



**Nyakongo t/a HR Ganijee & Sons v County Government of Kwale & another
(Civil Suit 96 of 2015) [2025] KEHC 12345 (KLR) (31 July 2025) (Ruling)**

Neutral citation: [2025] KEHC 12345 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT 96 OF 2015
F WANGARI, J
JULY 31, 2025**

BETWEEN

JOHN OMOLLO NYAKONGO T/A HR GANIJEE & SONS PLAINTIFF

AND

COUNTY GOVERNMENT OF KWALE 1ST DEFENDANT

**INTER-GOVERNMENTAL RELATIONS TECHNICAL COMMITTEE 2ND
DEFENDANT**

RULING

1. The 1st Defendant/Applicant filed a Notice of Motion application dated 19/03/2024 pursuant to Order 8 Rules 3, 5 and 8 and Order 50 Rule 1 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the *Civil Procedure Act*.
2. The Applicant seeks leave to further amend the Amended Statement of Defence as per the draft Further Amended Statement of Defence annexed to the Affidavit in support of the application. The Further Amended Statement of Defence would be filed within 7 days from the date of the order granting the leave. Costs of the application was also prayed for.
3. The application is premised on grounds on its face and the annexed Supporting Affidavit dated 19/03/2024. It was stated that for the purpose of determining the issues in controversy between the parties, the application herein is necessary since the 1st Defendant's Amended Defence is tainted with inadvertent defects and erroneous facts which need to be corrected for clarity purposes, and more specifically, paragraph 3 of the Amended Statement of Defence. That it is in the interest of justice that the application is allowed and that the proposed further amendment would cause no prejudice to the Plaintiff since the matter is not fully heard.
4. In response, the Plaintiff/Respondent filed a Replying Affidavit dated 09/04/2024 that the 1st Defendant's application is intended to unreasonably delay the hearing and disposal of the matter.



- That the case has been pending in court for 9 years which is a fairly long time and that the delay in its prosecution has been largely attributed to the 1st Defendant who attempted to have the suit struck out in limine.
5. That although the suit was initially struck out as prayed by the 1st Defendant, the same was later reinstated by the court as it had been struck out based on error of fact that the suit was time barred. That the 1st Defendant preferred an appeal in Mombasa Civil Appeal No. E055 of 2021, County Government of Kwale v John Omollo T/A H.R. Ganijee & Sons & Another against the court's finding that the suit was not time barred. That the appeal was dismissed by the court vide the Judgment delivered on 22/09/2023.
 6. The Plaintiff/Respondent averred that this is the second time that the 1st Defendant has sought to amend its defence and no plausible reason was given as to why the proposed amendment was not done when it amended its initial Statement of Defence.
 7. The matter came up for pre-trial conference on 20/11/2023 by which time the, if the 1st Defendant was keen to further amend its defence, it should have moved the court seeking leave to amend, on or before the said date or at the very least before 30/11/2023 when the matter was scheduled for hearing but that was not done.
 8. That from the contents of the Supporting Affidavit sworn by Alex Mbenga, it is apparent that the 1st Defendant's application is an afterthought and an attempt by the 1st Defendant to reframe and/or patch up its case as the matter progresses. That it is a reaction to the questions that he was asked on cross examination and that such amendment should therefore be disallowed by the court.
 9. The Plaintiff/Respondent states that the proposed amendment will occasion him great prejudice as he is currently unwell having been in and out of hospital. That the proposed amendment will subject him to great stress contrary to the doctor's advice as it will necessitate reopening of the case which will require him to be recalled to testify in order to challenge the issues raised. That the proposed amendment will prejudice the Plaintiff/Respondent's right to fair trial as he will be forced to reopen his case which will result in unnecessary delay in determination of the dispute which has been pending in court for the last 9 years.
 10. The Plaintiff/Respondent further stated that the matter is at an advanced stage of hearing, he has closed his case and the 1st Defendant's sole witness has already testified and is at the point of being further cross examined. That the 1st Defendant's application seeks to defeat the overriding objective as provided under Section 1A and 1B of the Civil Procedure Act which is to facilitate the just, expeditious and proportionate resolution of disputes. That the application should therefore be dismissed with costs.
 11. A Further Affidavit for the Plaintiff/Respondent dated 31/03/2025 by Nathan Omoth Omollo, suing as the administrator of the Estate of John Omollo Nyakongo (deceased), that he substituted his late father as the Plaintiff herein after his application for substitution was allowed by this court. That his late father died after he had given his evidence and that the Plaintiff's case now stands as closed. That the Plaintiff will be highly prejudiced if leave is granted to the Defendant to further amend the amended defence as the original Plaintiff is deceased and cannot be recalled to testify on the issues being introduced by the amendment.

