



REPUBLIC OF KENYA



**KENYA LAW**  
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**Pinnacle Projects Limited v Musau (Cause 1323 of 2018)  
[2024] KEELRC 562 (KLR) (14 March 2024) (Ruling)**

Neutral citation: [2024] KEELRC 562 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
CAUSE 1323 OF 2018  
JK GAKERI, J  
MARCH 14, 2024**

**BETWEEN**

**PINNACLE PROJECTS LIMITED ..... APPLICANT**

**AND**

**EPHRAIM KAKUI MUSAU ..... RESPONDENT**

**RULING**

1. Before the court for determination is the Respondent's Notice of Motion dated 24<sup>th</sup> October, 2023 filed under Certificate of Urgency seeking Orders That:-
  1. The Honourable Court be pleased to grant leave to amend its response to the Memorandum of Claim in the terms of the annexed Draft Amended Response.
  2. The annexed Draft Amended Response to the Memorandum of Claim be deemed as duly filed and served upon payment of the requisite court fees.
  3. Costs of this Application be in the cause.
2. The Notice of Motion is expressed under Sections 3A and 100 of the *Civil Procedure Act*, Order 8 Rules 3 and 5, Order 51 Rule 1 of the *Civil Procedure Rules*, 2010 and Article 159 of the *Constitution of Kenya*, 2010 and is based on the grounds set out on its face and the Supporting Affidavit of David Kuria sworn on 24<sup>th</sup> October, 2023 who deposes that it is necessary to amend the Response to the claim so as to capture all the issues in controversy and all the remedies being sought by the Claimant for the matter to be adjudicated comprehensively.
3. That the amendments address issues that are directly and substantively relevant to the claim and are not prejudicial to the Claimant.
4. The affiant deposes that the instant application was made timely as neither pre-trial directions had been issued nor hearing date given and is made in good faith.



5. That the applicant stands to suffer substantial loss and hardship if the application is not granted and it is in the interest of justice that it be allowed.

### **Response**

6. In his Replying Affidavit sworn on 8<sup>th</sup> December, 2023, the Claimant/Respondent deposes that the Applicant filed its pleadings out of time and has been delaying the matter and the application is a delaying tactic.
7. That the application is prejudicial to the Claimant on account of delaying the trial and is an abuse of the court process.
8. The affiant states that Respondent's promise to settle the matter did not materialise.
9. That the applicant has already filed its documents and pleadings and the Claimant responded to the applicant's response.
10. The affiant makes reference to the filing of the witness statement not addressed by the Applicant.
11. That although the Respondent denied owing pending dues, it acknowledged the same and settled others save for leave days.
12. The affiant contends that the application here is a consequence of Change of Advocates by the Respondent.
13. It is the Claimant's case that the Notice of Motion is an abuse of the court process, scandalous, frivolous and vexatious.
14. That allowing the application will delay the cause of justice and allow the Respondent to file pleadings out of time.

### **Applicant's submissions**

15. As to whether leave to amend its response is deserving, counsel relied on the sentiments of the court in *John Magaka Osoro V Reynold Karisa Charo & 5 others* (2021) eKLR to urge that the court had power to grant leave at any stage of the proceedings before judgment.
16. Similarly, reliance was made on *paragraph 76 of the Halsbury's Laws of England, 4<sup>th</sup> Edition, Vol. 36(1)*.
17. Counsel submitted that the amendment capture all the issues, does not introduce new causes, the matter is yet to be fixed for hearing, is made in good faith and no injustice or prejudice will be suffered by the Claimant/Respondent.

### **Respondent's submissions**

18. The Respondent had not filed submissions by 12<sup>th</sup> February, 2024 when a mention to confirm compliance was held.
19. The singular issue for determination is whether the Notice of Motion dated 24<sup>th</sup> October, 2022 is merited.
20. The pith and substance of the Applicant's Notice of Motion is that the amendment to its response to the Memorandum of Claim is necessary as it comprehensively responds to the claim, the material is relevant, the notice of motion is timely and no loss or prejudice will be suffered by the Claimant/Respondent.



