



**Coast Professional Freighters Limited v Industrial & Commercial Development Corporation
(Commercial Suit 77 of 2017) [2025] KEHC 12343 (KLR) (7 August 2025) (Ruling)**

Neutral citation: [2025] KEHC 12343 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
COMMERCIAL SUIT 77 OF 2017
F WANGARI, J
AUGUST 7, 2025**

BETWEEN

COAST PROFESSIONAL FREIGHTERS LIMITED PLAINTIFF

AND

**INDUSTRIAL & COMMERCIAL DEVELOPMENT
CORPORATION DEFENDANT**

RULING

1. The Plaintiff/Applicant filed a Notice of Motion application dated 18/12/2024 seeking for orders that pursuant to the Judgment of the Court of Appeal in Civil Appeal No. E120 of 2022 delivered on 22/11/2024, the court issues directions on the hearing of the Notice of Motion application by the Plaintiff dated 24/11/2020, and that costs of the application be provided for.
2. The application is based on grounds set out therein and the Supporting Affidavit of Patrick Mutune Kiasyo dated 17/12/ 2024. It was stated that the matter had been dismissed pursuant to the ruling of the court delivered on 28/01/2022. That the Plaintiff appealed to the Court of Appeal in Civil Appeal No. E120 of 2022 where Judgment was delivered on 22/11/2024 reinstating the suit and directing the same to be heard before a different Judge. Further, that the Plaintiff/Applicant had an application dated 24/11/2020 for amendment of the plaint and wished to prosecute it.
3. The said Notice of Motion application dated 24/11/2020 was premised on Order 8 Rule 3 and 5 of the Civil Procedure Rules 2010, Section 1A and 1B of the *Civil Procedure Act*, and Article 159 (2) of the *Constitution*. The application was seeking for orders that leave be granted to the Plaintiff to amend the Plaint as per the disclosed draft and the Defendant to have corresponding leave to amend its defence within the timelines to be set by the court, and that costs of the application be provided for.
4. The application was based on grounds in the application and the Supporting Affidavit dated 25/11/2020 by Patrick Mutune Kiasyo that the applicant filed the suit at a time when there were



pending proceedings before the Supreme Court with a bearing to the court herein. That proceedings before the Supreme Court being Petition No. 4 of 2017 were finalized on 30/04/2020 without making a determination of the substantive appeal, and that amendment of the plaint aimed at including some prayers which became relevant following the decision in Petition No. 4 of 2017.

5. The Defendant/Respondent filed a Replying Affidavit dated 25/2/2025 by Lazarus Max Ogembo Odongo, the Assistant Manager Legal Services to the Defendant's successor, that the Plaintiff intends to amend its plaint to claim a refund of Kshs. 4,500,000 paid to purchase Mombasa/Block X/291, Kshs. 27,569,076 as interest paid on that amount, legal fees of Kshs. 8,860,000, and Kshs. 58,185,669.21 paid to improve Mombasa/Block X/291. That as the Plaintiff notes at paragraph 18 of the Plaint, the cause of action accrued on 21/08/2015 when the High Court delivered its judgment.
6. The Defendant/Respondent stated that the claims ought to have been brought within 6 years from when they accrued, and that to permit the Plaint to be amended 10 years after the cause of action accrued is to deny the Defendant a defence of limitation that has accrued. That the proposed amendments would be contrary to public policy for reasons that the Plaintiff incurred them as a result of its own fraudulent conduct which was established in the Judgment of Mombasa High Court Civil Case No. 50 of 1998 and affirmed by Judgment of the Court of Appeal in Civil Appeal No. 18 of 2016.
7. The Defendant/Respondent further stated that even though the Court of Appeal in Civil Appeal No. E120 of 2022 has reversed the High Court's decision striking out the original plaint dated 28/07/2017, it did so to allow the High Court to consider the application for leave to amend the plaint. That in considering the application for amendment, the High Court was not hamstrung by the decision of the Court of Appeal since it was not declared that the Plaintiff's claim was not barred by the defence of illegality.
8. That the defence of illegality was a relevant consideration which this court ought to consider in determining whether to permit the amendments. The Defendant/Respondent therefore prayed that the application be dismissed with costs.
9. The Application was canvassed by way of written submissions. The Plaintiff/Applicant in their submissions dated 17/03/2025 argued that Order 8 Rule 3 of the Civil Procedure Rules grants this court jurisdiction to permit the Plaintiff to amend pleadings with leave of the court and that Order 8 Rule 5 gives the court the general power to amend.
10. That the principles for consideration in an application for amendment of pleadings are set out in the case of *Ochieng and Others v First National Bank of Chicago*, Civil Appeal No. 149 of 1991 (1995) eKLR cited with approval in *St. Patrick's Hill School v Bank of Africa Ltd* (2018) eKLR.
11. It was further submitted that the proposed amendments are necessary because they are seeking prayers that have become relevant following the ruling of Petition No. 4 of 2017 which will assist this court to fully determine the real questions of controversy between the parties.
12. That additionally, the proposed amendments are intended to ensure that this court determines the substantive merits of the case and award full compensation to the Plaintiff to prevent multiplicity of suits. The Plaintiff was guided by the case of *Central Kenya Limited v Trust Bank Limited & 5 Others* (2000) eKLR and *Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago* (1995) eKLR.
13. According to the Plaintiff/Applicant, the amendment is not foreign or inconsistent with the subsisting cause of action which is centered around compensation for losses incurred by the Plaintiff due to the inadvertence and negligence of the Defendant. That the proposed amendment will not occasion any prejudice or injustice to the Defendant as leave would be granted to the Defendant to file an



