



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT KWALE

COUNTY COURT NAME: KWALE HIGH COURT

CASE NUMBER: HCCC/E014/2024

JAMES CHADWICK SHAND AND THE REAL SHAND DREAMS LTD VS EMMA AWINO
OGOLA

RULING

1. The application herein by the James Shadwick Shand and The Real Shand Dreams Limited dated 9th July 2025 by way of notice of motion is for an order that leave be granted to the plaintiffs to amend their plaint dated 27th August 2024 in terms of the draft amended plaint annexed to the affidavit supporting the application. There are other prayers which would follow if the application is granted and needed not to be set out as such. It is expressed to be brought under Order 8 Rule 3 of the Civil Procedure Rules, Order 51 Rule 1 of the Civil Procedure Rules, Section, 1A, 1B, 3A and 63C of the Civil Procedure Act, Article 159 (2) (d) of the Constitution of Kenya and all enabling provisions of law.
2. The grounds in support of the application are set out on the face thereof and expounded in the affidavit of James Chadwick Shand, sworn on 9th July 2025 at Calgary, Canada. They are that the proposed amendments are necessary for the purpose of determining the real question in controversy between the parties as they capture the payment remittance of USD 171,500 made by the 1st Plaintiff to the Defendant on 25th June 2021 which is necessary to determine the real issue in controversy.
3. Secondly, that the amendment seeks to transfer the file from Kwale High Court Civil Division to the proper division being Kwale High Court Commercial and Tax Division which will assist in enforcement of court orders in the absence of which court orders may be rendered impotent and the entire suit shall have been nugatory or an academic exercise.
4. Further that no prejudice whatsoever shall be occasioned to the defendant as she shall be at liberty or have corresponding leave to amend the statement of defence if she so wishes.
5. Further that the application has been brought swiftly with no inordinate delay. The matter has not proceeded for pre-trial conference and thus

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pleadings have not been closed.

6. The applicant deposes further that the amendments do not substantially introduce any new issue or controversy save to introduce an additional prayer to enable the Hon. Deputy Registrar sign share transfer forms in the event that such order is issued and the Defendant fails to comply.

7. The applicants have annexed to the supporting affidavit the draft amended plaint showing the

intended amendments.

8. The application is opposed through the defendant/respondent's replying affidavit sworn on 29th July 2025 by Emma Awino Ogolla. She deposes that the application is brought in bad faith, is an afterthought, and is intended to unjustly prejudice the defendant by delaying this matter noting that a defense is already filed and directions taken. That the cause of action in this matter does not border on trade, commerce, contracts, banking, insurance or similar matters to warrant the amendments being sought.

9. Further that the application to amend is not only belated but would occasion unnecessary delay and injustice to the Respondent.

10. Further that the Applicants have not provided sufficient or reasonable justification for the amendment sought, nor have they demonstrated that the amendments are necessary for the just determination of the issues.

11. That the proposed amendments seek to introduce a new cause of action, which is time-barred and thus amounts to an abuse of the court process.

12. That the applicants have been duly represented from the onset of this suit by qualified team of Advocates who ought to have known the right forum to have lodged this suit and should not be allowed to feign ignorance.

13. The applicant deposes that she stands to suffer prejudice if the application is allowed, especially given that the amendments seek to depart materially from the original pleadings which she has already responded to.

14. The application was disposed of by way of written submissions filed by learned counsels for the parties.

15. The applicants have raised one issue for determination, being, whether they should be allowed to amend the plaint.

16. On the issue of transferring this matter from the from being characterized as a civil suit to a commercial suit, learned counsel for the applicants submits that at the time of filing, the CTS had not evolved well enough to allow filing of Commercial and Tax matters at the Kwale High Court. For that reason all civil matters regardless of the cause of action and substratum, were allocated to the civil division and that was how this matter was filed in the civil division. However, that the matter is a purely commercial one touching on company issues being shareholding, directorship and company assets. Thus, the amendment seeks to transfer the file from the Civil Division to the Commercial & Tax Division and that this court has the jurisdiction to entertain this suit.

17. Learned counsel submit further that the amendment sought is necessary and serves to correct a defect in proceedings by placing the file in the correct division. The role is purely administrative in nature and does not prejudice any of the parties herein. Additionally, the transfer does not affect the substratum of the suit in any manner whatsoever.

18. On the substance of the suit, learned counsel submits that the 1st plaintiff having traced evidence of remittance of USD 171,500 made by him to the defendant on 25th June 2021, which evidence was not available at the time of filing suit, the amendment is necessary to assist this court determine the real issues in controversy which is that the 1st plaintiff paid for incorporation of the 2nd plaintiff and acquired all its assets solely and this is the crux of the suit. That the defendant shall be at liberty to amend her defence to enable rebuttal of the facts presented and therefore she will not suffer any prejudice whatsoever.

