



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & TAX DIVISION

CIVIL CASE NO. 439 OF 2016

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

ARENEN HOLDING LIMITED..... DEFENDANT

RULING

1. **Diamond Trust Bank Kenya Limited** (DTB) has filed a Notice of Motion application dated 29th August 2018. The said application is brought under Order 8 Rule 3, 5 and 8 of the Civil Procedure Rules. By that application DTB seeks the Court's leave to amend its defence.

2. The affidavit in support of that application is sworn by Lwanga Mwangi DTB's Debt Recovery Officer. The deponent by that affidavit stated that the amendment would not introduce any new or inconsistent defence or cause of action. That the amendment is intended to rectify an oversight in particularization of the motor vehicles and the applicable interest rate agreed between the parties. The deponent therefore stated that no vested interest or accrued legal right would be affected by the proposed amendment and that the amendment was necessary to avoid a multiplicity of proceedings.

3. The application is opposed by the Plaintiff, **Arenen Holding Limited**. The Replying Affidavit of the Plaintiff was sworn by Rohit Mediratta the Plaintiff's Managing Director. The Plaintiff through that affidavit referred to a Ruling of this Court delivered by Justice Ochieng on 14th March 2017. It is the Plaintiff's view that the Learned Judge by his said Ruling made a finding that DTB had failed to grant the Plaintiff possession of vehicles.

4. The Plaintiff further stated that DTB had been reckless and negligent in failing to include the amendments now sought in its defence. The Plaintiff argued that the application for amendment of defence was time barred because, contrary to Order 8 Rule 1 of the Civil Procedure Rules (the Rules) the application was made after the close of pleadings. The Plaintiff concluded by stating that the application was a mere sham and was only aimed at delaying the hearing of this suit.

ANALYSIS

5. I have considered the parties affidavits and their written submission. The jurisprudence on application for leave to amend pleadings is that they are freely allowed subject to there being no injustice to the other party. Such amendment may be allowed no matter how negligent and careless was the omission to include the amendment to the initial pleadings and however late such amendment is sought. This is what is provided under Order 8 Rule 3(5) of the Rules, which is in the following terms:

“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.”

6. The Plaintiff was in error to argue the Defendant's application was time barred.

7. The general power to amend pleadings is to be found in Order 8 Rule 5(1) of the Rules, which provides:

“For the purpose of determining 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 document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

8. In my view there is no injustice that will be visited upon the Plaintiff if the present proposed amendment is allowed. There is no evidence that the proposed amendment will delay the trial of this matter since I note the Plaintiff filed its issues on 18th July 2017 and there has not been case management conference in this matter.

9. The Plaintiff erred to have argued that the application ought not to be allowed because Justice Ochieng by his Ruling faulted the Defendant.

10. My response to that argument is that the Learned Judge was entertaining an interlocutory application. The finding in that Ruling is not binding on the Trial Judge. Further in making that finding the Judge clearly stated that the finding was made on *prima facie* basis. Merriam Webster website defines *prima facie* as:

“At first view: on first appearance absent other information or evidence.”

11. That definition does show that the finding of the Learned Judge was at first view absent other information. It follows that the trial Judge who will receive the parties evidence will make full determination of this dispute and will not be bound by the finding in the interlocutory Ruling.

12. In conclusion I find there is merit in the application. The Defendant will bear the costs of the application.

13. The Orders of the Court are:

- a. The Defendant is granted leave to file and serve the amended defence, as sought in the Notice of Motion dated 29th August 2018.**
- b. The Plaintiff if need be may file a reply to defence within 15 days of service of Amended Defence.**
- c. The costs of the Notice of Motion dated 29th August 2018 shall be borne by the Defendant.**

DATED, SIGNED and DELIVERED at NAIROBI this 24TH day of JULY, 2019.

MARY KASANGO

JUDGE

Ruling Read and Delivered in Open Court in the presence of:

Sophie..... COURT ASSISTANT

..... FOR THE PLAINTIFF

..... FOR THE DEFENDANT