Amended Defence if need be. That the Defendant in their Replying Affidavit have not demonstrated the prejudice they will suffer should the amendment be allowed.

14. The Plaintiff stated that the cause of action accrued in 2015 and the present suit was instituted in 2017, approximately 2 years later. That the application for amendment was filed in 2020, approximately 5 years after the cause of action arose and 3 years after the present suit was filed. That therefore, the amendment sought emanates from the same cause of action, it was timeously sought and therefore the defence of limitation does not apply. The Plaintiff cited the case of *Thomas Nyangeri Mogaka v National Bank of Kenya & 3 Others* (2018) eKLR and *Hiram Bere Kinuthia & 2 Others v Erick Omondi & 3 Others* (2014) eKLR. The Plaintiff/Applicant therefore prayed that the application be allowed as prayed.
15. The Defendant/Respondent in their submissions dated 12/05/2025 argued on whether the amendment should be allowed, that, it is pleaded in paragraph 18 of the Plaintiff that the cause of action accrued on 21/08/2015, and that the cause of action currently pleaded is a tort of negligence, for which the limitation period is 3 years. That however, in the proposed amendments, restitution and unjust enrichment are pleaded, which are quasi-contractual causes of action for which the limitation period is 6 years, and that such claims ought to have been brought not later than 20th August 2021.
16. The Defendant/Respondent relied on the decision in *Marshall v London Passenger Transport Board* (1936) 3 ALL ER 83 cited in *Diamond Trust Bank Kenya Limited v John Wakaba Joseph & Joseph Githungo Wakaba* (2013) KEHC 6947 (KLR), and the Court of Appeal case in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited* (2013) eKLR and *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 Others* (2014) eKLR both cited in *Kenya Wine Agencies v Yobesh Amoro* (2018) KEELRC 970 (KLR).
17. The Defendant/Respondent submitted that the Plaintiff refers to the case of *Joseph Ochieng & 2 Others Trading as Aquiline Agencies v First National Bank of Chicago* (1995) KECA 31 (KLR), in which case the High Court refused an amendment to specifically plead the quantum of special damages.
18. That the Plaintiff alleging negligence made a claim for Kshs. 1,785,000 per month. That it now intends to introduce quasi-contractual claims that were known to it since August 2015 and ask for an additional Kshs. 99,114,745.21. That it would be unjust to require the Defendant to now make provision for such a colossal claim that it knew was precluded.
19. It was further stated that if an amended plaintiff was to be filed, it would be after lapse of the limitation period. That in *David Ngugi Waweru v Attorney General & Another* (2017) KECA 420 (KLR), the court was of the view that the axe of limitation falls despite pending proceedings.
20. The Defendant/Respondent argued that according to the doctrine of illegality, no court ought to entertain a claim that was founded on a violation of the law. That it was not in dispute that the Plaintiff acted fraudulently but the Plaintiff is now seeking to recover under the doctrines of unjust enrichment and restitution, monies paid to further that fraud.
21. That in the case of *Tinsley v Milligan* (1994) 1 AC 340, the doctrine of illegality in its classical form would bar the claim. Therefore, the proposed amendment would be useless and it ought not be allowed. The Defendant/Respondent invited the court to find that the Notice of Motion application dated 24/11/2020 lacks merit and should be dismissed with costs.
22. The Plaintiff/Applicant in their Further Written Submissions dated 20/05/2025 argued that the court has jurisdiction to allow an amendment when there is evidence of existence of peculiar circumstances.



