



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NYERI**

**CIVIL CASE NO.14 OF 2018**

**EDDS DESIGNERS LIMITED.....PLAINTIFF/RESPONDENT**

**VERSUS**

**UNITED CREDIT LIMITED**

**JOSEPH M. GIKONYO T/A..... 1<sup>ST</sup>DEFENDANT/APPLICANT**

**GARAM INVESTMENTS AUCTIONEERS.....2<sup>ND</sup> DEFENDANT/APPLI**

**RULING**

1. The 1<sup>st</sup> defendant/ applicant has filed an application dated 10<sup>th</sup> May 2021 seeking for orders:

**(1) That leave be granted to the defendants/applicants to amend their statement of defence in accordance with the draft amended statement of defence and counterclaim annexed hereto.**

**(2) That the draft amended statement of defence and counterclaim be deemed as duly filed upon payment of requisite filing fees.**

**(3) That the costs of the application be in the cause.**

2. The application was supported by the affidavit and supplementary affidavit of a director of the 1<sup>st</sup> applicant, one **Naina Haria**. The grounds in support of the application are that the 1<sup>st</sup> applicant extended credit of Ksh.18,000,000/- to the defendant/respondent who secured the credit by title No. Nyeri/Uasonyiro/621. The applicant contends that the respondent has failed to pay the loan facility as a result of which the outstanding amount owed to the 1<sup>st</sup> applicant as of 31<sup>st</sup> May 2020 is Ksh.27,167,065/-. That the applicant wishes to amend their statement of defence so as to introduce a counterclaim of the stated amount. The applicant further contends that the hearing of the case without the counterclaim will be greatly prejudicial to them. That the respondent will not suffer any prejudice if the orders sought are granted.

3. The application is opposed by the respondent vide the replying affidavit of its managing director, **Peter Mahu Muthee**. The grounds thereof are that the proposed amendments intend to introduce a new case of a different character from the current case which will be prejudicial to the respondent. Further that the application has been brought after a prolonged delay of three years and yet no explanation has been offered for the delay.

**Submissions –**

4. The application was canvassed by way of written submissions. The advocates for the applicant, **Macharia-Mwangi & Njeru Advocates** submitted that the court has power under Order 8 Rule 3 of the Civil Procedure Rules to allow amendment of pleadings at any stage of the proceedings in order to determine the true substantive merits of the case. That the intended amendment of introducing a counterclaim of Ksh.27,167,065/- is not a new cause of action as the indebtedness of the respondent was mentioned by the applicant in their statement of defence dated 23<sup>rd</sup> November 2018. That the present application is informed by the need to do justice by introducing the amount in form of a counterclaim.

5. It was submitted that it is settled law that amendments ought to be allowed as long as the same can be done without causing injustice to the other side. That no injustice whatsoever has been demonstrated by the respondent herein.

6. Counsels for the applicant cited several authorities that set out the principles governing amendment of pleadings, among them the case of

St. Patrick's Hill School Ltd v Bank of Africa Kenya Ltd (2018) eKLR, where the Court of Appeal set out the principles 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.*

See also **Joseph Ochieng & 2 Others v First National Bank of Chicago**, Civil Appeal No. 147 of 1991.

7. Reliance was also made on the decision in the case of **K K Lodgit Limited v Geminia Insurance Company Ltd & Another** (2021)eKLR where 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.**

8. On the issue of delay, it was submitted that courts have generally allowed applications for leave to amend pleadings even where there is inordinate delay. Reliance was made on the decision in the case of **Ocean Foods Limited v Osotpa Company Limited & 2 Others** (2020)eKLR where it was held that:

**The court however notes that, as rightly pointed out by the defendants, there was a long delay, on the part of the plaintiff in not only filing the defence to counter-claim, out of time, but also in filing the instant application. I find that the apparent long delay notwithstanding, this court still has the inherent power under Section 3A of the Civil Procedure Act, to permit the plaintiff to amend its pleadings at any time before judgment.**

**In J. C. Patel v D. Joshi [1952] 19 EACA 12, the court held:**

**“The rule of conduct of this court in such a case is that however negligent or careless may have been the first omission and however late the proposes amendment, the amendment should be made if it can be made without injustice to the other side.”**

9. In conclusion it was submitted that if the 1<sup>st</sup> applicant is denied the opportunity to amend its defence, it will not have the opportunity to ventilate its claim of the amount owing from the respondent. Further that the respondent will have the opportunity to amend its plaint and thus no prejudice will be revisited upon it.

