

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 468 OF 2017

**H. YOUNG & CO. (EA)
LIMITED.....PLAINTIFF**

VERSUS

TERMCOTANK S.A LIMITED.....DEFENDANT

RULING

1. By a Notice of Motion dated 28th October 2024, the Defendant, **Termcotank S.A Limited** moved this court under Sections 1A, 1B, and 3A of the Civil Procedure Act, Order 8 Rules 3 and 5, Order 7 Rule 5 (d) and Order 51 Rule 1 of the Civil Procedure Rules. The Applicant seeks the following orders:

1). The Honourable Court be pleased to grant the defendant/applicant leave to:

- i. amend its further amended statement of defence and counterclaim.*
- ii. file a further witness statement, and*
- iii. amend its list of documents*

in terms of the attached further statement of defence and counterclaim, further witness statement and amended list of documents.

- 2) *The attached further statement of defence and counterclaim, further witness statement and amended list of documents be deemed to be duly filed upon payment of the requisite fees.*
 - 3) *That costs of this application be in the cause.*
2. The application is supported by the grounds on the face of it and the affidavit of **Maxime Gonfray**, the defendant's Regional Manager sworn on 28th October 2024. He deposed that following the appointment of their current advocates, there was considerable delay in obtaining the pleadings and documents from the former advocates; that thereafter it became evident that key aspects of the claim, specifically those raised in the amended plaint dated 15th March 2023 and the witness statement dated 7th March 2024, were not adequately addressed by the previous advocates; that the proposed amendments are essential as they directly address the core and substance of the dispute; and that the financial stakes involved in this matter are substantial and the defendant/applicant stands to suffer severe and irreparable harm if the reliefs sought are not granted.

3. The Plaintiff filed Grounds of Opposition dated 3rd March 2025 and stated that the Defendant/Applicant had amended its defence and counterclaim on three previous occasions and all this with the aim of buying time and derailing the speedy determination of this matter; that the current application has been brought in bad faith, is an afterthought and a gross abuse of the court process; that the application is brought so late in the day and if allowed it will occasion a miscarriage of justice as the character of the suit will be altered. The plaintiff sought the application be dismissed with costs.
4. The application was disposed of by way of written submissions. There are two sets of submissions by the Defendant, one set dated 29th October 2024 and the other dated 10th March 2025. The Plaintiff's submissions are dated 4th April 2025.
5. The Defendant, in its submissions gave a background of the matter and argued how the proposed amendments are not intended to introduce new claims but only meant to clarify issues already raised to enable the court determine the true substance of the dispute. It further submitted that Order 8 Rule 5 of the Civil Procedure Rules gives the court wide latitude to allow amendments for the purpose of determining the real question in

controversy. That it is trite law that pleadings are superstructures for parties to set out their case and therefore it is imperative that the court is seized of all the facts and evidence.

6. The Defendant placed reliance on the decisions of **Eastern Bakery v Castelino (1958) EA 461** and **Central Kenya Limited v Trust Bank Limited and others (2000) KECA 367 (KLR)** where the Court stressed that amendments of pleadings are normally allowed, unless they cause injustice to the other side, and that mere delay is not a ground for refusing an amendment.
7. The plaintiff in its submissions in opposing the application relied on the principles set down by Kuloba J. in **Kassam v Bank of Baroda (Kenya) Ltd (2002) 1 KLR 294** relating to amendment of pleadings. Firstly, that the amendments should be allowed if the court is satisfied that the party applying is not acting *mala fide*; it will not cause some injury to the other side which cannot be compensated by costs; is not a device to abuse the court process; is necessary for the purpose of determining the real questions in controversy; the amendment will not alter the character of the suit. Secondly, that in case of late amendments, the applicants must show that the

delay is not deliberate and the court exercises such discretion for or against the applicant. Thirdly, in exercising discretion, the court ought to consider whether the amendment embodies a legally valid claim; the reasons why the proposed amendment was not included in the original pleading and justification for the delay if any.

