



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 457 OF 2015

JUMBO COMMODITIES LIMITED.....PLAINTIFF

- VERSUS -

FAHARI TRADING LIMITED.....1ST DEFENDANT

I & M BANK LIMITED.....2ND DEFENDANT

IMPERIAL BANK LIMITED.....3RD DEFENDANT

RULING NO.2

1. The application dated 18th April 2017 has been brought by the 1st Defendant, seeking to amend the Defence, so as to include a Counterclaim.
2. The applicant asserted that the proposed amendment was necessary for the purpose of bringing out the real issues in controversy between the parties.
3. It is the view of the applicant that if the amendment was effected, it would not prejudice the plaintiff.
4. The applicant also expressed the view that it was fair and in the interest of justice to allow the proposed amendment.
5. In answer to the application the plaintiff put up a two-pronged response; first that there had been inordinate delay in bringing the application and, second that the proposed amendment was not necessary to determine the real question in controversy.
6. On the issue of delay, the applicant says that the application had not been made late as it was brought at the stage of Case Management.
7. The applicant also pointed out that pursuant to Section 100 of the Civil Procedure Act, an amendment to pleadings may be allowed by the court at any time, provided that the amendment was for the purpose of determining the real question or issue.
8. In the case of **KYALO Vs BAYUSUF BROTHERS LTD [1983] KLR 229**, the Court of Appeal upheld the decision in which the High Court had rejected an application for leave to amend the Defence.
9. In that case, the accident, which gave rise to the claim, had occurred on 26th July 1975.

10. The original Defence was filed on 23rd February 1977, denying the plaintiff's assertion that the applicant's lorry had been involved in the accident in issue.
11. The original Defence also stated that the driver of the applicant's lorry, at the time of the alleged accident, was no longer their employee.
12. Thereafter, on 18th August 1980 the applicant filed an Amended Defence, but without the leave of the court.
13. The Amended Defence stated that the alleged driver of the applicant's lorry had never been an employee of the applicant.
14. It was further stated that at the material time, the applicant did not own the lorry in question. The applicant had, allegedly, only acquired ownership of the lorry in December 1975, which was 4 months after the alleged accident.
15. Upon service of the Amended Plaintiff, the plaintiff asked the court to disallow it, whilst the applicant sought leave to amend the Defence.
16. The High Court rejected the application for leave to amend the Defence, thus shutting out the Amended Defence.
17. Madan J.A. (*as he then was*) said;

“The application to amend was very late. To grant leave to amend the defence which proposes to take a complete somersault from the original one would be both unfair and cause heavy prejudice to the respondent who is entitled, nearly six years after the accident, to hold the appellants to the admissions made by them originally. I would not open the door to possible pleas of limitation against the respondent?.

18. In my understanding, it was not just the delay which was the basis for that decision. It was the impact of the said delay, which the court held, would occasion *“heavy prejudice?.*
19. In that case, the evidence of a police officer had already been recorded, on 8th February 1978.
20. In the circumstances, a defence which was not contemplated at the time when the police officer testified, would definitely occasion prejudice, considering that the said defence was inconsistent with the original Defence.
21. In the case of **CENTRAL KENYA LIMITED Vs TRUST BANK LIMITED & 4 OTHERS, CIVIL APPEAL No. 222 of 1998**, the Court of Appeal said;

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs?.

22. As the case was still at the pre-trial stages, I hold the considered view that the application for leave to amend the Defence was not made after a period of inordinate delay.
23. The next question is whether or not the proposed amendment was necessary to determine the real questions in controversy.

24. On 21st December 2015 the court had delivered a Ruling on an application by the plaintiff, seeking an interlocutory injunction to restrain the 2nd defendant from debiting the plaintiff's with the sum of Kshs. 103,875,000/-.

25. In the said Ruling, the court expressed the following view;

“25. Whatever dispute there might be between Jumbo Commodities and Fahari Trading, one thing is clear, that those two parties executed a Mutual and Amicable cancellation of the contract dated 7th April 2015.

26. A perusal of the agreement dated 9th June 2015 shows, on a prima facie basis, that the parties had ‘settled all disputes peacefully’.

26. In the light of that holding, which was not challenged by any appeal, the plaintiff submitted that the attempt to introduce new claims were neither *bona fide*, nor have they been shown to exist post the Mutual Cancellation Agreement.

27. The plaintiff emphasized that the 1st defendant had not provided any evidence, even remotely, to support the existence of the claims outside the Mutual Cancellation Agreement.

28. It was the plaintiff's position that;

“13. In any event, the suit herein between the Plaintiff and the Defendant is with respect to the Cancellation of the Avalised Bill of Exchange dated 7th April 2015?.

29. In the circumstances, the plaintiff said that the 1st defendant should launch another suit if, indeed, it believes that the claims it seeks to introduce into this suit by the proposed amendment, were not barred by the Mutual Cancellation Agreement.

30. I understand the plaintiff's submissions to acknowledge the nexus between the Avalised Bill and the Mutual Cancellation Agreement. But the plaintiff believes that the Mutual and Amicable Cancellation Agreement gave rise to an estoppel against the 1st Defendant.

31. To my mind, if the Mutual and Amicable Cancellation Agreement gave rise to an estoppel, the best place to test that position would be in these same proceedings.

32. I hold the view that if the 1st defendant were to lodge separate suits, to raise its claims, because such claims could conceivably be barred by estoppel, that would lead to the possibility of two or more inconsistent or contradictory determinations.

33. I appreciate the fact that the new figures which the applicant is desirous of introducing through the proposed amendments, were in existence prior to the execution of the Mutual and Amicable Cancellation Agreement. That would therefore mean that the applicant will have to persuade the court why the said applicant did not factor those figures into the Agreement.

34. In other words, it does appear that even if the amendment were allowed, the plaintiff may still have answers to the said amendments.

35. But the applicant also appears to have an explanation for the proposed amendments. The said explanation may or may not be found in the disclaimer which is a part of the Agreement.

36. Matters of fact were also not agreed upon, as regards the payment of Kshs.21, 281,910/-. The plaintiff insists that that sum was paid. However, the applicant insists that it had not yet received the payment for the 366 bags.

37. But is not the proposed amendment an avenue through which the applicant was being allowed to circumvent the earlier decision of the court, when I had held that the parties had settled all disputes peacefully?

38. First, it must be noted that my said finding was on a *prima facie* basis. It was not a final conclusive determination.

39. At this stage, the applicant had no obligation to provide the court with documents or any other evidence to prove their claims, as embodied in the proposed amendment. Evidence is tendered to support pleadings.

40. Evidence is not to be incorporated into pleadings.

41. If the proposed amendments cannot be proved, as alluded to by the plaintiff, or even if the same are barred by estoppel, the plaintiff's case would not be prejudiced, if the court allowed the amendments. I so find because the plaintiff would still be able to put forward the answers or responses which it believes to provide complete answers to the said claims.

42. In the result, I find merit in the application, and I do therefore grant leave to the 1st defendant to amend the Defence in terms of the draft attached to the application dated 18th April 2017.

43. As regards the costs of the application, I find no reason in law or in fact for ordering the plaintiff to pay the same. The 1st defendant has not demonstrated that the plaintiff played any role in any way hindering the 1st defendant from incorporating the proposed amendments into the original defence.

44. Accordingly, although the application is successful, I order that each party will meet its own costs.

DATED, SIGNED and DELIVERED at NAIROBI this 17th day of October 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

E.N. Mwangi for the Plaintiff

G.M. Mwangi for Mutoro for the 1st Defendant

G.M. Mwangi for the 2nd Defendant

No appearance for the 3rd Defendant

Collins Odhiambo – Court clerk.