



**Bruce Mutuku Mutie t/a Diani Data Tour & Travel Centre v Diamond Trust Bank
(Civil Suit E011 of 2023) [2024] KEHC 10127 (KLR) (29 July 2024) (Ruling)**

Neutral citation: [2024] KEHC 10127 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT MOMBASA
CIVIL SUIT E011 OF 2023
DKN MAGARE, J
JULY 29, 2024**

BETWEEN

**BRUCE MUTUKU MUTIE T/A DIANI DATA TOUR & TRAVEL
CENTRE PLAINTIFF**

AND

DIAMOND TRUST BANK DEFENDANT

RULING

1. The Applicant filed this application dated 11/3/2024. The application seeks to amend the Defendant's defence. The draft defence is annexed.
2. The application is said to be brought under the provisions of Order 8 rule 3(3) and 5, Order 51 Rule 1 of the *Civil Procedure Rules* (2010) and Section 1A, 1B and 3A of the *Civil Procedure Act* and the grounds on the face of the application and the supporting affidavit dated 11/03/2024 sworn by Jennifer Thiga.
3. It was opposed by Grounds of Opposition dated 5th April 2024. It is contended in material that the amendments will change the substratum of the cause of action.
4. The defendant filed submissions dated 16/4/2024. It was submitted that the defendant seeks to claim the sum of Kshs. 358,548.86/- under Clause 22.3 of the Merchant Application & Agreement Form which amount was withdrawn from the Plaintiff's merchant account before the bank blocked the account and refunded the amounts to the card holder's bank.
5. They relied on Order 8 Rule 3 of the *Civil Procedure Rules* 2020 which provides as follows: -
 3. Amendment of pleading with leave [Order 8, rule 3.]
 - (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.

6. They further relied on Order 8 rule 5 of the [Civil Procedure Rules](#) 2020 provides as follows: -

“(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.”

7. The Plaintiff did not file submissions.

8. It was submitted that the purpose for the amendment is thus to introduce a counterclaim. They relied on the Court of Appeal decision in [County Government of Kilifi ~vs~ Mombasa Cement Limited](#) [2017] eKLR as follows:

“...defendant is permitted to raise a counterclaim against a plaintiff on any right and claim he may have against the plaintiff even where the subject matter or cause of action maybe different from the original suit. The rationale is to avoid multiplicity of proceedings and claims based on the same or different cause of action between the parties to the suit to enable a court to pronounce a final judgment in the suit both on the original claim and on the counterclaim.”

Analysis

9. In Order 8 Rule 5 (1) of the [Civil Procedure Rules](#) 2010, the court has power to amend pleadings. Order 8 Rule 5(1) provides as follows:

For the purpose of determination 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 documents to be amended in such a manner as it directs and on such terms as to costs or otherwise as are just.

10. The [Halsbury's Laws of England](#), 4th Ed. (re-issue), Vol. 36 (1) at paragraph 76, states the following on amendment of pleadings:

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

11. The discretion of courts to amend pleadings was summarized by the Court of Appeal in [Joseph Ochieng & 2 others v First National Bank of Chicago](#), Civil Appeal No. 149 of 1991 thus:

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any



stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”

12. It is therefore clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. Further, amendments should be allowed even in situations of delay if the other side can be compensated by award of costs. The rider in amendments, in my view, is against changing the character of the whole case and in a manner to deprive the other side of its legal rights. Amendments therefore, are geared towards a just determination of all issues in controversy conclusively within the same suit.
13. The applicant herein wishes to amend its defence so as to introduce a counterclaim against the Plaintiff. This is said to enable the defendant to claim the sum of Kshs. 358,548.86/- under Clause 22.3 of the Merchant Application & Agreement Form which amount was allegedly withdrawn from the Plaintiff's Merchant Account before the bank blocked the account and refunded the amounts to the card holders bank.
14. The Plaintiff opposed the application on the grounds that the application, if allowed, will change the character of the case between the parties.
15. In my analysis, I do not see the manner in which the amendment will generate a completely new cause of action as to prejudice the Plaintiff. The Plaintiff has not demonstrated the prejudice that would be occasioned to them if the application is allowed as they will have a right to amend their plaint, if they deem it necessary.
16. In the case of *General Manager E A R & H A & Thierstein* (1968) 1 EA 354 (HCK) the court held: -

“The well-established practice in this country governing the amendment of pleadings is concisely stated in O.6, r 18 of the Civil Procedure (revised) Rules 1948, which, in the first place, enables the court, at any stage of the proceedings, to allow either party to alter or amend his pleadings in such a manner and on such terms as may be just and, in the second place, goes on to require in clear and mandatory language that “all such amendments shall be made as may be necessary for the purpose of determining the real questions in controversy between the parties.”
17. The court has the power to amend pleadings which power can be exercised at any stage of the proceedings before judgment as per *Bullen and Leake & Jacob's Precedents of Pleading*, 12th Edition, which provides as follows concerning amendment of pleadings:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed



unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

18. *Halsbury's Laws of England*, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings: -

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”

19. The issues raised go to the merit of the defence which are not relevant for this matter. The application is thus merited and accordingly allowed. Each party shall bear its own costs.

Determination

- a. The application dated 11/3/2024 is allowed.
- b. The defendant shall file and serve the amended defence and counterclaim within 14 days.
- c. The plaintiff to file and serve amended plaint within 14 days of service, if need be.
- d. Costs will be in the cause.

**DELIVERED, DATED AND SIGNED AT NYERI ON THIS 29TH DAY OF JULY, 2024.
JUDGMENT DELIVERED THROUGH MICROSOFT TEAMS ONLINE PLATFORM.**

KIZITO MAGARE

JUDGE

In the presence of:

No appearance for the Plaintiff/Respondent

Karatu for the Defendant/Applicant

Court Assistant – Jedidah