23. First, that the Court of Appeal commanded the court herein to allow amendment of the Plaintiff. Secondly, the Defendant never filed a Defence in the suit herein and that a non-existent defence cannot be said to be defeated through an amendment. Thirdly, that the application for amendment was filed within time on 25/11/2020 but before it could be heard the suit was struck out on 28/01/2022.
24. It is on this basis that the application for amendment could not be prosecuted. Fourth, that with the existence of the Mombasa Court of Appeal Civil Appeal No. E120 of 2022, the Plaintiff could do nothing but wait for the appeal to be determined, which judgment was delivered on 22/11/2022.
25. The Plaintiff/Applicant submitted that the claim for unjust enrichment is a matter of contract. That time started to run after judgment of the Court of Appeal was delivered in Mombasa Civil Appeal No. 18 of 2016 on 17/02/2017, an issue which was properly pleaded in paragraph 15 of the Plaintiff.
26. That the issues on illegality and fraud as raised by the Defendant were dealt with before the Court of Appeal and the court gave directions for amendment of the Plaintiff. The Plaintiff/Applicant therefore urged the court to allow the application as prayed.

Analysis

27. This court has considered the Notice of Motion applications dated 18/12/2024, 24/11/2020, their supporting affidavits, their respective Replying Affidavits and submissions. The issues for determination are: -
 - a. Whether the application for amendment of the plaintiff is merited.
 - b. What orders on costs should issue
28. Section 100 of the *Civil Procedure Act* gives the general power to amend pleadings at any stage of the proceedings. The right is not absolute, for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with criteria set out under Order 8 Rule 3 of the Civil Procedure Rules.
29. Order 8 Rule 3 of the Civil Procedure 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.”
30. Further, Order 8, Rule 5 gives the court the general power to amend in the following terms: -
 5. 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.”
31. In *Institute for Social Accountability & another v Parliament of Kenya & 3 others* [2014] eKLR, the court held as follows: -
 - “...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...”

32. The suit was instituted vide the Plaint dated 28/07/2017. An application to amend the same was made on 24/11/2020. As stated herein above, the Plaintiff has given explanations as to why the said application could not be prosecuted. The Defendant states that by amending the Plaint, the suit would be time barred as the Amended Plaint would be filed over 6 years after the cause of action arose in year 2015. I beg to differ. As stated by the Applicant, the suit was filed within time, that is 2 years after the cause of action arose. the proposed amendment do not introduce new or inconsistent cause of action hence the limitation of time does not apply.
33. The Defendant prayed that the application for amendment be disallowed based on the doctrine of illegality. I concur with the submissions by the Plaintiff that it is upon the hearing of the suit, that the court would determine whether or not the claim being included in the proposed Amended Plaint is based on illegal acts or not.
34. Guided by the principles in amendment of pleadings (see *Coffee Board of Kenya v Thika Coffee Mills Limited & 2 others* (2014) eKLR, I find no prejudice shall be occasioned upon the Defendant is the proposed amendments are allowed.
35. 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

36. Following the foregone discourse, the upshot is that the following orders do hereby issue: -
 - a. That the Notice of Motion dated 18/12/2024 allowed on the following terms;
 - i. That the Notice of Motion dated 24/11/2020 is allowed to the extent that the draft Amended Plaint annexed is deemed to have been properly filed and served.
 - ii. The Defendants to file the Amended Defence and comply with order 11.
 - b. That suit shall be heard on priority basis being a 2017 matter.
 - c. Costs to follow the outcome of the main suit.

It is so ordered.

DATED, SIGNED AND DELIVERED AT MOMBASA THIS 7TH DAY OF AUGUST, 2025

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HON. F. WANGARI
JUDGE

In the presence of: -



Advocate for the Plaintiff/ Applicant

Advocate for the Defendant/ Respondent

Ms. Norah, Court Assistant