10. The advocates for the respondent on the other hand submitted that the law as regards grant of leave to amend is well settled. They pointed out the principles set out in **Ochieng & Others v First National Bank of Chicago** (supra). That the application should not be allowed as the applicants are guilty of inordinate and protracted delay in bringing the application which was filed three years after the filing of the suit. That the reason given for the delay was that parties were negotiating an out of court settlement in Nyeri HCCC No. 15 of 2018. However, that the parties in the referred to case do not involve the respondent herein.

11. It was submitted that the application does not meet the mandate of Order 8 Rule 5 of the Civil Procedure Rules 2010 as far as amendment of proceedings is concerned. That an amendment can only be allowed under the said section for purposes of determining the real question in controversy between parties in a case and should not introduce any new facts or change the action into one of substantially different character. In this respect the advocates cited the case of **Eastern Bakery v Castelino (1958) EA 462** where it was held that:

**It will be sufficient for purposes of the present case, 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. The court will not refuse to allow an amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another, nor to change, by means of amendment, the subject matter of the suit. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.**

12. The advocates also referred to the Court of Appeal decision in the case of **Central Kenya Limited v Trust Bank Limited** (2002) 2EA 365 where it was held that:

**“...a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is**

**introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”**

13. It was submitted that the nature of the proposed amendments herein are so extensive that they change the entire nature and tenor of the original defence entirely including the counterclaim which raises totally new issues of alleged valuation done on the suit property in December 2020, long after the suit was filed in court. That the proposed amendments also introduces new facts on the purported attempts by the applicants to sell the suit property by way of public auction.

14. It was further submitted that the application is mischievous, an abuse of the process of the court and seeks to mislead the court into believing that there was an attempt on an out of court settlement. That the application was filed with the aim of delaying the hearing of the suit as it was filed out of time and without good explanation.

#### **Analysis and Determination–**

15. Section 100 of the Civil Procedure Act and Order 8 Rule 5 (1) of the Civil Procedure Rules, 2010 gives the court 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.**

16. **The Halsbury’s Laws of England, 4<sup>th</sup> 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 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...”**

17. 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.”**

18. From the principles set out above and as captured in the authorities cited by the advocates for the parties, it is clear that amendments of pleadings should be freely allowed unless they are bound to cause prejudice to the other party. That amendments should be allowed even in situations of delay if the other side can be compensated by award of costs. The caveat in amendments is that it should not change the character of the case and should not deprive the other side of its legal rights. Any amendments allowed by the court should be geared towards achieving a just and final determination of the real issues in controversy between the parties. In addition, the application must be made in good faith.

19. The applicant herein wishes to amend its defence so as to introduce a counterclaim against the respondent. The respondent opposed the application on the grounds that the application, if allowed, will change the character of the case between the parties and that the applicant is guilty of inordinate delay.

20. It is to be noted that in its statement of defence dated 3<sup>rd</sup> November 2018 that was filed with the court on 29<sup>th</sup> November 2018, the applicant stated in paragraph 23 that the respondent was indebted to them to the tune of Ksh.22,666,099/- as of 30/6/2018. The intended counterclaim is therefore not something that has caught the respondent by surprise. Though the respondent argued that the intended amendment will change the nature and character of the case pending between the parties, I am not persuaded that this will be the case. The respondent 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 deemed it necessary.

21. The applicant is however guilty of inordinate delay of over three years in bringing up the application since when the claim was filed in court. That notwithstanding, there is no evidence that the application is being made *mala fide*. The delay in filing the counterclaim has not occasioned any prejudice to the respondent. The respondent can be compensated by way of costs for the delay.

22. In the foregoing, I find that the application to amend the defence is merited. The same is allowed as prayed. The applicant is to file and serve the intended defence and counterclaim within 7 days from the date hereof. Correspondingly, the respondent is given leave to file a reply, if need be, within 14 days from the date of service of the amended defence and counterclaim.

Orders accordingly. Costs of the application to be borne by the applicant.

**DELIVERED, DATED AND SIGNED AT NYERI THIS 27TH DAY OF JANUARY 2022.**

**J. N. NJAGI**

**JUDGE**

In the presence of:

Mr. Kimani.....for Applicant

No appearance .....for Respondents

Parties: -Absent

Court Assistant:- Mr. Kinyua

30 days R/A.