



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**COMMERCIAL AND TAX DIVISION**

**HCCC NO. 335 OF 2016**

**ECOBANK KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**MERCBIMA INTERNATIONAL LIMITED.....1<sup>ST</sup> DEFENDANT**

**JOE MUSYIMI MUTAMBU.....2<sup>ND</sup> DEFENDANT**

**LYDIA NGUNJU KIBUE.....3<sup>RD</sup> DEFENDANT**

**RULING**

**Introduction**

1. In April 2014 the plaintiff herein, a banking institution conducting business in Kenya extended a loan facility of Kshs 72,250,000 in the form of asset backed finance to enable the 1<sup>st</sup> defendant purchase ten trucks. The 2<sup>nd</sup> and 3<sup>rd</sup> defendant guaranteed to pay to the plaintiff, on demand, all sums of money that may be owing.

2. A summary of the plaintiff's case is that the 1<sup>st</sup> defendant defaulted in payment of the installments as and when they fell due and that as at 12<sup>th</sup> January 2015, the 1<sup>st</sup> defendant's account reflected a total outstanding debt of kshs 75,239,927.82. The plaintiff then repossessed the trucks which were subsequently purchased by Foton East Africa Ltd pursuant to a Buy-Back Agreement dated 23<sup>rd</sup> May 2014 and the proceeds of the sale were credited into the 1<sup>st</sup> defendant's account thereby leaving an outstanding balance of Kshs 42,182,068.65 as at 1<sup>st</sup> April 2016.

3. The plaintiff filed this suit on 18<sup>th</sup> August 2016 and claimed the said balance of kshs 42,182,068.60 together with interest and costs of the suit.

4. Though a joint statement of defence dated 23<sup>rd</sup> September 2016 the defendants denied the plaintiff's claim in total and aver that the plaintiff did not account for the amount of money recovered from the sale of the trucks.

5. Though an application dated 24<sup>th</sup> January 2017, the plaintiff sought orders to strike out the defence and for entry of judgment against the defendants for the amount claimed in the plaint.

6. In a ruling delivered on 21<sup>st</sup> April 2017, **Onguto J.** declined to strike out the defence and dismissed the application dated 24<sup>th</sup> January 2017.

7. On 6<sup>th</sup> December 2018, the Deputy Registrar confirmed that parties had complied with the pre-trial directions and ordered that the case be mentioned before judge for directions on hearing.

**Plaintiff's application.**

8. On 27<sup>th</sup> June 2019, the plaintiff filed an application under Order 8 Rule 3, 5 and 8 of the Civil Procedure seeking leave to amend the plaint in the manner shown in the draft amended plaint.

9. The application is supported by the plaintiff's Remedial Officer, **Mr Sammy Miringu**, and is premised on the grounds that the plaintiff

needs to amend the plaint so as to reflect the manner in which the financed trucks were repossessed and subsequently sold in order to show the outstanding sums after crediting the 1<sup>st</sup> defendant's account together with the outstanding insurance premiums.

10. The plaintiff states that the amendments are necessary for purposes of determining the real issues in controversy. The defendants opposed the application though the 2<sup>nd</sup> defendant's replying affidavit sworn on 5<sup>th</sup> September 2019 wherein it is averred that the application is an abuse of the court's process, is misleading and is meant to prejudice the defendant's case as the parties have already closed pleadings after filing and exchanging all necessary documents.

11. He states that the plaintiff seeks to introduce a new cause of action in the application after all pleadings have been settled. He further avers that the plaintiff had, through application dated 24<sup>th</sup> January 2017, sought orders to strike out the defence and to enter judgment for the amount claimed in the plaint and that it was therefore dishonest for the plaintiff to seek to amend/alter/lower the amount claimed.

12. Parties agreed to canvass the application by way of written submissions but as at the time of writing this ruling, only the defendants had filed their submissions.

### **Analysis and determination**

13. I have carefully considered the plaintiff's application for leave to amend the plaint, the defendant's response and submissions together with the authorities that were cited. The main issue for determination is whether the plaintiff has made out a case for leave to amend the plaint.

14. Courts have taken the position that they would ordinarily allow applications to amend pleadings as amendments are at the heart of the right to a fair trial as is envisaged under Article 50 of the Constitution. Indeed courts have allowed amendments freely and at any stage of the pleadings.

15. In the present case, the defendants have taken issue with the fact that the plaintiff seeks to amend the plaint well after the close of the pleadings and after the matter has been certified for hearing. The defendants maintain that the amendment sought will prejudice their case as it has the effect of introducing a new cause of action.

16. I have however perused the draft amended plaint and I note that the plaintiff basically seeks to amend is the amount claimed which it has reduced from Kshs 42,182,068.60 to 40,378,344.43 plus Kshs 1,922,702.78. Considering that there is infact, a slight reduction in the amount claimed by the plaintiff in the proposed amendment, I am unable to find that the defendants will suffer any prejudice if the application to amend the plaint is allowed. I further find that the amendment does not introduce a new cause of action as all it seeks is to correct the amount claimed by the plaintiff. I am therefore not persuaded that any drastic alteration will be effected by the proposed amendment or that the defendants will suffer any prejudice.

17. For the above reasons, I find that the application dated 27<sup>th</sup> June 2019 is merited and I therefore allow it in the following terms:

*a) The plaintiff is granted leave to amend the plaint as shown in the draft amended plaint.*

*b) The amended plaint shall be filed and served on the defendants within 14 days from the date of this ruling.*

*c) The defendants are granted corresponding leave to amend, file and serve an amended defence, if need be, within 14 days from the date of service with the amended plaint.*

*d) The costs of the application will abide the outcome of the main case.*

**Dated, signed and delivered in open court at Nairobi this 27<sup>th</sup> day of February 2020.**

**W. A. OKWANY**

**JUDGE**

**In the presence of:**

Mr. Mbugua for Rimbui for plaintiff.

No appearance for defendant.

Court Assistant – Sylvia