19. On the issue of to seek an order directing the Deputy Registrar of this Court to sign transfer forms striking out the name of the defendant as a both director and shareholder of the 2nd plaintiff, the same is desirable in order to give effect to the court's decision should it find in favour of the plaintiffs.
20. Learned counsel submits that the amendments sought do not introduce any new or inconsistent

cause of action but that they help identify the actual issues in controversy.

21. Learned counsel also submits that the application for amendment has been brought without inordinate delay as this matter is at the preliminary stage and has not proceeded to case management conference yet. That the amendments do not adversely affect any vested interest or accrued legal right nor do they prejudice or cause injustice to the defendant and the amendments do not offend the provisions of the Limitations of Actions Act.

22. Finally, that the defendant shall be at liberty to amend her defence to address issues raised in the amendments

23. On her part the defendant has raised five issues for determination as:

- a. Whether the plaintiffs deserve leave to amend their plaint.
- b. Whether the application is timeous and made in good faith.
- c. Whether the proposed amendments introduce a new and time-barred cause of action.
- d. Whether the suit ought to be transferred to the Commercial and Tax Division.
- e. Who should bear the costs of the application.

24. In opposing the application, the respondent cites the case of *NWK v BKG* [2022] KEHC 13327 (KLR) for the holding that amendments should not be permitted where they introduce new causes of action, alter the character of the suit, or deprive the opposite party of an accrued defence such as limitation. I have gone through the cited decision and I do not seem to find that holding. I am aware that such is the law on amendment of a plaint but it does not appear in the cited case. Learned counsel similarly cites the case of *Central Kenya Ltd v Trust Bank Ltd & 5 others* [2000] KECA 367 (KLR) for the holding by the Court of Appeal that amendments that materially depart from the original claim are impermissible. Again, that is the position in law, but going through that decision I have not seen where the Court of Appeal held as such. In a decision of the court, submissions by counsels for the parties on issues for determination cannot be said to be the holding of the court. In these two cited decisions, the Courts did allow the amendments. In the later case of *Central Bank of Kenya*, the Court of Appeal held that:

"... the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs (see, *Beoco Ltd v. Alfa Laval Co. Ltd* [1994]4 ALL ER. 464)."

25. Learned counsel submits that the proposed amendments are a fundamental alteration of the pleadings and the same should not be allowed. However, he does not explain how they alter the character of plaintiff's case.

26. On the issue of delay in filing the application, learned counsel relies on the case of *Ng'ang'a v Carrington Complex Limited & another* [2025] KEELC 410 (KLR) stating that the Court emphasized that amendments made after directions have been given are often afterthoughts and contrary to the overriding objective of the Civil Procedure Act, which is the expeditious resolution of disputes. I have gone through that decision and I do not locate such holding therein.

27. Learned counsel for the defendant submits that the submission that the the CTS system in Kwale had not evolved by August 2024 is not credible. That they were



represented by advocates who were well aware of the divisions of the High Court. That this belated attempt to shift the forum amounts to forum shopping and demonstrates lack of good faith.

28. Learned counsel submits further that the proposed amendments seeking to introduce shareholder and directorship disputes, including a prayer to remove the defendant from directorship of the 2nd plaintiff constitutes a new cause of action which is separate from the original claim. Learned counsel submits that Kenyan jurisprudence is clear that amendments cannot be used to introduce new causes of action that are time-barred. He cites the case of Iga v Makerere University (1972) EA 65, for the holding that limitation goes to jurisdiction and cannot be defeated by

amendment and that this was reaffirmed in *Kambi v Ruston Global Holdings Limited* [2025] KEELC 4673 (KLR) where the Court allegedly struck out amendments that sought to bring in time-barred claims. I have gone through the case of *Kambi* cited above and I do not find such a holding in that case. In fact, in allowing the application the court, in considering the issue raised by the respondent that the claims made through the amendments sought to be made were time barred in line with the provisions of section 4 of the Limitations of Actions Act as they had been filed outside the period of 6 years contemplated in contractual transactions, expressed itself thus:

"With respect to the issue whether or not the claims of the applicant are time barred based on the 6 years limitation period, the court cannot agree with the Respondent because the issue before the court is a claim for the recovery of land which under Section 7 of the Limitation of Actions Act is 12 years and not 6 years. I hold the view that greater injustice will occur if the application is denied than when it is allowed."

