



Ocean Engineering Works Limited & another v SBM Bank (Kenya) Limited (Civil Suit 112 of 2021) [2024] KEELC 13482 (KLR) (18 November 2024) (Ruling)

Neutral citation: [2024] KEELC 13482 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT MOMBASA
CIVIL SUIT 112 OF 2021
LL NAIKUNI, J
NOVEMBER 18, 2024
BY WAY OF COUNTER CLAIM
REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT
AT MOMBASA**

BETWEEN

OCEAN ENGINEERING WORKS LIMITED 1ST PLAINTIFF

SHERAZ MOHAMED ADAM 2ND PLAINTIFF

AND

SBM BANK (KENYA) LIMITED DEFENDANT

RULING

I. Introduction

1. This Honourable Court is called to determine the Notice of Motion application dated September 30, 2024 by Applicant who is the Plaintiff in the Counter - Claim while the Defendant in main suit herein, SBM Bank (Kenya) Limited. The Application was brought under the provision of Sections 1A, 1B, 3A and 100 of the *Civil Procedure Act*, Order 1 Rule 10, Order 8 Rule 3(1), Order 8 (5), Order 31 (2) and Order 51 (1) of the Civil Procedure Rules, 2010, Sections 13, 18 and 19 of the *Environment and Land Court Act*, No. 19 of 2011 and all other enabling provisions of the law.
2. Despite of being served, there was no responses elicited. Ideally, it would be treated as unopposed. However, the Honourable Court has proceeded to decide on it on its own merit whatsoever.



II. The Applicant's case

3. The Applicant sought for the following orders:-
 - a. That the Honourable Court be pleased to grant leave to the Plaintiff/Applicant to amend its Counter - Claim dated 2nd October 2023, as per the draft Amended Counter - Claim annexed herewith.
 - b. That the Defendant/Respondents be granted corresponding leave to file and serve their Reply within 14 days upon service.
 - c. That the costs of this Application be provided for.
4. The application the Applicants is premised on the grounds, testimonial facts and the averments made out by the 13 Paragraphed annexed affidavit of Kelvin Kimani an Officer of the Plaintiff in the Counter -Claim herein. The Deponent averred that:-
 - a. The Plaintiff in the Counter - Claim and the 1st Defendant in the Counter - Claim were in a Bank Client relationship while the 2nd, 3rd, 4th and 5th Defendants were personal guarantees of the 1st Defendant.
 - b. At the point of filing the suit, the same was filed by the 1st Defendant in the Counter - Claim and the 2nd Defendant in the Counter - Claim to the omission of the other personal Guarantees whom the Plaintiff in the Counter - Claim intended to sue as the 3rd to 5th Defendants in the Counter - Claim.
 - c. The Plaintiff in the Counter - Claim was desirous of prosecuting the instant suit as against all the Personal Guarantees who executed the Guarantee with the Plaintiff in the Counter - Claim's predecessor.
 - d. It was necessary for the amendment to be allowed so as to have the issues determined on merit as against the Personal Guarantees particularly taking into account that the 1st Defendant in the Counter - Claim had liquidated the floating charge whilst the loan amount was still in arrears to the detriment of the Plaintiff in the Counter - Claim.
 - e. The amendments which were necessary did not prejudice the Defendants and the Intended Defendants who were in any case fully aware of the proceedings herein. Annexed and marked as 'SBM - 2' were copies of the letters dated 28th June 2014 addressed to the Personal Guarantees calling on them to settle the outstanding loan in the sum of Kenya Shillings Four Hundred and Nine Million One Fourty Three Thousand Thirty Five Hundred (Kshs. 409,143,035.00/=).
 - f. The matter was yet to proceed for hearing hence no prejudice would be suffered in the event the same was allowed prior to the Counter - Claim being heard on 8th October 2024.
 - g. The instant application would not unduly delay the determination of the issues between the Parties in the event the same was allowed before the Counter - Claim was heard on 8th October 2024.
 - h. The amendment sought never sought to raise new issues not know to the Parties and only sought addition of the Parties who were Personal Guarantees of the 1st Defendant in the Counter - Claim.



- i. They invited the Honourable Court to uphold the position that the objective of the amendments was to enable the parties to litigate between them on basis of the true state of facts, law and the Parties to the suit.
- j. It was therefore in the interest of justice that the Plaintiff in the counterclaim was granted leave to amend its Counter - Claim filed herein. Annexed and marked as “SBM - 3” a copy of the draft Amended Counter - Claim.
- k. The Affidavit was sworn in support of the Application filled herewith.