Submissions

12. The application was canvassed by way of written submissions. The 1st Defendant/Applicant filed submissions dated 27/02/2025. It was submitted that during cross examination of their only witness regarding the contested variation agreements that were allegedly signed between the Plaintiff and the 1st



- Defendant. That the witness denied any knowledge of the same. it was after the Plaintiff's counsel drew attention of the witness to Clause 3 of the 1st Defendant's Statement of Defence admitting the existence of variation agreements dated 27/05/2007 and 13/09/2007 as set out in the Plaintiff's Amended Plaintiff at paragraph 2D.
13. The 1st Defendant/Applicant argued that Clause 22.1, 22.2 and 22.3 of the main agreement signed between the 1st Defendant and the Plaintiff addresses how a variation of the contract dated 15/03/2004 shall be made.
 14. It was further submitted that in light of what transpired in court on 12/03/2024, it became manifestly clear that Clause 3 as set out in the 1st Defendant's Amended Statement of Defence must have been drawn out of a grave but regrettable drafting error which needed to be corrected immediately to align with the 1st Defendant's evidence and position in general regarding the alleged variation agreements.
 15. That the contested alleged variation agreements resulted in serious audit questions and questions of documents which were signed irregularly by officials of the now defunct Kwale County Council who did so without proper authority and must have done so out of gross misconduct.
 16. According to the 1st Defendant/Applicant, the proposed amendments will enable this court to effectively adjudicate upon all the issues falling for determination as they did not introduce a new cause of action or change the character of the case.
 17. That the mistake of an advocate should not be visited upon his client, that the matter of further amendment has been brought forward without undue delay. The 1st Defendant/Applicant is ready to abide by the terms set by this court, as it stands to suffer irreparable harm and prejudice if the application is not allowed, while the Plaintiff's prejudice if any may be compensated by way of damages.
 18. Finally, it was submitted that amendment of pleadings is intertwined with the right to be heard, which right will be breached as the 1st Defendant will be condemned unheard if the application is disallowed. The 1st Defendant sufficiently demonstrated that the application for further amendment of the Statement of Defence is merited and should therefore be allowed as prayed.
 19. The Plaintiff/Respondent filed submissions dated 31/03/2025. It was submitted that it would be unjust to allow this application as the matter is at an advanced stage. The Plaintiff has closed its case, the 1st Defendant's case is part-heard, as its witness is pending further cross examination.
 20. The application herein is an afterthought and attempts by the 1st Defendant to patch up the issues that became known to the trial court during cross examination. From a progressive reading of the intended Further Amended Defence, it is clear that it is an answer to the questions that were asked during cross examination and by allowing such application, the Plaintiff's right to a fair hearing will be deeply infringed upon.
 21. The Plaintiff/Respondent further stated that they shall be highly prejudiced if the application is allowed since the original Plaintiff is now deceased and is represented by in this suit by an administrator of his estate. Therefore, subjecting the newly substituted Plaintiff to new issues that have arisen and which are aimed at reframing and patching up the case after cross examination, is unfair to the plaintiff. That the matter having been in court for more than 9 years, was struck out and later on reinstated by the Court of Appeal, and any further delay of the matter would be greatly prejudicial to the Plaintiff.
 22. Both parties relied on various authorities in support of their rival positions and the same have been considered.