29. It is the respondent's contention that the suit herein cannot be transferred as applied for by the applicants because the suit as originally filed was not framed as a commercial dispute and re-characterizing it through amendment cannot cure jurisdictional defects. Learned counsel, in support of his submission, cites the case of *Phoenix of E.A. Assurance Co. Ltd v S.M. Thiga t/a Newspaper Service* [2019] KECA 770. The correct decision however is *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] KECA 767 (KLR). It is the same case but the decisions are on different applications, thus the different citations. In that case the suit had been filed in the magistrate's court without pecuniary jurisdiction and parties sought by consent at the High Court to have it transferred to the High Court. The Court of Appeal held that:

"the claim by the respondent was filed before a court devoid of jurisdiction. The suit was a nullity ab initio and was not transferable to another court; jurisdiction cannot be conferred by consent and ultimately, all orders emanating from that suit are null and void."

30. Although the Court of Appeal pointed out an aspect of amendment of the suit which was done in the High Court after it was transferred there, discussed in that decision the holding by the Court of Appeal was not on that issue as submitted herein by learned counsel for the respondent that the Court of Appeal made it clear that jurisdiction is substantive and cannot be conferred by convenience or "subsequent amendment."

31. Learned counsel for the respondent also cited the case of *Republic v Registrar of Companies & another; Lubeto & 9 others (Interested Parties); Music Copyright Society of Kenya (Exparte)* [2024] KEHC 14418 (KLR) where the High Court found that the dispute before it was related to a company dispute, its Memorandum of association and Articles of Association, elections, the CR 12, leadership, directorship and matters of membership inter alia and an issue of change of directorship, all issues which revolved around the company. The High Court was satisfied that the issues raised were company matters that would be best resolved at the Commercial Division of the High Court. Learned counsel submits that the present case does not fall within the scope of a commercial suit and that transfer would amount to forum shopping and delay of justice.

32. Learned counsel for the respondent, citing section 27 of the Civil Procedure Act submits that costs follow the event and according to him the plaintiffs' application is frivolous, belated, and intended to prejudice the defendant, the same ought to be dismissed with costs to the defendant.

33. I have considered the grounds in support of the application, the reply thereto by the respondent, the submissions by learned counsels and the authorities cited. The main point for determination is whether or not the applicant has made out a case for leave to amend the plaint.

34. I will start with an issue that requires no discussion and ought not to have been made a prayer in the application in the first place. The High Court is established and its jurisdiction provided for under Article 165 of the Constitution as follows, as is relevant for this application:

(1) There is established the High Court, which-

(a) shall consist of the number of judges prescribed by an Act of Parliament; and
(b) shall be organised and administered in the manner prescribed by an Act of Parliament. (2) ...

(3) Subject to clause (5), the High Court shall have-

(a) unlimited original jurisdiction in criminal and civil matters;

(b) ...

35. In line with Article 165(1)(b), there was enacted the High Court (Organization and Administration) Act (Cap. 8C) Laws of Kenya which under section 11 provides for the establishment of divisions of the High Court in the following terms:

(1) For purposes of promoting effectiveness and efficiency in the administration of justice and promoting judicial performance, the Chief Justice may, where the workload and the number of judges in a station permit, establish any of the following divisions-

(a) the Family and Children Division;

(b) the Commercial Division;

(c) the Admiralty Division;

(d) the Civil Division;

(e) the Criminal Division;

(f) the Constitutional and Human Rights Division;

(g) the Judicial Review Division; and

(h) any other division as the Chief Justice may, on the advice of the Principal Judge determine.

36. Divisions of the High Court are therefore administrative units established by the Hon. The Chief Justice on the advice of the Principal Judge as and when expediency demands. In the case of the High Court Kwale, no such divisions have been created. These divisions do not in any way affect the jurisdiction of the High Court as conferred by Article 165(3(a) of the Constitution.

37. On the other hand, the various divisions or case tracks set out in the Judiciary e-filing system or digital Case Tracking System (CTS) do not necessarily follow the divisions of the High Court as outlined above. These ones are essentially divisions of the Register of Civil Suits as provided for under Order 3 Rule 3 of the Civil Procedure Rules. The Register of Civil Suits has been broken down into various components for expedience to increase efficiency for quick filing, retrieval and handling of files. This is what is reflected in the CTS. Otherwise all the cases are either civil suits or criminal suits of which the High Court has unlimited jurisdiction.

38. Therefore, for me, the divisions of the civil register into various components as reflected in the CTS should not be cause for a party to file any application to transfer a case from one division or case track to the other as a jurisdictional issue. The filing of a case in the wrong track should be corrected as a matter of course administratively with the party misfiling liaising with the court administrator or Deputy Registrar of this Court to give effect to the correction.

39. Therefore, the prayer that the suit herein be transferred from one division to the other shall be dealt with that way.

