



**Ismail Rahimtulla Trustees Registered & another v The Joint Administrators  
- Spencon Kenya Limited (Under Administration) & 2 others (Environment &  
Land Case 375 of 2017) [2023] KEELC 886 (KLR) (16 February 2023) (Ruling)**

Neutral citation: [2023] KEELC 886 (KLR)

**REPUBLIC OF KENYA  
IN THE ENVIRONMENT AND LAND COURT AT NAIROBI  
ENVIRONMENT & LAND CASE 375 OF 2017  
LN MBUGUA, J  
FEBRUARY 16, 2023**

**BETWEEN**

**ISMAIL RAHIMTULLA TRUSTEES REGISTERED ..... 1<sup>ST</sup> PLAINTIFF**

**SONY HOLDINGS LIMITED ..... 2<sup>ND</sup> PLAINTIFF**

**AND**

**THE JOINT ADMINISTRATORS - SPENCON KENYA LIMITED (UNDER  
ADMINISTRATION) ..... 1<sup>ST</sup> DEFENDANT**

**PRAGNESH JITENDRA PATEL ..... 2<sup>ND</sup> DEFENDANT**

**ASHUTOSH SHARMA ..... 3<sup>RD</sup> DEFENDANT**

**RULING**

1. The Plaintiffs commenced this suit by a plaint dated June 7, 2017. Their case is that they leased the 17<sup>th</sup> floor of Rahimtulla towers erected on LR 209/11458 to the 1<sup>st</sup> Defendant through the lease dated July 27, 2011 and further entered into a car parking License agreement dated June 2, 2015. The lease terminated on October 31, 2016 by effluxion of time but the 1<sup>st</sup> Defendant refused to grant vacant possession of the premises. The plaintiffs sought vacant possession of the suit premises vide an application dated 7<sup>th</sup> June 2017 which application was allowed by this court in its ruling of March 29, 2018. The issues pending determination are therefore on whether the 2<sup>nd</sup> and 3<sup>rd</sup> defendants are severally liable to pay ksh.15,471,512.06 as well as mesne profits as sought in the plaint.

**Application dated 26<sup>th</sup> January 2022**

2. The 2<sup>nd</sup> defendant filed the application dated January 26, 2022 seeking leave to amend its defence dated April 30, 2018. The application is based on grounds on its face and on the 2<sup>nd</sup> defendant's supporting affidavit sworn on January 26, 2022.



3. He deposes that by an agreement dated July 27, 2011, the plaintiffs leased their premises to the 1<sup>st</sup> defendant for a period of 6 years commencing 1<sup>st</sup> November 2010. As directors of their company, the applicant jointly with the 3<sup>rd</sup> Defendant guaranteed to the plaintiffs the payment of rent and all sums due suffered by them arising from any breach of the lease agreement with the 1<sup>st</sup> Defendant.
4. He further deposes that in or around March 2014, ECP Africa FII Investments Limited (ECP) illegally, improperly and forcibly acquired 98% of the shares of Spenco International Limited (SIL) which was the holding company for Spenco Holdings Limited (SHL) which in turn wholly owned the 1<sup>st</sup> Defendant.
5. ECP then reconstituted the Board of Directors and the management of SIL, SHL and the 1<sup>st</sup> Defendant resulting in his appointment and that of 3<sup>rd</sup> Defendant as directors being terminated and new directors took over the management of the various companies including the 1<sup>st</sup> Defendant thus discharging him and the 3<sup>rd</sup> Defendant from the management of the 1<sup>st</sup> Defendant including its obligations under the aforementioned lease.
6. He avers that his ouster resulted in unjustifiable exposure of his personal assets in the fulfillment of the 1<sup>st</sup> Defendant's obligations and that he instituted proceedings against ECP in Mauritius seeking judgement for the illegal acquisition of shares and the mismanagement of the affairs of the 1<sup>st</sup> Defendant and its related companies. He contends that he needs to amend his defence to demonstrate the liability of ECP's directors for the actions that he is alleged to have defaulted on.
7. In opposition to the application, the plaintiffs filed grounds of opposition dated July 22, 2022. They argue that the 2<sup>nd</sup> defendant's application is brought after 4 years since the suit was filed thus the delay is inordinate. They add that the reliefs sought against the 1<sup>st</sup> defendant were granted through this court's rulings dated March 29, 2018 and September 24, 2020, thus what substantively remains are the reliefs sought against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants. They further state that the application is a disguise to clearly circumvent the mandatory procedure prescribed under order 1 rule 15 of the Civil Procedure Rules and introduce ECP as a 3<sup>rd</sup> Party.
8. They also contend that the amendments sought seek to introduce a new cause of action and change the nature of the cause of action herein into a commercial dispute between the 2<sup>nd</sup> defendant and ECP Africa FII Investments Limited (ECP) over control of the 1<sup>st</sup> defendant and thereby divest this Honourable Court of its jurisdiction. They aver that the dispute between the 2<sup>nd</sup> defendant and ECP over the management and internal affairs of the 1<sup>st</sup> Defendant are subjudice or resjudicata to the proceedings in the Mauritius case.