III. Submissions

5. On 8th October, 2024 while all the parties were present in Court, they were directed to have the Notice of Motion application dated 30th September, 2024 be disposed of by way of written submissions. Unfortunately, by the time the Honourable Court was penning down this Ruling, it was not able to access to any of the filed submissions. Hence, as indicated above, it proceeded to make a decision on its own merit whatsoever. Pursuant to that a ruling date was reserved on 19th November, 2024 by Court accordingly.

IV. Analysis & Determination.

6. I have carefully read and considered the pleadings herein by the Plaintiff/Applicant, the relevant provisions of *the Constitution* of Kenya, 2010 and statutes.
7. In order to arrive at an informed, just, equitable and reasonable decision, the Honorable Court has two (2) framed issues for its determination. These are:-
 - a. Whether the Notice of Motion application for amendment dated 30th September, 2024 is merited.
 - b. Who will bear the Costs of Notice of Motion application dated 30th September, 2024.

Issue No. a). Whether the Notice of Motion application for amendment dated 30th September, 2024 is merited

8. Under this sub - title the Honourable Court shall examine whether the Application for amendment is merited. The law as regards the grant of leave to amend, is well settled. The general rule on this subject is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. (See “Eastern Bakery – Versus - Castelino (1958) EA 461”) Amendment of pleadings is provided for under the provision of Order 8 Rule 5 of the Civil Procedure Rules (Hereinafter referred to as “The Rules”) which provides thus:-

“For the purpose of determining the real question in controversy between the parties, or for correcting any defect or error in proceedings, the court may either on 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.”



9. The provision of Order 8 Rule 3 of the 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”.

10. In the case of:- “Institute for Social Accountability & another – Versus - Parliament of Kenya & 3 others [2014] eKLR” the court held:-

“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.”.

11. Odunga J (as he then was) in the case of “Gladys Nduku Nthuki – Versus - Letshego Kenya Limited; Mueni Charles Maingi (2022) eKLR” summarized the principles governing the granting of orders to amend pleadings as follows:-

- i. The practice has always been to give leave to amend unless the court is satisfied that the party applying was acting mala fide or that, by his blunder, he has done some injury to his opponent which could not be compensated by courts or otherwise.
- ii. The Court of Appeal will not interfere with the discretion of a Judge in allowing or disallowing an amendment to a pleading unless it appears that in reaching his decision he has proceeded upon wrong material or wrong principle.
- iii. The general rule is that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs. The court will not refuse amendments simply because of introduction of a new case. However, there is no power to enable one distinct cause of action neither to be substituted for another nor to change by amendment, the subject-matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments e.g depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side and no injustice caused if the other side can be compensated by costs.



12. In its proposed amendment, the Plaintiff in Counter - Claim seeks to add more parties. The Court of Appeal outlined the principles in amendment of pleadings in “Elijah Kipngeno Arap Bii – Versus - Kenya Commercial Bank Limited [2013] eKLR” as follows: -

“The law on amendment of pleading in terms of section 100 of the *Civil Procedure Act* and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob’s Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others *vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991* as follows:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; 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; 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 of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts.”

13. The legal parameters governing the amendment of pleadings from the above cited decisions can be summed up 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.
14. The law on joining of parties is entrenched under Order 1 Rule 10 (2) which provides thus:-

“The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the Court to be just, order that the name of any party improperly joined, whether as Plaintiff or Defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the Court may be necessary in order to enable the Court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added”.

15. This order requires the Court to evaluate the importance of such a party to the suit and their relevance to the just determination of the suit. The provisions were echoed by the Court of Appeal of Tanzania in “Tang Gas Distributors Ltd – Versus - Said & Others [2014] EA 448” as quoted by the Court of Appeal in Mombasa CoA App No. 15 of 2015 “JMK – Versus - MWM & another [2015] eKLR” quoted:

“can be exercised at any stage of the proceedings; that a party can be joined even without applying; that the joinder may be done either before, or during the trial; that it can be done even after judgment where damages are yet to be assessed; that it is only when a suit or proceeding has been finally disposed of and there is nothing more to be done that the rule becomes inapplicable; and that a party can even be added at the appellate stage”.