21. The substance of the Respondent's response is that the Notice of Motion was made late in the day and will delay the suit further.
22. Court records reveal that the suit herein was first placed before this court on 25<sup>th</sup> July, 2023 and there are no records of what transpired before the hearing of the Notice to Show Cause dated 7<sup>th</sup> June, 2023.
23. Although the suit was filed on 23<sup>rd</sup> August, 2018 and a response filed on 24<sup>th</sup> January, 2019, no action appear to have been taken by the Claimant to facilitate disposal of the suit until the court issued the Notice to Show Cause suo motu.
24. On 25<sup>th</sup> July, 2023, the Respondent was absent for the hearing and the Notice to Show Cause was vacated as according to the Claimant's counsel, the only outstanding issue was leave days. Parties were accorded more time to negotiate a settlement but by 26<sup>th</sup> September, 2023 no agreement had been reached and the Claimant's counsel sought a hearing date.
25. Counsel for the Respondent/Applicant prayed for another chance for the parties to engage counsel for the Claimant and hearing was slated for 11<sup>th</sup> December, 2023 but on 3<sup>rd</sup> November, 2023, the Respondent/Applicant filed the instant notice of motion and inter partes hearing was scheduled for 11<sup>th</sup> December, 2023 but the court did not sit and hearing was re-scheduled to 18<sup>th</sup> December, 2023 when the Applicant did not appear and hearing was scheduled for 31<sup>st</sup> January, 2024 when counsels for both parties were present and directions on the filing of submissions were given.
26. Evidently, this matter has not moved since filing in 2017 courtesy of both the Claimant and the Respondent.
27. The Claimant/Respondent cannot, in the court's view, fault the Applicant/Respondent for having delayed the conclusion of the case. The Claimant showed the way by its indolence from August 2018 to June 2023 when the Notice to Show Cause was issued almost 4 years later.
28. The Claimant did not avail documentary evidence to show its enthusiasm to have the suit concluded expeditiously.
29. The court is in agreement with the Applicant's counsel that the amendment introduces no new cause but merely embellishes its case and negotiations having fallen through, it was incumbent upon the applicant to prepare for the hearing.
30. It is not uncommon for parties to seek leave to make amendments to the claim or response after a change of advocates several years after the suit was filed.
31. Notwithstanding the fact that it is a discreditable practice, it is part of the menu courts are subjected to in their work and must make appropriate orders in the interest of justice.
32. Order 8 Rule 3 of the [Civil Procedure Rules](#), 2010 provides that;

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.

Relatedly, Order 8 rule 5 embellishes Order 8, rule 1 as it facilitates amendments for purposes of determining the real question in controversy.
33. Needless to emphasize, the court has discretion to grant leave to a party desirous of amending its pleadings to do so and such discretion must be exercised judiciously.



34. The court is in agreement with the sentiments of the court in *John Nyagaka Osoro v Reynold Charo & 5 others* (*Supra*) as follows;

“The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment . . .

Power to so amend can be exercised by the court at any stage 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; that the proposed amendment must not be immaterial or useless or merely technical; 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 substantially different character which could more conveniently be made the subject of a fresh action . . .”

35. Contrary to the Claimant/Respondent averments that the application is an abuse of court, vexatious or scandalous and designed to delay determination of this suit, the averments had no supportive evidence and the court has not discerned any malafide in the application.

36. For the foregoing reasons, the court is satisfied that the Notice of Motion dated 24<sup>th</sup> October, 2023 is merited and is accordingly granted with no orders as to costs.

It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI ON THIS 14<sup>TH</sup> DAY OF MARCH 2024**

**DR. JACOB GAKERI**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the Covid-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15<sup>th</sup> March 2020 and subsequent directions of 21<sup>st</sup> April 2020 that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with Order 21 Rule 1 of the Civil Procedure Rules, which requires that all judgments and rulings be pronounced in open court. In permitting this course, this court has been guided by Article 159(2) (d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of 760 the Constitution and the provisions of Section 1B of the Civil Procedure Act (Chapter 21 of the Laws of Kenya) which impose on this court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**DR. JACOB GAKERI**

**JUDGE**

