



**Malde Pleating Industries Limited v Bank of Baroda Limited & another (Commercial Case E828 of 2021) [2025] KEHC 11685 (KLR) (Commercial and Tax) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 11685 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)  
COMMERCIAL AND TAX  
COMMERCIAL CASE E828 OF 2021**

**MN MWANGI, J  
JULY 31, 2025**

**BETWEEN**

**MALDE PLEATING INDUSTRIES LIMITED ..... PLAINTIFF**

**AND**

**BANK OF BARODA LIMITED ..... 1<sup>ST</sup> DEFENDANT**

**ZUWENA COMPANY LIMITED ..... 2<sup>ND</sup> DEFENDANT**

**RULING**

1. The plaintiff filed a Notice of Motion application dated 3<sup>rd</sup> May 2024 pursuant to the provisions of Sections 1A, 1B & 3A of the *Civil Procedure Act*, Order 1 Rule 10 & Order 8 Rule 3 of the Civil Procedure Rules, 2010 and any other enabling provisions of the law. The plaintiff prays for leave to amend its plaint dated 27<sup>th</sup> September 2021 and for the draft amended plaint attached to its application to be deemed duly filed and served upon payment of requisite Court fees.
2. The application is premised on the grounds on the face of the Motion, and it is supported by an affidavit sworn on the same day by Mr. Sudhir Meghji Shah, the plaintiff's Director. He averred that this suit was instituted vide a plaint dated 27<sup>th</sup> September 2021 accompanied by an application under Certificate of Urgency seeking injunctive reliefs. He also averred that following the Court Ruling on the application that limited the plaintiff's claim to damages, the plaintiff wishes to amend its pleadings to include key issues relevant to the final resolution of this case. Mr. Shah claimed that the proposed amendment is necessary for the Court to fully and effectively determine all matters in dispute and address the real issues in controversy between the parties herein. He stated that the instant application has been filed without undue delay, noting that previous interlocutory applications have impeded the progress of this suit. He averred that the plaintiff will suffer irreparable harm if the orders being sought herein



are not granted, while no prejudice will be suffered by the defendants since this matter is still at the interlocutory stage and pre-trial proceedings have not yet commenced.

3. In opposition to the application, the 1<sup>st</sup> defendant filed a replying affidavit sworn on 18<sup>th</sup> June 2024 by Ms Sylvia Muthemba, the 1<sup>st</sup> defendant's Legal Manager. She stated that this suit was filed on 27<sup>th</sup> September 2021 vide a plaint and an application under Certificate of Urgency seeking injunctive reliefs, then the 1<sup>st</sup> defendant filed its statement of defence dated 1<sup>st</sup> October 2021. She averred that on 31<sup>st</sup> March 2022, the Court dismissed the plaintiff's application for injunction, which means that the application herein has been filed inordinately late, having been filed more than two (2) years after delivery of the said ruling.
4. Ms Muthemba stated that the plaintiff has not justified why it did not act sooner despite being aware of the Ruling's implications. She claimed that the proposed amendments would significantly overhaul the original plaint and introduce new causes of action that were always within the plaintiff's knowledge and that do not arise from the same facts as originally pleaded, thereby altering the nature of the suit to the 1<sup>st</sup> defendant's prejudice. She pointed out to the fact that the plaintiff has been legally represented throughout and offers no reason for failing to include the now proposed issues earlier.
5. In a rejoinder, the plaintiff filed a supplementary affidavit sworn on 9<sup>th</sup> October 2024 by Mr. Sudhir Meghji Shah, the plaintiff's Director. He averred that this case is still at the pre-trial stage, and the 1<sup>st</sup> defendant would not be prejudiced in the event that the orders being sought herein are granted, as it will have a chance to respond. He explained that the delay in filing the instant application was due to the plaintiff's focus on related eviction proceedings in ELC Case No. E068 of 2022 (OS), and contended that the said delay was inadvertent and regrettable. He stated that any oversight by the plaintiff's Counsel should not be held against the plaintiff. Mr. Shah denied that the amendment being sought herein introduces a new cause of action, maintaining that it merely clarifies the facts to support the existing claim of breach of duty by the 1<sup>st</sup> defendant as a chargee.
6. The instant application was canvassed by way of written submissions. The plaintiff's submissions were filed by the law firm of CM Advocates LLP on 15<sup>th</sup> November 2024, while the 1<sup>st</sup> defendant's submissions were filed by the law firm of Gathaiya & Associates Advocates on 19<sup>th</sup> November 2024.
7. Ms Kendi, learned Counsel for the plaintiff cited the provisions of Section 100 of the [Civil Procedure Act](#) and Order 8 Rule 3 of the Civil Procedure Rules, 2010 and submitted that this Court has the discretion to issue the orders being sought in the instant application. She relied on the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR, to assert that the purpose of amending pleadings is to allow parties to present the true facts and intended reliefs, ensuring that the case is determined based on the actual issues in dispute rather than outdated or incorrect claims. She contended that the amendment sought is necessary due to a change in circumstances, specifically the fact that the plaintiff is no longer in possession of the suit property, which has since been taken over by the purchaser.
8. Counsel referred to the case of *Beatrice Gikunda v CFC Life Assurance Limited* [2020] eKLR, and stated that the plaintiff acknowledges the delay in filing the application herein but stated that the delay has been adequately explained and should be excused. She submitted that under established legal principles, delay alone is not a sufficient reason to deny an amendment, unless the respondent can show that he will suffer prejudice that cannot be compensated by costs. Counsel asserted that the 1<sup>st</sup> defendant has not shown any prejudice that it would suffer in the event that the orders being sought are granted.