16. In this instant case, the Plaintiff in the Counter - Claim exclusively sought to amend the Counter - Claim but not for leave to join other parties to the Counter - Claim. However, the Court is alive to the provisions of Article 159 (2)(d) of *the Constitution* which requires the Court to administer justice without undue regard to procedural technicalities. Indeed, the Court in the case of “Raila Odinga – Versus - *IEBC and 4 others Petition (No. 5 of 2013)*”, pronounced itself on the matter thus;

“The essence of that provision is that a Court of law should not allow the prescriptions of procedure and form to trump the primary object, of dispensing justice to the parties. This principle of merit, however, in our opinion, bears no meaning cast-in-stone and which suits all situations of dispute resolution. On the contrary, the Court as an agency of the processes of justice, is called upon to appreciate all the relevant circumstances and the requirements of a particular case, and conscientiously determine the best course.”

This is one of the cases where the Court disregards procedural technicalities in favour of substantive justice having regard to all relevant circumstances obtaining in this case.”

17. This court is conscious of the need to dispense justice without undue delay and without undue regard to technicalities as espoused in Article 159 of *the Constitution*. Nonetheless, it must indeed act within the confines of the law and guard against the temptation to dispense justice through short cuts which are wrong cuts which are likely to deny justice to a party. It would be a travesty of justice, in my view, if a court of law would refuse to hear a party on a pending application merely because it lacked merit without first hearing both parties on its merits and demerits and or dispensing with it as provided for by law. To deny the subject a hearing should be the last resort of a court.

18. The suit has not been heard and no final orders issued so the application is properly before this Court. Nambuye J, in Eldoret High Court Civ’ No. 136 of 2000:- “Joseph Njau Kingori – Versus - Robert Maina Chege & 3 others [2002] eKLR” enumerated four aspects to look at before joining a party to a suit to wit:

- i. Is a necessary party?
- ii. A proper party;
- iii. There is a relief flowing from him to the plaintiff;
- iv. The ultimate order or decree cannot be enforced without his participation in the proceedings

19. Similarly, the Judges sitting in Nairobi High Court case of “Julius Meme – Versus - Republic & another [2004] eKLR” Miscellaneous Criminal App. No 495 of 2003, when looking at the principles for joinder of parties in Constitutional reference, though different circumstances, held:-

- i. Joinder of a person because his presence will result in the complete settlement of all the questions involved in the proceedings;
- ii. Joinder to provide protection for the rights of a party who would otherwise be adversely affected in law;
- iii. Joinder to preempt a likely course of proliferated litigation

20. The Applicant herein has contended that the Plaintiff in the Counter - Claim and the 1st Defendant in the Counter - Claim were in a Bank Client relationship while the 2nd, 3rd, 4th and 5th Defendants were personal guarantees of the 1st Defendant. At the point of filing the suit, the same was filed by the 1st Defendant in the Counter - Claim and the 2nd Defendant in the Counter - Claim to the omission of the



other personal Guarantees whom the Plaintiff in the Counter - Claim intended to sue as the 3rd to 5th Defendants in the Counter - Claim. The Plaintiff in the Counter - Claim was desirous of prosecuting the instant suit as against all the Personal Guarantees who executed the Guarantee with the Plaintiff in the Counter - Claim's predecessor.

21. According to the Applicant it is necessary for the amendment to be allowed so as to have the issues determined on merit as against the Personal Guarantees particularly taking into account that the 1st Defendant in the Counter - Claim has liquidated the floating charge whilst the loan amount is still in arrears to the detriment of the Plaintiff in the Counter - Claim. The Amendments which is necessary does not prejudice the Defendants and the Intended Defendants who were in any case fully aware of the proceedings herein. Annexed and marked as 'SBM - 2' were copies of the letters dated 28th June 2014 addressed to the Personal Guarantees calling on them to settle the outstanding loan in the sum of Kenya Shillings Kenya Shillings Four Hundred and Nine Million One Fourty Three Thousand Thirty Five Hundred (Kshs. 409,143,035.00/=).
22. The applicable principles of amendments were settled in the Court of Appeal Case of "Joseph ochieng & 2 others trading as Aquiline Agencies – Versus - First National Bank of Chicago [1995] eKLR". And also echoed by the Court in "Nairobi HCC Civil No 2715 of 1987 Lakhamsi Khimji Shah & Another – Versus - Ajay Shantilal Shah & 2 others [2010] eKLR" where it was held:-
 - i. The application should be made timely.
 - ii. The application should be made in good faith.
 - iii. The Court should examine the nature and extent of amendments.
 - iv. The Court must ensure there is no new or inconsistent cause of action.
 - v. That no injustice will be occasioned to the other party.
23. The Application was filed on 30th September, 2024, while the Statement of Defence and Counter - Claim filed on 2nd October, 2023 which is close to one year after the instituting of the Counter - Claim. The proposed Counter - Claim by the Applicant however, goes beyond the definition of a Counter - Claim in the sense that it seeks to introduce three new parties who are presently not parties in this suit. Apparently, the Applicant has a claim against the three it proposes to introduce as Defendants in its Counter - Claim. Can an Applicant introduce new parties into the suit by way of a Counter - Claim?
24. The answer to the above question is a firm No! Strictly speaking, a Counter - Claim can only be filed by a Defendant(s) against a Plaintiff(s). It is a 'Cross - Suit' by the Defendant against the Plaintiff. It is a 'Counter - Action' or a 'Counter - Suit'. A Defendant who has a claim against any person who is not already a party to the suit should instead follow the procedure provided for under the provision of Order 1 Rule 15 of the Civil Procedure Rules, 2010. Order 1 rule 15 provides as follows:-

