



Vivo Energy Kenya Limited (Formerly known as Kenya Shell Limited) v Gamasil Limited (Environment & Land Case 101 of 2019) [2024] KEELC 6244 (KLR) (25 September 2024) (Ruling)

Neutral citation: [2024] KEELC 6244 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT ELDORET
ENVIRONMENT & LAND CASE 101 OF 2019
EO OBAGA, J
SEPTEMBER 25, 2024**

BETWEEN

VIVO ENERGY KENYA LIMITED (FORMERLY KNOWN AS KENYA SHELL LIMITED) PLAINTIFF

AND

GAMASIL LIMITED DEFENDANT

RULING

1. By Notice of Motion dated 6th March, 2024, the Applicant sought the following orders: -
 - a. That leave be granted to the Applicant/defendant to further amend its Amended Statement of Defense and Counter-claim. That the annexed draft Further Amended Statement of Defense and Counter-claim and the accompanying verifying affidavit marked “SCL 1” be deemed as duly filed upon grant of prayer 1 and payment of the requisite filing fees.
 - b. That pursuant to prayer 2 being granted, the applicant/defendant be allowed to file further witness statement, list of documents and documents.
 - c. That pursuant to prayer 2 being granted, the respondent/ plaintiff be allowed to further amend their Reply and file further documents in a bid to comply with Order 11 of the Civil Procedure Rules if need be.
 - d. That the costs of this Application be in the cause.
2. The application is premised on 4 grounds on its face and on the Supporting Affidavit sworn by Simon Chepsiror Lilan, a Director of the Defendant, on even date. It is his contention that the further amendment of the Amended Statement of Defence is necessary to enable the defendant adequately



present its grievances and for purposes of determining the real issues in dispute between the parties, so that the said issues are litigated upon wholesomely.

3. It is further his claim that if the orders sought are not granted then the applicant will be greatly prejudiced and stands to suffer colossal financial loss while the plaintiff/ respondent will not suffer any prejudice should the application be allowed.
4. The application was opposed by the Respondent based on Grounds of Opposition dated 11.03.2024. The respondent avers that no basis has been laid by the applicant to warrant the grant of the discretionary orders sought; that the court cannot be used to reward a party in breach of its contractual obligations under a registered lease.
5. It is further their contention that the instant application mirrors the one dated 10/01/2023 and is therefore an abuse of the court process as the same constitutes litigation by installments; that the applicant is undeserving of the orders sought, the proposed amendments having been made late in the day; that the application is prejudicial to the plaintiff who continues to be denied quiet possession and use of the suit property.
6. The Application was canvassed by way of written submissions. The Applicant filed their submissions dated 6/3/2024 while the Respondent filed their submissions dated 28/3/2024, which I have read and taken into account in arriving at my decision.
7. I have read the application and the grounds raised therein, the response thereto and the rival submissions and it is my considered opinion that the only issue arising for determination is whether the applicant has met the threshold to warrant the grant of leave to further amend the Amended Statement of Defense and Counter-claim.
8. The court in the case of *Institute for Social Accountability & Anor v Parliament of Kenya & 3 others* [2014] eKLR held that: -

“The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings....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.”

See also the Court of Appeal decision in *Central Kenya Limited v Trust Bank Limited* [2000] 2 EA 365.

9. It is not in dispute that there was a similar Application dated 10/1/2023 seeking to amend the statement of defence and counter-claim, which I allowed on the 27/4/2023. The instant application has been filed 11 months after leave was granted. The respondent contends that the present application has been made late in the day, amounts to litigation in installments and is thus an abuse of the court process.
10. On this regard, I wish to restate that however late an application for amendment is made or further amendment as in the instant case, the same can still be considered and allowed and the court only needs



to ensure that the application is made in good faith, the proposed amendments will not introduce a new cause of action and/or are not merely technical and lastly that no prejudice or injustice will be occasioned to the opposing party that cannot be compensated by way of costs.

11. The main question should be on the intent and purpose of the proposed amendment and whether the same will help the court in determining the real and substantive issues that goes to the root of the case. I have critically looked at the application and the supporting affidavit and I have noted that the same does not clearly outline the basis for the proposed amendment. I have however looked at the annexed Further Amended Statement of Defence and Counter-claim and I note that the same seeks to rectify the amount pleaded as special damages for the value of the developments and the total amount pleaded as special damages in the counter-claim; which was attributed to the Valuation Report dated 19/2/2024 from City Valuers Limited, from the court proceedings of 22/2/2024.
12. As earlier stated in my ruling of 27/4/2023; both parties are seeking compensation out of the aborted contracts. The proposed amendment seeks to rectify the amount pleaded as special damages. It is settled that special damages must be specifically pleaded and proved; thus, the only way for the applicant to specifically plead the special damages claimed from the alleged breach of contract will be by allowing the said further amendment.
13. The question that therefore follows is whether the said amendment if allowed will be prejudicial to the respondent. The matter herein has never taken off for hearing and further the plaintiff/respondent will have an opportunity to respond to the said amended amount of special damages if need be. I therefore find that no prejudice will be occasioned to the respondent and it is necessary for leave to be granted to the applicant to further amend the Amended Statement of Defence and Counter-claim to amend the amount pleaded as special damages.
14. Consequently, I do grant the Applicant leave to further amend the Amended Statement of Defence and Counter-claim and accordingly allow the application as prayed in terms of prayers; i, ii, iii, iv and v save that there shall be filed an amended plaint within 14 days from the date hereof.

It is so ordered.

DATED, SIGNED AND DELIVERED AT ELDORET ON THIS 25TH DAY OF SEPTEMBER, 2024.

E. O. OBAGA

JUDGE

In the virtual presence of: -

Mr. Lilan for the Defendant/Applicant

M/s Nyabuto for Mr. Luseno for the Plaintiff/Respondent

Court Assistant - Laban

E. O. OBAGA

JUDGE

