



**REPUBLIC OF KENYA**

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

**COMMERCIAL AND ADMIRALTY DIVISION**

**CIVIL CASE NO. 60 OF 2011**

**MOYEZ SADRU DIN BHANJI.....PLAINTIFF**

**-VERSUS-**

**FARID MOHAMED.....1ST DEFENDANT**

**ABDUL MOHAMED.....2ND DEFENDANT**

**RULING**

1. The plaintiff in this action filed on **23rd February 2011** seeks judgment for **Ksh 5 million** which money the plaintiff pleaded he lent to the 1st defendant and which was guaranteed by the 2nd defendant.

2. In one of the plaintiff's documents attached to the plaint, is a loan agreement dated **22nd July 2004**. That agreement witnesses that the plaintiff lent to the 1st defendant **Ksh 5 million** and that the 1st defendant gave the plaintiff, as security for that loan, a blank transfer of 15% shares in **Network Housing Development Company Limited**.

3. The defendants filed their defence on **20th April 2011** whereby they stated that the plaintiff's loan was secured by 15% shares in **Network Housing Development Company Limited** which shares were discharged and the defendants were released from their liability of the loan.

4. The defendants have filed a notice of motion dated **19th March 2018**. It is brought under Order 8 Rule 3 of the Civil Procedure Rules. The defendants seek leave of the court to amend their defence.

5. The main amendment to the defence is to add a counter claim where the defendants plead that they agreed with the plaintiff to transfer to the plaintiff's shares in **Greenwoods Limited** and **Network Housing Development Company Limited**. The defendants further pleaded in the counter claim that as a consequence of those transfers of shares they had overpaid the plaintiff. They therefore seek judgment for the plaintiff to transfer to the defendants 14% shares of **Greenwoods Limited**.

6. The main objection to the defendants' application is that there is no evidence in support of the counter claim; that the counter claim contains inconsistent and fresh cause of action and that the amendments is sought late in the day, that is 7 years after the suit was filed.

7. I have considered the affidavit evidence both in support and in opposition of the application. I have also considered the submissions. Having done so, I will begin by considering what is the general principle in regard to an application for leave to amend a pleading. The law is set out in Order 8 Rule 3 of the Civil Procedure Rules which provides that amendment to pleading may be allowed at any stage of the proceedings on such terms as to costs. Order 8 Rule 3 (5) of those rules also provides that an amendment to pleadings may be allowed '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 fact.'

8. The court in the case of **Kassam vs Bank of Baroda (K) Limited [2002] KLR 296**, the court in considering an application to amend a pleading stated:

***"the court has power to allow necessary amendments to pleadings at any stage, but the granting or refusal of an application for such leave to amend is a matter within the discretion of the trial judge."***

9. In the case **Central Kenya Ltd vs Trust Bank Ltd & 5 Others [2000] eKLR** the court considered when an amendment will be allowed and held:

***" (i) That are necessary for determining the real question 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 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; and*

*(v) so long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for.”*

10. In my view, the amendment sought in this case will avoid multiplicity of suits and will assist in determining the real dispute between the parties. The additional counter claim in the proposed amendment relates to the transactions between the plaintiff and the defendants. The defendant has however inordinately delayed in seeking the amendment and I will therefore order the defendants to pay the plaintiff’s cost of the notice of motion.

11. For the above reasons I grant the following orders:

*a. The defendants shall within 2 (two) days from today file and serve their amended defence which will be in the same terms to the one attached to the application dated 19th March 2018.*

*b. The plaintiff on being served shall within 7 (seven) days file and serve a reply to the amended defence, if need be.*

*c. The costs of the notice of motion dated 19th March 2018 are awarded to the plaintiff to be paid by the defendants.*

*d. In going through this file, I have realised that this is a case that should be tried before the Chief Magistrates Court. I do therefore hereby transfer this suit to the Chief Magistrates Commercial Court Milimani, Nairobi. This case shall be mentioned before the Chief Magistrates’ Court on 12th November 2018.*

**DATED, SIGNED and DELIVERED at NAIROBI this 31st day of October, 2018.**

**MARY KASANGO**

**JUDGE**

**Ruling read and delivered in open court in the presence of:**

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

**MARY KASANGO**

**JUDGE**