“where a Defendant claims as against any other person not already a party to the suit (hereinafter called the third party);-

- a. That he is entitled to contribution or indemnity; or
- b. That he is entitled to any relief or remedy relating to or connected with the original subject-matter of the suit and substantially the same as some relief or relief or remedy claimed by the Plaintiff, or
- c. That any question or issue relating to or connected with the said subject matter is substantially the same question or issue arising between the Plaintiff and



the Defendant and should properly be determined not only as between the Plaintiff and the Defendant and the third party or between any or either of them shall apply to court within 14 days after the close of pleadings for leave of the court to issue a notice (hereinafter called a third party notice) to that effect, and such leave shall be applied for by summons in chambers ex - parte supported by affidavit.

25. The rule is self-explanatory. Therefore, the Applicant has not followed the right procedure in as far as introducing the two proposed new parties is concerned. As against the three new parties, the Applicant is at liberty to commence third party proceedings against them in accordance with the provisions of Order 1 Rule 15 of the Civil Procedure Rules, 2010. The introduction of an amendment to the pleadings means that the pleadings have been re-opened. The Applicant should take advantage of that window to take-out third-party proceedings. The application must fail.

Issue No. b). Who will bear the Costs of Notice of Preliminary objection dated 30th September, 2024.

26. It is now well established that the issue of Costs is a discretion of the Court. Costs mean the award a party is awarded at the conclusion of a legal action or proceedings in any litigation. The provision of Section 27 (1) of the *Civil Procedure Act*, Cap. 21 holds that costs follow the events. By event it means the results or outcome of the legal action or proceedings. See the decisions of Supreme Court “Jasbir Rai Singh – Versus - Tarchalan Singh” eKLR (2014) and Cecilia Karuru Ngayo – Versus – Barclays Bank of Kenya Limited, eKLR (2014).
27. In the case of “Hussein Muhumed Sirat – Versus - Attorney General & Another [2017] eKLR, the court stated that costs follow the event as a well-established legal principle, and the successful party is entitled to costs unless there are other exceptional circumstances. In this case, this Honourable Court has reserved its discretion in not awarding costs.

V. Conclusion & Disposition

28. In long analysis, the Honorable Court has carefully considered and weighed the conflicting parties’ interest as regards to balance of convenience. Ultimately in view of the foregoing detailed and expansive analysis to the application, this court arrives at the following decision and makes the orders below:-
- a. That the Notice of Motion application dated September 30, 2024 be and is found to lack merit and thus hereby dismissed with no orders as to costs.
 - b. That for expediency sake, the suit should be heard on February 14, 2025. There should be a mention on January 23, 2025 for purposes of conducting the final Pre – Trial Conference pursuant to the provision of Order 11 of the Civil Procedure Rules, 2010.
 - c. That there shall be no orders as to costs.

It is so ordered accordingly.

RULING DELIVERED THROUGH THE MICROSOFT TEAM VIRTUAL MEANS, SIGNED AND DATED AT MOMBASA THIS 18TH DAY OF NOVEMBER 2024.

**HON. MR. JUSTICE L. L. NAIKUNI,
ENVIRONMENT AND LAND COURT AT
MOMBASA**

Ruling delivered in the presence of:



M/s. Firdaus Mbula, the Court Assistant.

Mr. Gathu Advocate for the Plaintiff in the Counter - Claim.

Mr. Ondieki Advocate for the Defendant in the Counter - Claim.

