

REPUBLIC OF KENYA

IN THE ENVIRONMENT AND LAND COURT AT MOMBASA

ELC CASE NO. 232 OF 2019

NITIN JAYANTILAL RAJANI.....1ST

PLAINTIFF

RAMAGAURY JAYANTILAL RAJANI.....2ND

PLAINTIFF

VERSUS

SHAILESH JAYANTILAL RAJANI.....1ST

DEFENDANT SIMOUN TRAVEL LIMITED.....

.....2ND DEFENDANT

JEREMY NJENGA, VICTORIA WAMBUA, VIVIANNE W

WACHANGA &

PHYLLIS KIRAGU T/A J M NJENGA &

CO. ADVOCATES.....3RD

DEFENDANT

RULING

1. By a notice of motion dated 31.05.2025 filed pursuant to *Order 8 rules 3, 5, 7 and 8 for the Civil Procedure Rules (the Rules)*, the plaintiffs sought leave of court to amend their plaint in terms of the draft annexed to their supporting affidavit. They

also sought an order that the defendants be granted corresponding leave to amend their respective pleadings.

2. The application was based on the grounds set out on the face of the motion and the contents of the supporting affidavit sworn by the 1st plaintiff, Nitin Jayantilal Rajani on 31.05.2025. The plaintiff pleaded that the proposed amendment was necessary for the purpose of determining the real question in controversy among the parties. It was pleaded that the amendment related only to the prayers sought and does not affect the substance of the suit. It was contended that the proposed amendment shall not prejudice the defendants and that any prejudice thereby caused shall be adequately compensated by an award of costs.
3. It was the plaintiffs' case that the impugned transactions were tainted with secrecy and fraud on the part of the defendants hence they (the plaintiffs) were unable to obtain all the necessary information and documents to enable them frame their prayers appropriately. It was the plaintiffs' position that having failed to obtain all the necessary information from the defendants they should amend the plaint accordingly and move

on with the prosecution of the suit on the basis of the information and documents at hand.

4. The 1st defendant filed a replying affidavit sworn on 15.10.2025 in opposition to the application on four grounds. First, that it was incompetent. Second, that it was an afterthought merely intended to delay the conclusion of the suit. Third, that it was an abuse of the court process. Forth, that it was prejudicial to him.
5. The 1st defendant was of the view that the plaintiffs' application was not tenable because it was filed more than 6 years after the filing of the suit and after the hearing of the suit had proceeded substantially. The 1st defendant contended that the plaintiffs were seeking to reconstruct their case after cross-examination of their witness at the trial which option was not permissible in law. The rest of the averments in the replying affidavit dealt with the history of the suit which is not directly related to the instant application.
6. The 2nd defendant filed a replying affidavit sworn by Sukhminder Kaur Chima on 13.10.2025 in opposition to the application. It was contended that the application was bad in law and was filed for the purpose of delaying the expeditious

conclusion of the suit. It was also contended that the amendment was intended to fill in gaps which came out during cross-examination of the plaintiffs' witnesses. The rest of the averments in the replying affidavit deal with the history of the case which is not directly relevant to the instant application for amendment.

7. On their, part the 3rd defendant did not file any response to the application. However, they informed the court that they shall rely upon the responses filed by the 1st and 2nd defendants.
8. When the application was scheduled for directions it was directed that it shall be canvassed on the basis of written submissions only. The parties were consequently granted timelines within which to file and exchange their respective submissions. The record shows that all the parties filed their respective submissions except the 3rd defendant whose advocate had informed the court that she would rely upon the 1st and 2nd defendants' submissions.
9. The court has perused the plaintiffs' notice of motion dated 31.05.2025, the replying affidavits in opposition thereto as well as the material on record. The court is of the opinion that the main issue for determination is whether the plaintiffs have

made out a case for the grant of leave to amend their plaint.
The ancillary issue is who shall bear costs of the application.

10. **Order 8 rule 39(1)** of the **Rules** on amendment of pleadings stipulates as follows;

“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.”

