



**REPUBLIC OF KENYA**

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

**CIVIL CASE NO. 95 OF 2003**

**ALLAN GEORGE NJOGU KAMAU.....PLAINTIFF**

**VERSUS**

**NATIONAL BANK OF KENYA LIMITED... DEFENDANT**

**RULING**

The applicant filed an application dated 23<sup>rd</sup> April 2018 seeking the following orders;

- a) The court grants leave to the defendant to amend the defence dated 24<sup>th</sup> November 2003.
- b) The amended defence and counterclaim to be deemed properly filed and served upon payment of assessed court fees.
- c) The court grants leave to the defendant to file a list of documents.
- d) The court be at liberty to give further orders including reopening of the plaintiff's case or recall of the Plaintiff's witnesses.
- e) Costs of the application be in the cause.

The application is based on the following grounds supported by the the affidavit of *Samuel Wanjohi Mundia*;

- a) The applicant was not satisfied with the representation rendered by its erstwhile advocates and has since changed advocates.
- b) Upon change and legal advice from present advocates and evaluation of proceedings it has become necessary for the defendant to amend its defence in accordance with the amended defence and counterclaim and to produce a list of documents.
- c) The documents sought to be added contain critical evidence in the case and fill critical gaps in the documentation of the transactions at the core of the suit.
- d) The amended defence and counterclaim and the documents sought to be produced will enable the court determine the real issues in controversy between the parties.
- e) The suit is part-heard and the plaintiff has already given evidence necessitating the leave to amend the defence and to produce the annexed evidence and for further orders if need be, to secure a fair hearing for both parties including re-opening of the plaintiff's case.
- f) No prejudice will be occasioned to the plaintiff.

**APPLICANT'S CASE**

The plaint was amended on 7<sup>th</sup> December 2011 to incorporate declaratory reliefs that the plaintiff does not owe any money to the defendant and invalidation of the legal charge following redemption of Eldoret/Municipality Block 6/11 owned and charged by *Agnes Wamboi Kamau* at Kshs. 1,569,659/-, in addition to a purported refund of an overpayment of debt in kshs. 609,659/- and a discharge over UASIN GISHI/KIMUMU/79 owned by her.

The defendant did not respond to the amendments out of inadvertent and or legal oversight. To remedy the shortcomings of legal representation the applicant changed representation which necessitated the present application to seek leave to adduce additional evidence

and amend the defence to conclusively rebut the plaintiff's allegations comprised in the new amendments.

The amendments sought to be incorporated in the amended defence and counterclaim are closely intertwined with the facts of the case naturally flowing from the pleadings and do not constitute a new cause of action.

The proposed amendments will bring out real issues in controversy between the parties for effective, affordable and timely disposal of the underlying disputes. The amendments sought to be introduced conclusively seek to address the following issues:

- What was the amount actually lent to the plaintiff?
- Whether the plaintiff admitted any part of the debt and has repaid in full
- Whether the defendant has levied unlawful charges, practices and interest
- Whether the outstanding debt was kshs. 12,453,599.40 as at 15<sup>th</sup> November 2003 with further interest thereon.
- Whether the redemption of the land title Eldoret Municipality Block 6/111 by the guarantor, *Mrs. Agnes Wamboi Kamau* extinguished the entire debt or not.
- Whether the plaintiff is entitled to a refund of kshs. 609,659/-, invalidation and discharge of the registered charge over Land title no. Uasin/Gishu/Kimumu/79
- Whether the defendant is entitled to a counterclaim of kshs. 12,453,599.40 as at 15<sup>th</sup> November 2003 with interest thereon.

The applicants submitted that the amendments only clarify underlying issues and that the plaintiff has not demonstrated any hardship or prejudice that are likely to be suffered.

The alleged prejudice and inconvenience occasioned by the delayed amendments is well capable of being remedied in costs. Further, the applicant submitted that the bar to the proposed counterclaim on grounds of statute barred by limitation of actions is entirely misconceived. That it is not for the court to rule on this at the stage of applying for leave and the same can be raised in the reply to amended defence and counterclaim.

The applicant submitted that the allegation that the defendant has an alternative remedy in a suit for professional negligence against his erstwhile advocates is misconceived.

The applicant relied on the cases of *Ramco Investment Limited vs Nairobi Water and Sewerage Co. Ltd (2017) eKLR*, *Bosire Ogeto vs Royal Media Services (2015) eKLR*, *Kuloba vs Oduol (2001) eKLR and Milimani HCCC No. 432 of 2006*, *National Bank of Kenya Ltd v Pipelastik Samkolit (K) Ltd & others* in support of the application.

