAJNIKANT C. VORA**, who stated that the suit, filed in 2005, stalled after failed out-of-court negotiations. The Defendant offered to settle the principal

sum of Kshs.3,880,000 without interest. Due to numerous interlocutory proceedings, the Plaintiff has now applied to amend the Plaint. The main issue is interest, and the Plaintiff seeks to amend prayer (b) to specifically claim interest from 7th October 1999 (the date of payment to the Defendant) until full settlement.

4. In response to the Application, the Respondent filed the Replying Affidavit sworn on 30th October 2024 and stated that having seen the Amended Plaint, it is clear that the same seeks to introduce a new cause of action. This is aimed at defeating the limitation of time which is 6 years to file a claim against the Defendant as provided under **Section 4(1) of the Limitation of Actions Act**.
5. Further, the Defendant is required under **Section 24 of the Tax Procedures Act** to only maintain documents for five (5) years and is therefore highly prejudiced as documents - necessary to defend the new cause of action that is being filed over twenty-five (25) years since the cause of action arose and may not be part of its current records.

6. That allowing this Application would be prejudicial to the Defendant as the Applicant/Plaintiff will use this opportunity to introduce new issues and fill up the gaps in its case at this stage, rendering the same improper in law and a waste of the Court's time.

Issues for Determination

7. The Court has considered the Plaintiff's Application, the Response filed as well as the submissions relied upon. The primary issue for determination by this court is whether it should allow the Plaintiff to amend its Plea. The Court thus frames a single issue for determination.

a) Whether leave should be granted to the Plaintiff to amend the Plea.

Analysis

8. The Applicant/Plaintiff herein wishes to amend prayer (b) of the plea to seek interest from 7th October 1999, when the

Plaintiff made the payment to the Defendant, until payment in full.

9. The Applicant argued that the amendment sought is neither an abuse of the Court process nor an introduction of a new cause of action. It is merely amending the terms of the original claim and it is necessary for the proper determination of the issues in dispute between the parties.

10. In contrast, the Defendant submitted that the proposed amendment should not be allowed as it will cause injustice to the Respondent who is unable to raise a formidable defense against the Amended suit due to a lack of witnesses and documents. This cannot be compensated by an award of cost in any manner.

11. The general power to amend pleadings is provided for under **Section 100 of the Civil Procedure Act**. It states 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.

12. Further to the above, the general power to amend is also provided for under **Order 8 Rule 5** which provides as follows:

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.

13. However, after the close of pleadings, a party must seek leave of the court before amending their pleading. This is prescribed under **Order 8 Rule 3 of the Civil Procedure Act** as below;

[Order 8, rule 3.] 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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under sub-rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub-rule (2) if the capacity in which the party will sue is one in which, at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under sub rule (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.

14. The Court of Appeal in **Central Kenya Limited vs Trust Bank Limited (2000) 2 E.A 365** set out the following principles that guide the Court in considering an application for amendment of pleadings:

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

15. The Court notes the special circumstances which led to the Court file going missing and eventually necessitating the

reconstruction of the file; the issue of delay, as argued by the Respondent, does not fit in this case.

16. With regard to the amendment, the issue of interest on the sum of Kshs 3,880,000/- was already pleaded in the original plaint, and the amendment herein merely seeks to clarify the date from which interest should accrue. It does not change the cause of action. The amendment is necessary for the fair and proper determination of the case and to be fair the Respondent has not demonstrated how the period of the accrual of interest affects its documents and how it will prejudice it given that the amendment does not change the cause of action.
17. In any event it is only fair that the Applicant states clearly from which date it seeks interest. This will avoid the Respondent being caught by surprise.
18. It is therefore the finding of the Court that the proposed amendments will enable the Court to adjudicate on the substantive merits of this case and the Applicant plead their case fully as well as the Respondent know which case they intend to meet. Further, the Defendant has not shown the

prejudice that it stands to suffer by the amendment of the Plaintiff. The question of whether to award interest or not is one that invites the exercise of discretion, unless it is provided for by a contract. The parties will still have to persuade the Court at the trial, whether to award or deny the interest as well as the applicable dates if interest is allowed. That is a river that is yet to be crossed. Parties now have ample time to prepare for that river crossing. Leave is hereby granted to amend the Plaintiff.

19. As to costs of the application, this a one application where the fair order is that let the costs abide the outcome of the suit.

Determination

20. The Plaintiff's Application by way of a Notice of Motion dated 9th May, 2024 is allowed in the following terms;
 - a) *The Court **HEREBY** allows the Plaintiff to amend the Plaintiff dated 19th April 2005. An Amended Plaintiff be filed and served upon the Defendant within the next*

Fourteen (14) days. *Corresponding leave is granted to the Defendant to file and serve an Amended Defence within the next **Fourteen (14) days.***

b) Costs of and/or incidental to this application be costs in the cause.

21. It is so ordered.

DATED, SIGNED AND DELIVERED AT MILIMANI THIS 09TH DAY OF OCTOBER, 2025.

NJOROGE BENJAMIN K.

JUDGE

In the presence of;

Miss Noor Plaintiff/Applicant.

Mr. Gaya for the Defendant/Respondent.

Mr. Peter Wabwire -Court Assistant