11. On the other hand, **Order 8 rule 5** of the **Rules** stipulates as follows;

“(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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as may be just.

(2) This rule shall not have effect in relation to a judgment or order.”

12. The principles to be considered in granting or refusing an application for leave to amend pleadings were re-stated in the case of **Eastern Bakery -vs- Castellino [1958] EA 461 at 462** as follows;

“It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs Tildesley v. Harper (10 (1878), 10 Ch. D. 393; Clarapede v. Commercial Union Association (2) (1883), 32 W.R. 262. The court will not refuse to allow an amendment simply because it introduces a new case: Budding v. Murdoch (3) (1875), 1 Ch. D. 42. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit: Ma Shwe Mya vs. Maung Po Hnaung (4) (1921), 48 I.A. 214; 48 Cal. 832. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character: Raleigh v. Goschen (5), [1898] 1 Ch. 73, 81; or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ: Weldon v. Neal (6) (1887), 19 Q.B.D. 394; Hilton v. Sutton Steam Laundry (7), [1946] K.B. 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.

13. Similarly, in the case of **Central Kenya Ltd -vs- Trust Bank Ltd & 5 Others [2000] eKLR** the Court of Appeal considered the principles as follows;

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

14. The court is satisfied on the basis of the material on record that the amendment sought is necessary for the purpose of determining the real issues in controversy among the parties. It would also be necessary to avoid duplicating of suits since the entirety of the plaintiffs’ claim can be conveniently adjudicated and determined in one suit. The court is not satisfied that the application was brought in bad faith or that it is an abuse of the court process. There is absolutely no indication on record to show that the additional prayers the plaintiffs intend to seek

were prompted by the defendants' questions during cross-examination of the plaintiffs' witnesses.

15. The court is also unable to find anything on record to suggest or demonstrate that the additional reliefs being sought would be statute barred under the *Limitation of Actions Act (Cap 22)*. Even if the defendants consider that the additional relief would be time-barred, they would still be at liberty to plead the defence of limitation in their pleadings and at the trial.
16. The other aspect which requires consideration is the lateness in filing the instant application and the fact that the suit is already part-heard. The court is of the view that the power of the court to allow amendments can be exercised at any stage of the proceedings before final submissions are tendered and a judgment pronounced. The only instance where delay may disentitle a party to leave to amend is where the resultant delay may occasion prejudice which cannot be compensated by costs.
17. In the case of **General Manager E. A. R & H Authority vs Thierstein [1968] EA 354** the trial court considered an application by the defendant for leave to amend brought after the close of the defendant's case but still allowed the same. It

was held that as long as a fair trial is still possible and the adverse party can be compensated in costs then a late amendment may still be allowed. It is of the opinion that even though the general rule on costs is that costs shall follow the event, the plaintiffs are not entitled to the costs of the application. The application was filed belatedly and whilst the suit was part-heard. The court is further of the view that the plaintiffs should compensate the defendants in costs for the prejudice they have occasioned the defendants by the late filing of the application. As a result, the defendants who opposed the application shall be awarded costs of the application.

18. The upshot of the foregoing is that the court finds merit in the plaintiffs' application for leave to amend the plaint. As a consequence, the notice of motion dated 31.05.2025 is hereby allowed in the following terms;

- a. Leave be and is hereby granted to the plaintiffs to file and serve an amended plaint within 7 days from the date hereof.***
- b. The defendants are hereby granted leave to file and serve amended defences, if need be, within 14 days upon service of the amended plaint.***

c. The suit shall be mentioned on 04.03.2026 for directions and further orders on the hearing hereof.

Orders accordingly.

Ruling dated and **signed** at **Mombasa** and **delivered** virtually via Microsoft Teams on this **29th** **day** of **January 2026** in the presence/absence of the parties as indicated below.

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Y. M. ANGIMA

JUDGE

In the presence of:

Gillian - Court assistant

Mr. Odipo for the plaintiffs

Ms. Dave for 1st defendant

Ms. Dave for Mr. Singh for 2nd defendant

Ms. Wachanga for 3rd defendant