



REPUBLIC OF KENYA



Put Sarajevo General Engineering Company v Bank of Africa Limited & another (Commercial Case 278 of 2018) [2024] KEHC 4026 (KLR) (Commercial and Tax) (25 April 2024) (Ruling)

Neutral citation: [2024] KEHC 4026 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 278 OF 2018**

PM MULWA, J

APRIL 25, 2024

BETWEEN

PUT SARAJEVO GENERAL ENGINEERING COMPANY PLAINTIFF

AND

BANK OF AFRICA LIMITED 1ST DEFENDANT

CREDIT REFERENCE BUREAU AFRICA LIMITED 2ND DEFENDANT

RULING

1. Before the Court is the plaintiff's Notice of Motion dated 24th July 2023, made under Order 8 Rules 3 and 5 and Order 51 Rule 1 of the *Civil Procedure Rules*, 2010, Sections 1A, 1B, 3A and 100 of the *Civil Procedure Act*. The application is seeking the following orders:
 1. Spent
 2. That the Honourable Court be pleased to grant the Plaintiff leave to amend the Plaintiff dated 16th July 2018 in the manner shown in the draft Amended Plaintiff annexed herewith.
 3. That pursuant to grant of leave as prayed in (2) above, the draft Amended Plaintiff annexed herewith be deemed duly filed upon payment of the requisite court fees.
 4. That the costs of this application be in the cause.
2. The application is anchored on the grounds on its face, the supporting and supplementary affidavits sworn by the plaintiff's executive chairman, Usamah Timimi on 24th July 2023 and 19th January 2024 respectively and written submissions dated 19th January 2024. The plaintiff was originally incorporated



- in the former Republic of Yugoslavia; that on 21st May 1980, it was issued with a Certificate of Compliance No F 21/80 by the Registrar of Companies in order to carry on business in Kenya; and that Rade Kulic, Zarko Slijepcevic and Mura Hadzimusic were duly registered as its directors.
3. The plaintiff instituted this suit through a plaint dated 16th July 2018. Its claim is that the 1st defendant maliciously listed it as a defaulter as the 1st defendant did not at any time disburse the loan facility, whose alleged non-performance led to the listing subject of this suit, to the plaintiff.
 4. The plaintiff discovered there exists another company with a similar name, which was initially registered in Kenya on 5th June 2002 as Put Africa Limited No C. 98786, and on 23rd March 2009 changed its name to Put Sarajevo General Engineering Company Limited incorporation registration C. 98786. Its shareholders/directors are Esed Becirevic, Ramo Gagula and Gradevinsko Preduzece who negotiated, transacted and entered into a loan facility agreement dated 15th September, 2014 with the 1st defendant.
 5. That one Adnan Terzic together with another person unknown to the plaintiff (F. 21/80) appointed Esed Becirevic and Ramo Gagula, the directors of Put Sarajevo General Engineering Company Limited (C. 98786), to open and operate a bank account with the 1st defendant for purposes of borrowing the loan facility from which the listing subject of this suit emanated.
 6. The 1st defendant allowed Esed Becirevic and Ramo Gagula, the directors of Put Sarajevo General Engineering Company Limited (C. 98786), to open an account and used the same account to borrow the loan facility from which the listing subject of this suit emanated. Adnan Terzic is apparently associated with Put Sarajevo General Engineering Company Limited (C. 98786) and a director in the said company, not in the Plaintiff (F. 21/80) herein. The admission of the debt vide the various letters referred to by the 1st defendant were made by Ramo Gagula in his capacity as the director and/or officer of Put Sarajevo General Engineering Company Limited (C. 98786).
 7. The 1st defendant herein did not have any cause to report the plaintiff as a loan defaulter as the plaintiff neither applied for nor benefitted from the loan facility purportedly advanced by the 1st defendant.
 8. The plaintiff submitted that it is in the interest of justice that it is granted leave to amend its plaint so as to appropriately plead the foregoing facts and assist this Court resolve the real question(s) in dispute between the parties herein. The plaintiff also submitted that the proposed amendments shall not occasion any prejudice to the defendants as they shall be accorded a corresponding chance to amend their defences accordingly.

Response

9. In opposing the motion, the 1st defendant filed a replying affidavit sworn by its recoveries' assistant, Annfaith Muthoni on 11th December 2023 and written submissions dated 10th January 2024. The main depositions were that according to the account opening forms and supporting documentation, the company that opened the account with the 1st defendant is Put Sarajevo General Engineering Company. The said company which opened the accounts with the 1st defendant is the same company which is suing as the plaintiff in this suit, was established in Yugoslavia but was incorporated on 21st May 1980 and its Registration Number is F.21/80. In HCCC No 51 of 2017: *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Company & 2 others*, the bank sued the plaintiff for recovery of the loan facilities extended to it, the plaintiff did not in any instance raise the issue of fraud perpetrated by C.98786.
10. It was also deposed that on 15th December 2017 prior to the delivery of a ruling for contempt of court, the plaintiff through Mr. James Muli swore an affidavit where its schedule of ongoing projects were



produced and whose proceeds were supposed to be utilized to repay the loan; that if it was true as alleged in this suit that the plaintiff does not owe the 1st defendant any loan, the plaintiff would not have sworn the affidavit stated above; that in the 1st defendant's records and books, there is no account by the name Put Sarajevo General Company Limited with the registration number as C.98786; that the Board Resolution to borrow dated 19th December 2012 and 23rd October 2014 do not indicate anywhere that the said company's registration number is C.98786.

