



Level One Holdings Limited v Moran Lounge & Grill Limited (Environment & Land Case E123 of 2023) [2024] KEELC 13983 (KLR) (18 December 2024) (Ruling)

Neutral citation: [2024] KEELC 13983 (KLR)

**REPUBLIC OF KENYA
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI
ENVIRONMENT & LAND CASE E123 OF 2023
MD MWANGI, J
DECEMBER 18, 2024**

BETWEEN

LEVEL ONE HOLDINGS LIMITED PLAINTIFF

AND

MORAN LOUNGE & GRILL LIMITED DEFENDANT

RULING

(In respect of the Plaintiff's application dated 11th October, 2024 seeking leave to amend plaint)

Background

1. The Application for determination before this Court is the Plaintiff's Notice of Motion dated on the 11th October, 2024 expressed to be brought under the provisions of Order 8 Rule 5 and Order 51 Rule 1 of the *Civil Procedure Rules* seeking for Orders that: -
 - a. The Plaintiff be granted leave to amend its Plaint filed herein on 18th October, 2023, as per draft annexed herein.
 - b. The Draft Amended Plaint annexed hereto be treated as the Plaintiff's Amended Plaint and that the same be deemed as having been duly filed and served.
 - c. The Defendant's be at liberty to amend its Defence within 14 days thereafter if they so wish.
 - d. Costs of this Application be in the cause.
2. The application is premised on the grounds on the face of it and is further supported by the Affidavit of Mary Angaine, the Plaintiff's Director, deponed on the 11th October, 2024. The Applicant avers that vide the Lease dated 3/11/2022, it leased from the Defendant the suit premises located on Land Reference No. 5989/2 off Kiambu Road. The deponent avers that the Applicant performed its obligations in accordance with the Lease Agreement but the Defendant breached the terms of the



Agreement. The Applicant therefore seeks special and general damages for breach of contract against the Defendant.

3. The deponent further avers that while reconciling its accounts, it realized that it did not plead all the special and general damages hence the need to amend the Plaintiff to plead all the facts. The proposed amendments are to bring before the Court the real dispute between the parties herein. It is therefore in the interest of justice that the Plaintiff should be granted leave to amend its Plaintiff herein. It affirms that no prejudice will be occasioned to the Defendant herein by reason of the proposed amendments.

Replying Affidavit by the Defendant

4. The application is opposed by the Defendant vide the Replying Affidavit sworn on 5th November, 2024 by Stephen Mwai Muchene. The Defendant argues that the Plaintiff did not perform its obligations as per Lease Agreement as it had not paid rent for a period of seven (7) months. The Deponent contends that the application herein is an afterthought that arose after the Plaintiff perused the Statement of Defence which raised issues of failure to provide sufficient evidence for special damages. The Plaintiff ought to have reconciled its accounts and put its documents in order before filing the suit.
5. The Respondent argues that the amendment is not intended to correct a mere error or oversight but seeks to add new issues and claims which should have been included from the onset of suit. The proposed amendments are misconceived, made in bad faith and overly vexatious and likely to prejudice the Defendant. The application should therefore be dismissed with costs.

Supplementary Affidavit by the Applicant

6. In its Supplementary Affidavit sworn by Mary Angaine on 13th November, 2024, the Plaintiff reiterates its assertions that the intended amendment aims at providing facts and the amounts arrived at after reconciliation of accounts for the court to determine the real matters in dispute between the parties. The deponent maintains that the Defendant will not be prejudiced in any way as it will have an opportunity to amend its Defence.
7. The Deponent further avers that the delay in reconciling the accounts was occasioned by the fact that the Defendant carted away all the Plaintiff's goods, tools of trade including documents hence the delay. That the amendment does not seek to change the cause of action or introduce a new suit. Therefore, the amendment should be allowed to enable the parties to litigate this matter once and for all.

Court's Direction

8. Parties by consent agreed to rely on their respective pleadings in supporting and opposing the application respectively. The Applicant however filed a List of Authorities which the Court has had occasion to peruse.

Issues for Determination

9. In this Court's opinion, the only issue for determination is whether the Plaintiff's Notice of Motion for amendment is merited.