## RESPONDENTS' CASE

The respondent submitted that the application was unmerited for the following reasons;

- a) The application is an abuse of the court process as it is in contravention of Sections 1A and 1B of the Civil Procedure Act and Article 159(b) of the Constitution of Kenya and therefore highly prejudicial for the defendant to purport to file a counterclaim 15 years after the cause of action arose.
- b) The application is fatally defective as it seeks to introduce a completely new cause of action in a matter that is about to be determined.
- c) The intended amendments and the counterclaim are barred by the provisions of the Limitation of Actions Act.
- d) The application is misconceived and an abuse of the process of the court as it is in breach of the provisions of orders 2,3,7 and 11 of the Civil Procedure Rules.

The respondent submitted that the defendant had sufficient time to bring his claim and bringing it after 15 years have lapsed since the institution of the suit is done with the intention of delaying the hearing and determination of the suit. He has legitimate expectation that litigation should come to an end and allowing this application would be contrary to the overriding objective. He relied on the case of *John Mulwa Kang'aatu v Pan African Insurance Co. Ltd. [2015] eKLR* on amendment of pleadings. He also relied on the case of *Andrew Wabuyele Biketi vs Chinese Center for the Promotion of Investment Development and Trade in Kenya Limited & 2 others*. The defendant is guilty of inexcusable delay.

The plaintiff further submitted that the application is contrary to *Order 2 Rule 6(1)* of the *Civil Procedure rules* as it seeks to introduce a completely new cause of action in a matter that is about to be determined. The application fails to meet the threshold in *John Mulwa Kang'aatu v Pan African Insurance Co. Ltd. [2015] eKLR*. The dispute herein is in relation to the account number 401-002-997 specifically as to the facility of kshs. 2,200,000/- which the plaintiff dutifully discharged. The amendments contain allegations that are inconsistent with the previous pleadings filed in this suit.

The plaintiff relied on the case of *Daniel Ngetich & Anor v K-rep bank Ltd. [2013] eKLR* as well.

The respondent submitted that the amendments and the counterclaim are barred by *Section 35* of the *Limitation of Actions Act*. He also referred to *Section 19(1)* of the said *Act*. The respondent further submitted that the period taken to file the counterclaim is inordinately long and will prejudice his interests. He relied on the case of *Suryakant Bhagwanji raja Shah v Aperit Investments S.A and Another [2002]*

**eKLR.** Further, that the issue of limitation of actions is jurisdictional thus the court will have no jurisdiction to entertain a claim which is time barred.

He contends that the plea of alleged mistake of his then advocates cannot avail it since the application is not for extension of time under the Limitation of Actions Act.

The plaintiff submitted that the application is in bad faith and should be dismissed with costs.

#### ISSUES FOR DETERMINATION

- a) Whether the application is time barred
- b) Whether the application meets the threshold for amendment of pleadings

#### WHETHER THE APPLICATION IS TIME BARRED

Section 35 of the *Limitation of Actions Act* provides;

**For the purposes of this Act and any other written law relating to the limitation of actions, any claim by way of set-off or counterclaim is taken to be a separate action and to have been commenced on the same date as the action in which the set-off or counterclaim is pleaded.**

Section 19 of the *Limitation of Actions Act* provides;

**(1) An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued...**

**(4) An action to recover arrears of interest payable in respect of any sum of money secured by a mortgage or payable in respect of proceeds of the sale of land, or to recover damages in respect of such arrears, may not be brought after the end of six years from the date on which the interest became due**

The counterclaim seeks to recover a residual debt from the plaintiff arising from the same cause of action that the suit arises from. The cause of action arose in 2003. Given that the counterclaim is perceived to be a separate action as per Section 35 of the *Limitation of Actions Act* it is apparent that the counterclaim is time barred.

#### WHETHER THE APPLICATION MEETS THE THRESHOLD FOR AMENDMENT OF PLEADINGS

The threshold for amendment of pleadings was set out in the case *Central Kenya Ltd v Trust Bank Ltd and 5 others (2000) eKLR* where the court of appeal set out the principles on amendment of pleadings as follows;

- i) That are necessary for determining the real questions in controversy.
- ii) To avoid multiplicity of suits provided there has been no undue delay.
- iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.
- iv) That no vested interest or accrued legal rights is affected.
- v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

The court of appeal in *Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR* held;

**The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows: -**

**“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.”**

From the foregoing, the court is guided on determining whether the amendment should be allowed. The amendments are being sought 15 years after the suit has been filed. This does not amount to the application being timeously filed.

The counterclaim seeks to initiate a claim for an issue that was already raised in the defence yet the applicant had elected not to file a counterclaim on the same at the time of filing the initial defence.

The claim as earlier expressed, is barred by virtue of *Section 35* of the *Limitation of Actions Act* as read with *Section 19* of the *Act*.

The application is therefore unmerited and is dismissed with costs to the respondent

**S. M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 18<sup>th</sup> day of June, 2019.**

In the absence of:-

Mr. Kimani for Plaintiff/Respondent

Mr. Rachuonyo for defendant/Applicant

Ms Sarah - Court clerk