Analysis

23. I have considered the application, supporting affidavit, Replying Affidavit, and submissions by the parties. The issues for determination are: -
- a. Whether an application for leave to further amend and file the Amended Statement of Defence is merited
 - b. What orders on costs should issue
24. Order 8 Rule 3 of the Civil Procedure Rules provides for amendment of pleading where leave of court is required. A party may amend its pleadings at any stage of the proceedings. Rule 3 provides as follows;

Amendment of pleading with leave

- (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 subrule (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 subrule if it thinks just so to do.
 - (3) An amendment to correct the name of a party may be allowed under subrule (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 subrule (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
25. The power of the court to order for amendment of pleadings is provided for in Order 8 Rule 5 which states as follows;

General power to amend

1. 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.

26. On the principles in amendment of pleadings, the Court of appeal in the case of Central Kenya Limited v Trust Bank Limited & 5 Others [2002] eKLR stated as follows;

“That a party is allowed to make such amendments as may be necessary for determining the real question controversy or to avoid a multiplicity of suits provided that there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

27. Further, in the case of Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others (2014) eKLR the principles in amendment of pleadings were elaborated as follows;

- a. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- b. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- c. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
- d. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
- e. Amendments of a claim or relief barred by time should not be allowed;
- f. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- g. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties;
- h. The delay in filing the petitions for amendment should be properly compensated by costs;
- i. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.

28. This suit was instituted vide the Plaint dated 23/07/2015. The 1st Defendant filed its Statement of Defence dated 20/08/2015. The Plaintiff Amended his Plaint dated 25/10/2019 and the 1st Defendant filed its Amended Statement of Defence dated 13/11/2019. In the cause of the proceedings, several interlocutory applications were filed and determined.

29. The matter was finally set down for hearing. The Plaintiff (now deceased) gave his evidence on 30/11/2023 and the Plaintiff's case was closed. The Defence case was heard on 12/03/2024 with the 1st Defendant's witness (the only defence witness) testifying. The witness was stood down for further cross examination on 25/04/2024.

30. Pending further defence hearing, the 1st Defendant filed an application seeking to further amend the Amended Statement of Defence on the basis that the Amended Statement of Defence was tainted with inadvertent defects and erroneous facts which needed to be corrected.



31. The inadvertent defects were blamed on the counsel for the 1st Defendant. It is until the 1st Defendant's witness was cross examined that this error was noted. In as much as the party may amend its pleadings at any stage, and the court exercises its discretion in granting leave to amend where leave is required, the proposed amendment should not cause prejudice to the other party.
32. The Defendant filed this application five (5) years after its Amended Statement of Defence was filed. The Plaintiff's case was closed. The Plaintiff is now deceased and has been substituted by the son who may not be privy to the alleged contract between the deceased Plaintiff and the Defendants, and may require the recalling of the Plaintiff's witness. I do agree with the Plaintiff's submissions that by re-opening the pleadings would be highly prejudicial to the current Plaintiff.
33. This court shall rely on the pleadings and documentary exhibits filed in support of each party's case to reach an informed decision. I find that the application lacks merits.
34. On costs, it is settled that the same follows the event. However, the court retains discretion whether to grant them or not. I hereby direct that costs to abide the outcome of the suit.

Determination

35. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. That the Notice of Motion dated 19/03/2024 lacks merits and is hereby dismissed.
 - b. Costs to follow the outcome of the main suit.It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 31ST DAY OF JULY, 2025

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HON. F. WANGARI

JUDGE

In the presence of: -

Ms. Murage Advocate for the Plaintiff/ Respondent

Ms. Bwire Advocate h/b for Kibara Advocate for the 1st Defendant/ Applicant

N/A by the 2nd Defendant

Ms. Norah, Court Assistant