Analysis and Determination

10. The power to allow amendment of pleadings is a discretionary power donated by the [Civil Procedure Rules](#) under Order 8. In particular Order 8 Rule 3(1) provides: -

“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”
11. On the other hand, Order 8 rule 5 (1) provides: -

“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any 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.”
12. The above provisions do not seem to place time restrictions within which an amendment to a pleading should be made. In fact, Order 8 Rule 3 (1) uses the phrase ‘at any time of time’.
13. For this reason, it is considered trite that amendments to pleadings may be freely allowed at any time before the delivery of a judgment. In this regard, Mulla in [The Code of Civil Procedure](#), 17th Edition Volume 2, at pages 333, 334 and 335 observes that as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised in the pleadings where the amendment will occasion no injury to the opposite party.
14. Consequently, in [Beatrice Gikunda -vs- CFC Life Assurance Limited](#) [2020] eKLR, the court observed that leave to amend must always be granted unless the party applying is acting mala fide and where it is not necessary for determining the real question in controversy between the parties. Thus, an application to amend a pleading, must be made in good faith without the intention of frustrating the suit or delaying justice.
15. The main consideration by the court is that an amendment should not be allowed if it causes injustice to the other side. In [Abdul Karim Khan vs Mohamed Roshan](#) (1965) EA. 289 (C.A), the court stated that an amendment that is inconsistent with the original pleading and entirely alters the nature of the Defence or Plaint should not be allowed.
16. A wider footage on the issue was given in the case of [Elijah Kipngeno Arap Bii -vs- Kenya Commercial Bank Limited](#) [2013] eKLR, where the Court of Appeal clearly set out the principles upon which Courts may grant leave to amend pleadings. The same is as follows:
 - a. the power of the court to allow amendments is intended to determine the true substantive merits of the case;
 - b. the amendments should be timeously applied for;
 - c. power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages);
 - d. 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;
 - e. that the proposed amendment must not be immaterial or useless or merely technical;



- f. 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; and
- g) 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.”
17. The above mentioned parameters are not exhaustive as far as the grant of leave to amend pleadings is concerned. This position was stated in the case of *St. Patrick's Hill School Limited v Bank of Africa Kenya Limited* [2018] eKLR cited by the Plaintiff/ Applicant in her submissions.
18. 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.
19. A perusal of the Draft Amended Plaint shows that the proposed amendments are intended to add more claims of special damages in addition to the ones already pleaded. The Plaintiff further intends to add a prayer for mental and psychological torture allegedly suffered by the Plaintiff's Directors. Evidently, the proposed amendments emanate from the same transaction and the Plaintiff is not introducing any new suit.
20. Further, I do not see how the above amendments will in any way prejudice the Defendant and or result in any injustice. The Defendant's contention that the claims for special damages have not been proved is a matter to be determined by the trial court at the hearing. Moreover, whereas there has been no sufficient explanation given for the delay in filing of the application for leave to amend the Plaint, I am guided by the decision in *Central Kenya Limited v Trust Bank Limited* [2000] 2 EA 365, where the court stated that mere delay is not a ground for declining leave to amend, unless such delay is one likely to prejudice the other party beyond monetary compensation.
21. In this particular case, I am of the view that there is no prejudice that will be occasioned to the defendant; even if, it is not one that cannot be compensated by an award for costs to the Defendant.
22. Furthermore, if the application for amendment is allowed, the Defendant will have the opportunity to respond to the amendments if she so wishes.
23. In the foregoing, I find that the Plaintiff has demonstrated a good case for an amendment of pleadings and that no prejudice will be suffered by the Defendant if the application is allowed.
24. Accordingly, the application dated the 11th October, 2024 is allowed on the following terms: -
- a. That the Amended Plaint be filed and served within fourteen (14) days from the date of this ruling
 - b. That the Defendant is granted leave to file an Amended Defence within fourteen (14) days of service, if need be; and,
 - c. Costs of this application shall be in the cause.

It is so ordered.

RULING DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 18TH DAY OF DECEMBER, 2024.

M.D. MWANGI



JUDGE.

In the virtual presence of:

Mr. Okemwa for the Defendant/Respondent

Ms. Wanjiku for the Plaintiff/Applicant

Joan: Court Assistant

M.D. MWANGI

JUDGE.