8. The Plaintiff submitted that the Defendant had amended its statement of defence and counterclaim on three different occasions being 26th June 2019, 8th December 2021 and 2nd May 2023. That thereafter case management was done and the case certified ready for hearing with several hearing dates being fixed but not proceeding due to actions by the Defendant including changing advocates. The Plaintiff submitted that there was no adequate explanation for the delay or why the subject of the amendment was not included in the defendant's Statement of Defence, and relied on the case of **Rubina Ahmed and 3 others v Guardian Bank Limited (sued in its capacity as a successor in title to First National Finance Bank Limited)**.

9. According to the Plaintiff the proposed amendment was a calculated move by the Defendant to litigate the suit in instalments and the application ought to be dismissed.

10. I have considered the applicant's Notice of Motion, the grounds of opposition and the rival submissions. The single issue for determination is whether the applicant is deserving of leave to amend its further amended statement of defence and counterclaim, further witness statement and amended list of documents.

11. **Order 8 Rule 3** of the **Civil Procedure Rules** provides for amendment of pleadings with leave of court as follows:

(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.

12. Further, **Order 8, rule 5** gives the court the general power to amend.

(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 are just.

13. It is clearly evident that the purpose of allowing amendment of pleadings is to enable the court to determine the real issues in controversy between the parties once and for all. For the court to allow the amendment, it has to first look into the intent and purpose of the amendment and whether any prejudice will be suffered by the other party or parties in dispute and whether prejudice can be compensated by way of costs.

14. In **Institute for Social Accountability & another v Parliament of Kenya & 3 others [2014] eKLR** the court held:

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

15. The Court of Appeal outlined the principles in amendment of pleadings in **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR** where it summed up the legal parameters as follows; that the amendment should not introduce new or inconsistent cause of actions or issues; the amendment should be made timeously; it should not affect any vested interest or accrued legal right and it should not prejudice or cause injustice to the other party.
16. The Applicant's case is that its new advocates did not get pleadings and documents from the previous advocates and resulted in retrieving the same from the Court Registry. And upon review it became evident that key aspects of the claim by the Plaintiff had not been addressed. That it has become necessary for it to effect amendments on its statement of defence and counterclaim earlier amended on 14th June 2022 and 2nd May 2023 by the previous advocates.
17. Having looked at the proposed amendments, I note that they try to address specific paragraphs of the amended plaint and therefore are not foreign or inconsistent with the subsisting cause of action which is centered around a supply contract of bitumen and the condition and/or term of provision of a Bank Guarantee by the Plaintiff. I find that no prejudice or injustice will be suffered by the Plaintiff/Respondent.

18. On the concern about the timing of the application for amendment, it should not be lost that the right to a fair hearing, as enshrined under Article 50 of the Constitution, is a non-derogable right that should be accorded to every litigant. In any case the Plaintiff will have the right of reply, if need be, hence no prejudice will be suffered. In my view, the amendment is not sought in bad faith.

19. Consequently, I find that the application dated 28th October 2024 is merited and I allow it in the following terms:

a. That the applicant be and is hereby granted leave to amend its further amended statement of defence and counterclaim, file a further witness statement, and amend its list of documents.

b. That the draft amended statement of defence and counterclaim, further witness statement, and list of documents be and are hereby deemed as duly filed and served upon payment of requisite court fees within 7 days of this ruling.

c. Upon service, the plaintiff respondent be and is hereby at liberty to file and serve an amended reply to the amended defence and defence to counterclaim within 14 days.

d. Mention on 17th March 2026 to confirm compliance and directions as to the hearing of the main suit.

e. Costs be in the cause.

RULING delivered virtually, dated and signed at **NAIROBI**

This **26th** day of **February** 2026.

P.M. MULWA
JUDGE

In the presence of:

Mr. Agwara for Plaintiff/Respondent

Mr. Vincent Oloo for Defendant/Applicant

Court Assistant: *Carlos*