40. On the issue of amendment of the plaint, the general power to amend pleadings is provided for under Section 100 of the Civil Procedure Act (Cap. 21) Laws of Kenya 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."

41. This provision is expounded in 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.

42. Further, Order 8, rule 5 gives the court the 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

43. These provisions have found expression in various judicial decisions explaining under what circumstances leave to amend a plaintiff's claim may be granted or denied. For instance, in the case of *Joseph Ochieng & 2 others Trading as Aquiline Agencies v First National Bank of Chicago* [1995] KECA 31 (KLR) the court of Appeal, citing *Bullen and Leake & Jacob's Precedents of Pleading* 12th Edition set out the principles under which Courts may grant leave to amend the pleadings as follows:

- a. that powers of the court to allow amendment is to determine the true, substantive merits of the case;
- b. that amendments should be timeously applied for;
- c. that the power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) 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;
- d. that the exact nature of proposed amendment sought ought to be formulated and be submitted to the other side and the court;
- e. that adjournment should be given to the other side if necessary if an amendment is to be allowed;
- f. that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed;
- g. that the proposed amendment must not be immaterial or useless or merely technical;
- h. that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed;
- i. that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action;
- j. that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff's claim the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation;
- k. that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.

44. These parameters are not exhaustive as far as the grant of leave to amend a plaintiff's claim is concerned.

45. I have considered the intended amendment as set out in the draft amended plaintiff's claim. The intended amendments are at paragraphs 16 of the plaintiff's claim where in the particulars of the monies disbursed to the defendant under bullet (iv), the



sum of USD 171,500 is added with a date of 25th June 2025. The other amendment is in the prayers where a new order is sought directing the Deputy Registrar of this Court to sign transfer forms striking out the name of the defendant as both a director and shareholder of the 2nd plaintiff.

46. Since it is trite law that special damages must be specifically pleaded and strictly proved (see Hahn v Singh [1985] KECA 129 (KLR)), it means that if the applicant fails to include the intended amendment in his pleadings, he will not be allowed to lead evidence to prove the same at the hearing. That amendment is therefore necessary to assist the court to determine the true substantive merits of the case.

47. On the issue of the application for leave being done late in the day as submitted by learned

counsel for the respondent, that is not correct. It is not correct as submitted that pre-trial had been done. A date for pre-trial was fixed but was not done because on that day learned counsel for the applicant informed the court that they had filed the application for leave to amend. The law on amendment of pleadings, Order 8 rule 3 with respect to the time when the same can be done, provides that 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. I am satisfied and find that the application was timeously made.

48. The intended amendment is not frivolous as I have found that it will help to bring out the real issues in the case for determination and not lock the plaintiffs' evidence out. I do not find any bad faith in the intended amendment of the plaint.

49. Learned counsel for the respondent submits that the remittance relied upon by the plaintiff dates back to June 2021, which is outside limitation and amounts to an attempt to revive a stale cause of action and the amendment should be rejected on this ground. However, learned counsel has not pointed out which limitation period would be offended by the amendment sought. On my part I do not find any limitation period that would be offended by the proposed amendment. That submission is therefore not valid.

50. I am inclined to be guided by the case of *Eastern Bakery v. Castelino*, (1958) E.A.461 (U.) at

p.462 where the Court considering this issue stated that:

"It will be sufficient, for purposes of the present case, to say that amendments to pleadings sought before the hearings 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.

51. I do not find that any injustice would be occasioned to the respondent if the amendments are allowed. In the end, I am satisfied that the application for amendment of the plaint is merited and is allowed in the following terms: -

- a) That the applicants be and re hereby granted leave to amend their plaint in terms of the draft amended plaint annexed to their application;
- b) That the draft amended plaint be and is hereby deemed as duly filed and served upon payment of the requisite court fees within 7 days of this ruling.
- c) Upon service, the respondent be and is hereby allowed to file and serve an amended defence within 14 days. The applicant to file and serve a reply to the amended defence within 7 days of service.
- d) Mention on 15th April 2026 to confirm compliance with Order 11 of the Civil Procedure Rules and to take directions on hearing.

52. Costs be in the cause.

53. Orders accordingly.

Delivered, dated and signed on the Virtual Platform, Microsoft Teams this 16th day of March 2026.

ANDAYI W.

F.

JUDGE

In the presence of:

Jepchirchir (Ms) h/b for Tabut for



applicant/plaintiff. Tar Mohammed for the
respondent/defendant.

Ummu: Court Assistant.

SIGNED BY/FOR:
HON. JUSTICE ANDAYI
W.F.



THE JUDICIARY OF KENYA.
KWALE HIGH COURT
HIGH COURT DIV
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