### **Submissions.**

9. The 2<sup>nd</sup> defendant filed written submissions dated September 22, 2022 in support of his application. He submits that this court has power to allow the 2<sup>nd</sup> Defendant to amend its pleadings under section 100 of the Civil Procedure Act and order 8 rules 3 and 5 of the Civil Procedure Rules, 2010 and guided by legal principles on amendments as stated by the Court of Appeal in Central Kenya Ltd v Trust Bank Ltd & 5 others [2000] eKLR.
10. He relies on the case of Patrick Kabue Muchene v Hannah Wangari Kinuthia & another [2021] eKLR to submit that the amendments will allow a determination on the real questions in controversy since without the proposed amendments, he cannot adequately respond to the claim against him as he had no visibility over the 1<sup>st</sup> Defendant's actions during the time of the alleged breach of the lease and car park Licence agreement between the plaintiffs and the 1<sup>st</sup> defendant.



11. It is also the 2<sup>nd</sup> defendant's submission that the amendments are not brought after inordinate delay as no prejudice will be suffered by the Plaintiffs as the matter is yet to proceed for hearing. To this end, he relies on the case of *Central Kenya Ltd v Trust Bank Limited & 5 others* (Supra) and the case of *Barnabas Kariuki v Nyeri Water & Sewerage Company Limited* [2016] eKLR where amendments were allowed 3 years and 8 years respectively after the suits were filed.
12. On the plaintiff's contention that the amended defence sets a basis for inclusion of 3<sup>rd</sup> Party proceedings against ECP, he submits that the Plaintiff's concern is pre-emptive. He distinguishes the case of *Baruthi v Domitila Obala Ouma & 2 others* [2022] eKLR and the case of *Morabo Limited v Sinohydro Corporation Ltd* [2014] eKLR relied on by the Plaintiffs from this case and argues that in the 2 cases, the court was determining an application seeking leave to introduce 3<sup>rd</sup> parties.
13. He also submits that the proposed amendments do not introduce a new cause of action. He points out that the commercial claims against ECP relating to forceful and illegal acquisition of the 1<sup>st</sup> defendant are being pursued in Mauritius and the proposed amendments do not seek to pursue claims against ECP in these proceedings. He asserts that the Plaintiffs will not suffer any prejudice if the application is allowed because they will have an opportunity to respond to the allegations.
14. The submissions of the plaintiffs are dated September 20, 2022. They rely on the case of *Central Kenya Limited v Trust Bank Limited* (2002) E.A 365 and the case of *Edds Designers Limited v United Credit Limited Joseph M.Gikonyo t/a & another* [2022] eKLR to Submit that the draft amended defence points at a new and inconsistent cause of action with the instant suit as it intends to raise new issues relating to the alleged mismanagement of a corporate company, purchase of shares, appointment of directors and other similar matters which are all commercial in nature.
15. They argue that if allowed, the amendments will not only fundamentally change the character of the suit herein, but will also raise issues which are beyond the jurisdiction of the Environment and Land Court as set out under article 162(2) of *the Constitution*; thus defeating the findings of this court in the ruling dated September 24, 2020 by which it found that it has jurisdiction to hear and determine this matter and thereby dismissed the 2<sup>nd</sup> defendant's preliminary objection.
16. The plaintiffs also submit that since the only outstanding claims are against the 2<sup>nd</sup> and 3<sup>rd</sup> defendants which arise from personal guarantees issued by them, enjoining ECP is irrelevant.
17. It is also the plaintiffs' submission that the *Civil Procedure Rules* impose a strict and mandatory timeline for filing an application for leave to issue a 3<sup>rd</sup> Party Notice, therefore since the amendments seek to form a basis for inclusion of ECP Africa FII Investments Limited ("ECP Africa") as a 3<sup>rd</sup> Party in these proceedings, then the court ought to consider the issue of undue delay in bringing the amendments. They rely on the case of *Baruthi Bundi Domitila Obala Ouma & 2 others* [2022] eKLR as well as the case of *Morabo Limited v Sinohydro Corporation Ltd* [2014] eKLR.
18. The issue for determination is whether the 2<sup>nd</sup> defendant has established grounds to warrant this court's discretion to allow him to amend his defence. He argues that the amendments he seeks will demonstrate that another party is liable to pay damages and mesne profits as claimed by the plaintiffs. The plaintiffs on the other hand contend that the 2<sup>nd</sup> defendant is sneaking in a 3<sup>rd</sup> Party while such applications are required to be made within fourteen days after the close of pleadings in tandem with the provisions of order 1 rule 15 of the *Civil Procedure Rules*, that the amendments sought raise a new cause of action and that the matter is an undefended claim.



