



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE NO. 26 OF 2020

MOHAMED NAQI NOORANY.....PLAINTIFF

-VERSUS-

PREMIER FLOUR MILLS LIMITED

PARAMAMBA LIMITED.....DEFENDANTS

RULING

1. The application, subject of this ruling is dated **16th April, 2021** and taken out by the Plaintiff/Applicant under the provisions of **Sections 1A, 1B, 3A and 100** of the **Civil Procedure Act, Cap 21, Order 8 Rule 3 and Order 51 Rule 1 and 4** all of the **Civil Procedure Rules, 2010** and all other enabling provisions of the law. By that application, the Applicant seeks for the for following orders:-

a) That leave be granted to the Applicant to further amend its amended plaint dated 29th September, 2020 in the manner shown in the draft further Amended Plaint annexed hereto.

b) That leave be granted to Applicant to file a supplementary witness statement and documents.

c) That the costs of this application be in the cause.

2. The application is supported by the grounds on its face and the supporting affidavit of the Plaintiff sworn on **16th April, 2021**. His case is that in **Criminal Case No.211 of 2012**, it was established that the guarantee agreement was signed under coercion and in his view, liability warranting his indemnity under the agreement no longer exists. He therefore seeks to amend the plaint to include a prayer for relief by way of discharge of the guarantee agreement as indicated in the further amended Plaint annexed to the application. That the amendment to the Plaintiff is necessary since it will enable the court effectually and completely adjudicate upon and settle all the questions involved in the suit.

3. The application is opposed by the 1st Defendant on basis of the grounds of opposition dated and filed on **14th June, 2021**. It is adduced there in that the Plaintiff has not offered sufficient reasons at all as to why the amendment is being made at this juncture. It is denied that the accused in the criminal case was acquitted but averred that the accused was discharged solely on grounds of non-attendance of witnesses. Further, that the amendment is being sought after the ruling of the court and the Plaintiff is merely seeking to change the trajectory of the case but not to help the court adjudicate on the issues in dispute.

4. The application was canvassed by way of written submissions with the Plaintiff filing his submissions on **18th June, 2021** and the 1st Defendant filing his on the **15th June, 2021**. I have had the benefit of reading through the submissions and the authorities relied on, they do reflect the position taken in the pleadings as summarized above and I need not repeat the same here.

Analysis and Determination

5. I have considered the pleadings, depositions and rival submissions including the various cases cited. I find the issue for determination is whether or not to allow the proposed amendments as sought by Plaintiff.

6. It is trite in law that amendments to pleadings can be freely allowed at any time before delivery of a Judgment. That position has frequently been inclined to by courts and on that note, I rely on the case of **St Patrick's Hill School Ltd -vs- Bank of Africa Kenya Ltd [2018]eKLR**, where the Court of Appeal cited with approval the case of **Ochieng & Others v First National Bank of Chicago Civil Appeal No. 147 of 1991** (unreported) and set out the principles governing the amendment of pleading 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 and amendment notwithstanding the expiry of current period of limitation.*

7. Further, the Court of Appeal in the case of Central Kenya Ltd v Trust Bank Ltd [2000] eKLR 365 held that: -

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party.”

8. Generally therefore and based on the above cited cases, amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other party can be compensated by costs. The amendment will however not be allowed when the party applying for the same is acting *mala fide* or where it is not necessary for determining the real question in controversy between the parties. The application to amend must therefore be made in good faith and may be allowed even at late stages when the court is satisfied that the amendment is necessary to enable justice to be done between the parties. This is of course the spirit behind **Sections 100** of the **Civil Procedure Act** and **Order 8 Rule 5** of the **Civil Procedure Rules**.

9. Applying those principles to the facts of the present case, it is undisputed that the case has never been set for hearing. In deed vide the ruling delivered on **4th February, 2021**, parties had been directed to set the matter for hearing within 60 days thereof. From the grounds adduced in support of the application, the purpose of the amendment is to include a further prayer for relief by way of discharge of the guarantee agreement and to adduce further evidence in support of that prayer.

10. I have considered the reasons advanced by the plaintiff for seeking leave to amend the plaint alongside the reasons advanced by the defendant for opposing the same. I have not seen any instance where the Defendants will be unfairly prejudice, nor has it been shown that the amendment is irrelevant or useless, or would raise a merely technical point. I do reiterate that applications for amendment of pleadings before the suit is set for hearing ought to be freely permitted, unless prejudice and injustice would be occasioned to the opposite party since they would have an opportunity to respond.

11. For the above reasons, and having regard to the above cited authorities on amendment of pleadings, I find that the upshot of the foregoing is that the Plaintiff’s **Notice of Motion** dated **16th April, 2021** is allowed as prayed on the following terms: -

a) *The Plaintiff is granted leave to amend his Plaint.*

b) *That the draft amended Plaint be deemed as filed and the same to be served within fourteen (14) days from the date of this ruling.*

c) *The Plaintiff is also granted leave to file supplementary witness statement and documents within fourteen (14) days hereof.*

d) *The Defendant is equally granted corresponding leave to amend file and serve an amended defence alongside witnesses’ statements and list of documents within 14 days from the date being served with the amended Plaint, if need be.*

e) *The costs of the application shall abide the outcome of the main suit.*

It is hereby so ordered.

SIGNED, DATED AND DELIVERED VIRTUALLY AT MOMBASA THIS 30TH DAY OF SEPTEMBER, 2021.

D. O. CHEPKWONY

JUDGE

In the presence of:

Mr. Kinuthia counsel for Plaintiff/Applicant

No appearance for and by Defendant

Court Assistance - Winnie