11. It was further deposed that there is no evidence to support the allegation that Put Sarajevo General Company Limited (C.98786) fraudulently opened an account with the Bank and borrowed a loan facility; that the fraud was perpetuated by one of the directors of Put Sarajevo General Company Limited (C.98786) by the name Ramo Gagula and that Put Sarajevo General Company Limited (C.98786) benefited from the loan; that Put Sarajevo General Company Limited (F 21/80), the plaintiff did not benefit from the said loan; that the account opening forms alleged to have been fraudulently opened by Put Sarajevo General Company Limited (C.98786) show that they were actually opened by Put Sarajevo General Company Limited (F 21/80); the said account opening forms show that Ramo Gagula who is accused of fraudulently opening the account using Put Sarajevo General Company Limited (C.98786) actually opened the account using Put Sarajevo General Company Limited (F 21/80). The annexed letters of admission of debt signed by Ramo Gagula and the plaintiff do not show anywhere that the company admitting the debt is Put Sarajevo General Company Limited (C.98786).
12. The 1st defendant contended that the application for amendment should be dismissed because it is an abuse of the court process, it has been made in bad faith, it will prejudice the expeditious disposal of the matter and it does not set out a legally valid claim; that amending the plaint will lead to misjoinder because the amendment proposes to join in the suit a company with a similar name as the plaintiff. Put Sarajevo General Company Limited (C.98786) is not a necessary and proper party in this case and that the ultimate order or decree in the suit can be enforced without the presence of the said Put Sarajevo General Company Limited (C.98786).

Analysis and Determination

13. I have considered the motion, the grounds, the parties' respective affidavits and submissions. The issue for determination is whether the applicant has made out a case for the amendment of the plaint.
14. 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 (See Order 8 Rule 3(1) of the *Civil Procedure Rules*). The Court's power to allow amendment of pleadings is discretionary and ought not to be exercised on a whim but based on sound principles.
15. The principles for consideration in the amendment of pleadings were comprehensively captured by the Court of Appeal in *George Gikubu Mbutia v Consolidated Bank of Kenya & another* [2015] eKLR, citing the following excerpt from Mulla, *The Code of Civil Procedure*, 18th Ed, Vol.2 at pages 1751-1752, as follows:

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;



- i. 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;
- i. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- i. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- i. Amendment of a claim or relief barred by time should not be allowed;
- i. 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;
- i. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
- i. The delay in filing the petitions for amendment of the pleadings 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.”

16. At the outset, I note that the parties herein are engaged in another related suit, being HCCC No 51 of 2017: *Bank of Africa Kenya Limited v Put Sarajevo General Engineering Company & 2 others*, where the bank sued the plaintiff for recovery of the loan facilities extended to it. In that suit, the defendant who is the plaintiff herein, made a similar application dated 30th September 2021 for further amendment of its defence. I have read the ruling in respect of that application, in which the Court observed that:-

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“21. I have perused the draft further amended defence, the supporting affidavit and the response thereto. There is an argument that the proposed amendment is intended to introduce a distinct cause of action, a departure from the original cause of action. I do not agree. In my view, the proposed amendment will assist the court determine the real dispute before the court and therefore who took the loan is the real issue before the court and the amendment is necessary for a fair determination of this suit.

22. There is also no argument that the amendment will cause injustice to the other side that cannot be compensated by costs. The argument that the proposed amendment is intended to delay the case, seems to ignore the fact that the law allows a party may amend his pleadings at any time on terms as the court may consider appropriate.



There is again no denial that this matter has not been heard and, therefore, there can be no argument that the application for amendment has been brought without undue delay. Sarajevo stated clearly that it had discovered facts that would assist the court in fairly adjudicating this matter.

24. The contention by Bank of Africa that allowing the amendment would cause prejudice by adding another party is not a sufficient reason for disallowing the amendment. This is because the party sought to be added is a necessary party more so where it is alleged that the name is similar to the applicant, and therefore, the amendment would assist the court in resolving the issues in dispute at once.

Taking into account the totality of the circumstances of this case, and the reasons why the law allows amendments at any stage before close of the party's case, it is the view of this court that the application is merited and is for allowing.”

17. In the present matter, the 1st defendant bank presented similar arguments in opposing the amendment of the plaint. However, having looked at the draft amended plaint, I am convinced, by parity of reasoning, that the proposed amendment will assist the Court to determine the real dispute between the parties. The crux of this matter is whether the 1st defendant maliciously listed the plaintiff as a defaulter, and therefore, I hold the similar view that the real issue is who took the loan. The proposed amendments are necessary for assisting the Court to resolve the issues in dispute at once.
18. Consequently, the plaintiff's application dated 24th July 2023 is found to have merit and is allowed as prayed. The plaintiff to file and serve amended plaint within 21 days. Costs in the cause.

RULING DELIVERED VIRTUALLY, DATED AND SIGNED AT NAIROBI THIS 25TH DAY OF APRIL 2024.

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P. MULWA

JUDGE

In the presence of:

Mr Wachira for Plaintiff/Applicant

Mr. Nadio for 1st Defendant/Respondent

Ms. Ameso h/b for Ms. Atieno for 2nd Defendant

Court Assistant: Carlos