19. In *Eastern Bakery v Castellino* (1958) EA 461 cited in *Springbox Kenya Ltd v Daniel Kulanga Nthusa* [2015] eKLR the court stated that;

“It will be sufficient to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”

20. Further, the court held as follows in *Diamond Trust Bank Kenya Limited v John Wakaba Joseph & another* [2013] eKLR;

“My view of the matter is as follows. Order 8 rules 3 and 5 of the *Civil Procedure Rules* gives the court discretion to allow amendments at any stage of the proceedings in order to bring forth all issues in dispute between the parties for exhaustive and conclusive determination. The significant and guiding principle is to do justice between the parties. This can only be achieved by having all issues in dispute being brought forth for the Court to determine them. The law is clear that amendments will be freely allowed at any stage of proceedings provided no injustice is caused to the opposite party.”

21. The question is, is there a valid pleading of the 2<sup>nd</sup> defendant capable of being considered for amendment?. In the ruling delivered by this court on 29<sup>th</sup> March 2018, at paragraph 6, the court set out the status of the 2<sup>nd</sup> defendant in the following terms;

“Service of the suit papers and the present notice of motion was effected through a notice published in the Standard Newspaper on October 18, 2017 pursuant to leave granted by Gitumbi J on September 21, 2017. The 1<sup>st</sup> and 3<sup>rd</sup> defendants neither entered appearance nor filed defence. The 2<sup>nd</sup> defendant entered appearance on November 2, 2017 through M/s Gikera & Vadgama Advocates but did not file a defence within 14 days as required under order 7 rule 1 of the *Civil Procedure Rules*. Similarly, although the 2<sup>nd</sup> defendant attended the hearing of the application, he neither filed a response nor made submissions in opposition to the present application. The application is therefore unopposed and the suit is similarly undefended. Emphasize added”.

At the end of the aforementioned ruling, the court rendered itself as follows;

“The rest of the plaintiff’s claim shall be set down for hearing /Formal proof”.

22. The aforementioned ruling has never been set aside by way of an appeal or review.
23. In the case of *Gichinga Kibutha v Caroline Nduku* [2018] eKLR, the court had this to say on issue of proof.

“It is, therefore, settled law that in civil cases, a party who wishes the court to give a judgment or to declare any legal right dependent on a particular fact or sets of facts, that party has a legal obligation to provide evidence that will best facilitate the proof of the existence of those facts. The party must present to the court all the evidence reasonably available on a litigated factual issue. It goes without saying that a party is bound by their own pleadings and the evidence they adduce in court. The purpose of pleadings is to ascertain with clarity the matters on which parties disagree and points of agreement so as to ascertain matters for determination. Emphasize added.”



