



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL CASE NO. 603 OF 2004

GIRO COMMERCIAL BANK LIMITED..... PLAINTIFF/APPLICANT

-VERSUS-

MACHO CREDIT LIMITED.....DEFENDANT/RESPONDENT

RULING

1. The notice of motion before court is brought under Order 1 Rule 10 and Order 8 Rule 3 of the Civil Procedure Rules. It is dated **7th May 2018**. By that application, the plaintiff seeks leave of the court to amend the plaint, amongst others, to substitute the plaintiffs from **Giro Commercial Bank Limited** with another that is **I & M Bank Limited**. The application is grounded on the need to reflect the changes to the immovable property which is the subject of the proceedings, and to reflect the change that the plaintiff has transferred its assets and liabilities to **I & M Bank Limited**. This changes its stated in the application need to be reflected in the plaint so as to enable the court to adjudicate on the issues between the plaintiff and the defendant.
2. The plaintiff relied on the gazette notice no. 1301 of **13th February, 2017** which gazetted the transfer and acquisition of assets and liabilities of **Giro Commercial Bank Limited** and **I & M Bank Limited**.
3. The defendant opposed the application on the grounds that the defendant entered into contractual relationship with **Giro Commercial Bank Limited** and not **I & M Bank Limited**; that the proposed amendment seek to change the entire nature of the suit from a claim of rent to one of trespass; and that the application for amendment is brought after an unusual and unexplained delay.
4. I have considered the rival arguments . In the first instance, I wish to disagree with the defendant’s submissions that the amendment seeks to change the nature of the claim. That submission is incorrect. The amendments, other than the change of the plaintiff, relate to the tenancy of the defendant. There is no amendment proposed to the amount of Ksh 14,995,200 claimed against the defendant. There is no merit in the defendant’s argument in that regard.
5. The defendant erred to argue that **I & M Bank Limited** cannot take over this suit because the defendant had no contractual relationship with the bank. What entitles **I & M Bank Limited** to seek to take over this suit is the agreement with **Giro Commercial Bank Limited** for **I & M Bank Limited** to take over all assets and liabilities of **Giro Commercial Bank Limited**.
6. That agreement was gazetted in the Kenya Gazette as stated above. Section 9 (3) of the Banking Act Cap 488 provides in part as follows:

“Upon the coming into effect of a transaction effecting the amalgamation or acquisition of one institution by another institution, or effecting the transfer of all or part of the assets and liabilities of one financial institution to another institution pursuant to this section –

(a) All the assets and liabilities of the amalgamating institutions or, in the case of a transfer of assets and liabilities, those assets and liabilities of the transferor institution that are transferred in terms of the transaction shall vest in and become binding upon the amalgamated institution or, as the case may be, the receiving institution;

(b) The amalgamated institutions or, in the case of the transfer of assets and liabilities, the receiving institution shall have the same rights and be subject to the same obligations as those which the amalgamating institution or, as the case may be, the transferor institution may have had or to which they or it may have been subject immediately before the amalgamation or transfer.”
7. It is clear from the above that **I & M Bank Limited** by virtue of Section 9 (3) (b) obtained the same rights on the assets and liabilities of **Giro Commercial Bank Limited** from the moment the transfer transaction came into effect.

8. In my view, the plaintiff's have demonstrated that the application for amendment is merited. In considering the amendment proposed and in exercise of the discretion afforded to me under the civil procedure rules, I find that it is just to permit the amendment. In allowing the amendment, it will enable the trial court to deal with the real issues between the parties. This was what was stated in the case **Mombasa Cement Limited v Speaker of the National Assembly & 2 others [2016] eKLR** where the court stated:

“in the case of Central Kenya Ltd v Trust Bank Ltd [2002]2 EA 365. The Court of Appeal held that amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action and that a party should always be allowed to make such amendments as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits.”

9. In my view to allow the amendment the defendant will not suffer, and it has not proved, any prejudice. The amendment is in keeping with the principles set out in the case **Eastern Bakery v Castelino** as follows:

“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 side can be compensated by costs.”

10. Accordingly, the court orders are as follows:

- a. The plaintiff shall file and serve its amended pleadings, after 7th May 2018 in conformity with the one annexed to the notice of motion dated 7th May 2018 within 13 days from today's date.*
- b. The defendant shall, if need be, file an amended defence within 17 days of service of the amended pleadings.*
- c. The costs of the notice of motion dated 7th May 2018 shall be in the cause.*
- d. Parties shall comply with case management conference within 14 days from today.*
- e. At the reading of this ruling this cases shall be transferred to the Chief Magistrate's Court.*

DATED, SIGNED and DELIVERED at NAIROBI this 30th 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 Defendant

MARY KASANGO

JUDGE