9. Ms Kendi cited the case of *WK & 2 others v British Airways Travel Insurance & another* [2018] eKLR, and submitted that it is trite that amendments should generally be allowed if they are necessary to resolve the real issues in dispute, especially where any prejudice to the opposing party can be addressed through costs or appropriate terms set by the Court as is the case herein. She argued that the proposed amendments aim to reflect the true factual position without altering the original cause of action, which remains a breach of duties by the defendant as a chargee. Further, that even if a new cause of action arises, the applicant notes that under Order 8 Rule 3(5) of the Civil Procedure Rules, 2010, the Court can allow such an amendment if it stems from the same or substantially the same facts already pleaded. Counsel stated that it is just and proper for the instant application to be allowed.
10. Mr. Gathaiya, learned Counsel for the 1<sup>st</sup> defendant relied on the case of *Institute for Social Accountability & another v Parliament of Kenya & 3 others* (supra) and submitted that amendments must not cause injustice, introduce inconsistent causes of action, or result from undue delay. Further, that while the plaintiff blames the delay on focusing on eviction proceedings in ELC Case No. E068 of 2022, those proceedings begun nine (9) months after the plaintiff's application for injunction was dismissed, and the eviction case could not have caused the delay in filing the instant application. Counsel argued that the proposed amendments should be rejected due to undue delay in filing the application herein, which would cause injustice to the opposing party.
11. Mr. Gathaiya stated that the proposed amendments introduce an entirely new cause of action and significantly alter the original claim, including a fresh claim of Kshs.455,000,000/=, which would be unjust to the 1<sup>st</sup> defendant given that no provision was made for such a claim over four years after the property was sold via public auction. He further stated that the proposed amendments violate Order 8 Rule 3(1) of the Civil Procedure Rules as they would require the 1<sup>st</sup> defendant to address entirely new claims thus delaying the conclusion of this suit, increase costs and undermine the right to a fair trial by introducing new issues late in the process.

### **Analysis and Determination**

12. Upon consideration of the application herein, the grounds on the face of the Motion, and the affidavits filed in support thereof, as well as the replying affidavit by the 1<sup>st</sup> defendant and the written submissions by Counsel for the parties, the issue that arises for determination is whether the plaintiff should be granted leave to amend its plaint.
13. This Court has the discretion under Order 8 Rule 5(1) of the Civil Procedure Rules, 2010, to allow amendments to any document where necessary for determining the real issues in dispute between the parties. The said provisions state as follows-

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.

14. Amendment of pleadings with leave of the Court is provided for under Order 8 Rule 3 of the Civil Procedure Rules, 2010 which states 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.



2. Where an application to the court for leave to make an amendment such as is mentioned in sub - rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub - rule if it thinks just so to do.
  3. An amendment to correct the name of a party may be allowed under sub - rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.
  4. An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.
  5. An amendment may be allowed under sub - rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for leave to make the amendment.
15. The plaintiff's case is that the instant application is as a result of the Ruling delivered on 31<sup>st</sup> March 2022, dismissing the plaintiff's application for injunction. The plaintiff contended that the Court in the said Ruling limited its claim to damages, thus it wishes to amend its pleadings to include key issues relevant to the final resolution of this case. The defendant on the other hand averred that the proposed amendments would introduce a new cause of action that does not arise from the same facts as originally pleaded, thus altering the nature of the suit.
16. amendments to pleadings should be allowed freely at any stage of the proceedings as long as the amendment does not cause prejudice or injustice to the opposing side which cannot be remedied by costs. In the case of *Kassam v Bank of Baroda (Kenya) Limited* [2002] 1 KLR 294, the Court laid down the factors to be considered when dealing with an application for amendment of pleadings as hereunder –
- a. The party applying is not acting mala fides;
  - b. The amendment will not cause some injury to the other side which cannot be compensated by costs;
  - c. The amendment is not a device to abuse the court process;
  - d. The amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits;
  - e. and that the amendment will not alter the character of the suit.
17. In the case of *Joshua Kimani v Kiso Enterprises Ltd & 3 others* [2020] eKLR, the Court held that –
- The Learned authors of *Halsbury's Laws of England, 4th Ed (Re-Issue), Vol. 36(1)* at paragraph 76, state the following about amendments of pleadings: -
- “.....The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this



purpose the Court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.

...The person applying for amendment must be acting in good faith. amendment will not be allowed at a late stage of the trial if on analysis of it, it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...” (Emphasis added).

18. On perusal of the plaint, this Court notes that the plaintiff's suit against the 1<sup>st</sup> defendant as earlier pleaded was for breach of its duties as a chargee. The plaintiff claimed that the 1<sup>st</sup> defendant advanced various loan facilities to Malplast Industries Limited, secured by a charge over all that parcel of land known as L.R. No. 1870/126/1 (Originally No. 53/3), registered in the name of the plaintiff. The plaintiff avers in the said plaint that Malplast Industries Limited defaulted in its loan repayment obligations and the 1<sup>st</sup> defendant proceeded to exercise its statutory power of sale over the charged property.
19. The plaintiff contends that the suit property was advertised for sale by public auction that was scheduled for 14<sup>th</sup> July 2020, but the bids were lower than the reserve price. The plaintiff contends that the suit property was subsequently sold more than a year after the advertised date to the 2<sup>nd</sup> defendant, at Kshs.257,000,000/=, without its knowledge. The plaintiff alleges that the 1<sup>st</sup> defendant failed to properly advertise the sale and conduct a current valuation within 12 months prior, rendering the sale unlawful and irregular.
20. Upon perusal of the draft amended plaint annexed to the plaintiff's supporting affidavit, I note that the proposed amendments seek to introduce the fact that the suit property has since been sold. In the said amendments, the plaintiff brings to the Court's attention the events leading to the sale of the suit property and challenges the process leading up to its sale. The plaintiff asserts that the 1<sup>st</sup> defendant was negligent and in breach of its statutory duty of care owed to the plaintiff as a chargor. It is noteworthy that the reliefs sought by the plaintiff in the draft amended plaint are different from the ones sought in the main plaint.
21. It is not in contest that in the Ruling delivered on 31<sup>st</sup> March 2022 which dismissed the plaintiff's application for injunction, the Court noted that the plaintiff's claim was limited to damages. I therefore agree with the plaintiff that it was necessary to amend its plaint since it initially sought for orders inter alia, that the sale of the suit property be set aside, an injunction restraining the 1<sup>st</sup> defendant from transferring the suit property and damages as a result of the said sale.
22. In view of the foregoing, I do not agree with the 1<sup>st</sup> defendant that the proposed amendments would alter the nature of this suit by introducing a new cause of action that does not arise from the same facts as originally pleaded. To the contrary, my considered view is that the proposed amendments are not only in tandem with the original cause of action but also crystalize the plaintiff's case. In addition, the said amendments will facilitate the determination of the real question in controversy between the parties, by the Court.
23. I note that in as much as the 1<sup>st</sup> defendant contends that it will suffer prejudice in the event the instant application is allowed, it has not demonstrated the nature of prejudice it stands to suffer. Further, by the time the instant application was filed, this matter was still at the pre-trial stage as it had not yet been certified ready for hearing. I am therefore not persuaded that the 1<sup>st</sup> defendant stands to suffer any



substantial prejudice and/or injustice that cannot be compensated by way of costs in the event that the instant application is allowed. In view of the foregoing, it is my finding that it is in the wider interest of justice to allow the plaintiff to amend its plaint.

24. The upshot is that the application herein is merited. It is allowed in the following terms –
- i. The plaintiff is hereby granted leave to amend the plaint dated 27<sup>th</sup> September 2021 as per the draft amended plaint;
  - ii. The plaintiff will file and serve its amended plaint within fourteen (14) days from today;
  - iii. The 1<sup>st</sup> defendant is granted leave to file and serve an amended defence within fourteen (14) days of service of the amended plaint; and
  - iv. Costs of the application shall be borne by the plaintiff.

It is so ordered.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 31<sup>ST</sup> DAY OF JULY, 2025. RULING DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

**NJOKI MWANGI**

**JUDGE**

In the presence of:-

Ms Munjogu holding brief for Ms Kendi for the plaintiff/applicant

Mr. Gathaiya for the 1<sup>st</sup> defendant/respondent

Ms B. Wokabi –Court Assistant.