24. No leave was ever sought to file the statement of defence allegedly brought forth by the 2<sup>nd</sup> defendant on April 30, 2018. Thus the said pleading is invalid, and incapable of being considered for amendments.
25. What could have been the scenario in the event that the defence was properly on record?. A perusal of the proposed amendments as set out in paragraph 9 of the draft amended defence primarily captures the nature and extent of the applicant’s claim against ECP Africa. In paragraph 31 of their submissions, the 2<sup>nd</sup> defendant avers that for clarity, the commercial claims against ECP relating to forceful and illegal acquisition of the 1<sup>st</sup> defendant are being pursued in a Mauritius Court. It is quite clear that the applicant is blowing hot and cold at the same time since the proposed defence is geared towards laying blame at the door of another entity which is not a party to these proceedings.
26. As rightly submitted by the plaintiffs, the 2<sup>nd</sup> defendant is in essence introducing a new and inconsistent cause of action with the instant suit as it intends to raise new issues relating to the alleged mismanagement of a corporate company, purchase of shares, appointment of directors and other similar matters which are all commercial in nature despite the existence of another case in Mauritius. The proposed amendments would indeed fundamentally change the character of the suit herein and circumvent the finding of this court in the ruling dated 24<sup>th</sup> September 2020 by which the court had found that it has jurisdiction to hear and determine this matter.
27. The 2<sup>nd</sup> defendant has also advanced an argument that they reserve a right to join a third party in these proceedings. The legal frame work for such proceedings is to be found under order 1 rule 15 of the *Civil Procedure Rules*. Also see - *Kenya Commercial Bank vs Suntra Investment Bank Ltd* (2015) eKLR.
28. On November 18, 2021, this suit was coming up for hearing when counsel for the 2<sup>nd</sup> defendant addressed the court as follows;
- “I am not ready to proceed. While preparing for trial, we got new information which was not previously supplied to us. We would need time to introduce a 3<sup>rd</sup> party.”
29. Thus the case was adjourned to enable the 2<sup>nd</sup> defendant to file the relevant application on third party proceedings. One year and three months down the line, the 2<sup>nd</sup> defendant has not filed such an application. One wonders at what point in the lifespan of this suit, the 2<sup>nd</sup> defendant intended to bring in this third party.
30. Another issue relates to the personal guarantees. In paragraph 4 of his supporting affidavit, the 2<sup>nd</sup> defendant admits that himself and 3<sup>rd</sup> defendant had guaranteed to the plaintiffs the payment of rent and all sums due suffered by them (plaintiffs) arising from any breach of the lease agreement by the 1<sup>st</sup> defendant. To this end, I am in agreement with the plaintiffs averments that the introduction of claims against ECP by the 2<sup>nd</sup> defendant would inevitably occasion injustice upon the plaintiff.
31. Finally this court has considered the issue of delay. The defence which the 2<sup>nd</sup> defendant desires to amend was filed on April 30, 2018. Thus almost 5 years have gone by. In the case of *Lawrence Kinjua Mwai v Nyariginu Farmers Co Ltd & another* [2019] eKLR, I decried the issue of delayed justice in the following words;

“In exercising its judicial authority this court has a duty to facilitate just and expeditious determination of proceedings. One of the cardinal principles in our constitution is “the expeditious delivery of justice” –see Article 159 (2) (b) of *the Constitution* of Kenya, which in effect codifies the 17<sup>th</sup> century maxim “Justice delayed is justice denied”. This means that if justice is not provided in a timely manner to the parties, it loses its importance and it violates



the human rights of the litigants and their families. That is precisely why rights to speedy trials are incorporated in law worldwide”.

32. The proposed amendments are certainly not in tandem with the constitutional principles on expeditious trials.
33. The upshot of the analysis herein is that the application dated January 26, 2022 is not merited. The same is hereby dismissed with costs to the plaintiff. The matter shall proceed for formal proof as directed on March 29, 2018.

**DATED, SIGNED AND DELIVERED AT NAIROBI THIS 16<sup>TH</sup> DAY OF FEBRUARY, 2023 THROUGH MICROSOFT TEAMS.**

**LUCY N. MBUGUA**

**JUDGE**

In the presence of:-

Okoth for Plaintiffs

Makena holding brief for M/s Mulindi for 2nd Defendant

