



**Sakafu Limited v Captive Africa Limited (Civil Appeal E046 of 2021)
[2024] KEHC 912 (KLR) (Commercial and Tax) (30 January 2024) (Judgment)**

Neutral citation: [2024] KEHC 912 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL APPEAL E046 OF 2021
A MABEYA, J
JANUARY 30, 2024**

BETWEEN

SAKAFU LIMITED APPELLANT

AND

CAPTIVE AFRICA LIMITED RESPONDENT

JUDGMENT

1. This is an appeal against the decision of the Hon. Magistrate Edgar Kahoni (PM) delivered on 10/6/2021. Being aggrieved by the said decision the appellant lodged this appeal vide a Memorandum of Appeal dated 17/6/2021.
2. The appeal was founded on the grounds that the Learned Magistrate erred in holding that the appellant was guilty of inordinate delay and in ordering thrown away costs of Kshs 20,000/-. That the Learned Magistrate erred in holding that failure to pay the thrown away costs of Kshs 20,000/-, the amended defence and counterclaim be struck out.
3. The appeal was canvassed by way of written submissions which I have carefully considered.
4. The appellant submitted that the decision allowing the amendment and at the same time ordering throw away costs was against the spirit of Articles 48 and 159 of the *Constitution*. That the trial court usurped the jurisdiction of the taxing officer by awarding costs without giving the appellant the right of reply. Counsel submitted that the application for amendment at the lower court had been made without delay since the courts were shut in 2020 due to the COVID 19 pandemic and the matter was still at its pretrial stage.
5. The respondent submitted that the appellant was guilty of causing unnecessary delay. That the matter was instituted on 14/8/2019 and the defence was filed on the 3/10/2019. That the appellant had



previously delayed the matter and was ordered to pay throw away costs of Kshs 7500/- and only complied with the orders 10 months later.

6. Counsel further submitted that in the application for amendment of the defence, the appellant did not give any explanation for the delay. It was the respondent's submissions that the court did not err in ordering throw away costs as the principles for awarding costs were properly followed.
7. I have considered the record and the submissions of Learned Counsel. The appeal is with respect to the ruling delivered on 10/6/2021. In the impugned ruling, the court allowed the application for amendment of defence on condition that throw away costs of Kshs 20,000/- be paid by the defendant. That is what triggered the present appeal.
8. The appellant's contention is that there was no delay in filing the application for amendment considering that in 2020, the courts were not functional due to the covid 19 pandemic. Counsel stated that in awarding costs, the Honourable magistrate usurped the jurisdiction of the taxing officer.
9. Section, 100 of the Civil Procedure Act (Cap 21,) Laws of Kenya provides: -

“The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding”.

10. On the other hand, Order 8 rule 3(1) provides: -

“(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.

11. In Joseph Ochieng and others v First National Bank of Chicago Civil Appeal Number 147 of 1 (unreported) as cited with approval in St Patrick's Hill School Ltd v Bank of Africa Kenya Ltd [2018] eKLR, the Court of Appeal stated of amendment of 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 amend can be exercised by the court at any stage of the proceedings;
- 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) 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.”

12. In K. K. Lodgit Limited v Geminia Insurance Company Ltd & another (2021) eKLR, it was held that: -

“..... it is clear that courts will readily grant leave to amend pleadings in order to determine the real issue(s) in dispute. The only caveat is that a proposed amendment should not cause



prejudice or an injustice to the opposing party. Such prejudice or injustice must be one that cannot be compensated by an award of costs. Further, the Court will not permit an amendment that completely changes the nature of a party's case.”

13. The power to grant amendment of pleadings is at the discretion of court. The only caveat is that the court in exercising that discretion, it should pronounce itself on the costs caused by the application for amendment. That is what the phrase, on such terms as to costs or otherwise in Order 8 Rule 3(1) means.
14. Under Section 27 of the *Civil Procedure Act*, it is provided that “the costs of and incidental to all suits shall be in the discretion of the court or judge, and the court or judge shall have full powers to determine by whom and out of what property and to what extent such costs are to be paid.” That means that, it is in the discretion of the court in allowing or declining an amendment to pronounce itself on the costs payable.
15. In the present case, the leave to amend was made on condition that thrown away costs of Kshs 20,000/- was provided for. The reason given by the court was that the appellant had occasioned the delay in filing for the amendment.
16. In *Kenya Pipeline Company Limited v Grey Soil Investments Limited & 3 others* 2009eKLR, the court held of thrown away costs as follows: -

“Costs thrown away by amendment would reasonably mean costs of the action which had been rendered abortive as a result of the amendment, in this case, to the plaintiff and which costs the defendants would never have been called upon to pay if it had not been for the amendment to the plaintiff. The defendant should be reimbursed the unnecessary costs occasioned due to the necessity to amend its pleading as a result of the amendment of the plaintiff. The costs to be reimbursed are the drawing charge of the amended pleading and can be equated with (but are not the same as instructions fees) additional instructions made necessary to plead to the amended pleading. The reason for this is these instructions would not have been necessary but for the amended pleading. The original instructions are wasted to that extent and the defendants are entitled to the drawing charge of his amended pleading in terms of the order made by the court. An order for payment of thrown away costs does not however entitle a party in whose favour the order for costs was made to claim a separate instruction fee for drawing an amended pleading in consequence of the opponent's amendment.”

17. The court is of the view that the provision for costs is to cure any prejudice that may have been occasioned to a respondent by having been forced to amend its documents. I find no error in the decision of the magistrate as it was within his discretion to grant the leave sought and impose the costs. It was neither claimed that he had no power to order the costs or the costs ordered were excessive. In any event, the amount ordered, in my view was reasonable.
18. It does not matter that the application was brought at the earliest. The fact that the amendment was to cause the respondent to re-work on its pleadings by taking fresh instructions thereon meant that costs were payable. I reject the submission that the order for costs was in violation of either Article 48 or 159 of the *Constitution* of Kenya.
19. Accordingly, I find no merit in the appeal and the same is dismissed with costs.
It is so ordered.



DATED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JANUARY, 2024.

A. MABEYA, FCI Arb

.....

JUDGE

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRAR

