



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO 433 OF 2003

ROSE FLORENCE WANJIRU

(Suing on her own behalf and on behalf of and representing and for

the benefit of all persons interested in and being past and present

account holders with specified banks in Kenya).....PLAINTIFF

VERSUS

STANDARD CHARTERED BANK KENYA LIMITED.....1ST DEFENDANT

J. K WANYELA the Executive Director (Secretary) of the Kenya

Bankers Association being sued on behalf of

KENYA BANKERS ASSOCIATION.....2ND DEFENDANT

CENTRAL BANK OF KENYA.....3RD DEFENDANT

RULING

1. The application by the Plaintiff dated 14th October 2015 is brought under the provisions of Order 8 Rule 3 & 5 of the Civil Procedure Rules. The Plaintiff seeks the following orders inter alia;

1. THAT the Plaintiff be granted leave to amend her plaint dated 22nd July 2003;

2. THAT the costs of this application be in the course.

2. The application was predicated upon the grounds that this Court had in its ruling dated 27th August 2015 allowed various parties to be enjoined in the suit herein and that, in the course of filing the suit, pertinent information requires to be included in the statement of claim. The application was further supported by the affidavit of S. Gichuki Waigwa sworn on 14th October 2015, and in which it was deposed therein, thus, reiterating the grounds adduced in support of the application.

3. The 1st Defendant objected to the application by filing its replying affidavit sworn on 2nd December 2015. Therein, it was deposed to that the amendments proposed by the Plaintiff vide its draft amended Plaint constituted claims of fraud and other additional claims, and thereby, introducing new causes of action. It was further averred that such claims were time barred, and as such the application should be dismissed.

4. On its part, the 2nd Defendant filed its Grounds of Opposition and replying affidavit on 18th November 2015. In the grounds of opposition, they contended that the issues the Plaintiff sought to introduce new causes of action through the draft amended Plaint, and further, that the said issues relating to fraud and/or alleged fraudulent conduct were time barred. It was averred that the draft amended Plaint did not conform to the provisions of Order 2 Rule 10(1)(a) of the Civil Procedure Rules, and further, that the amended Plaint does not plead any cause of action or the facts giving rise to individual claims of the persons sought to be enjoined. The relying affidavit deposed to the facts that the persons named as intended Plaintiffs in the suit were not members of the 2nd Defendant as at various times when the Plaintiff commenced the instant suit.

5. I have considered the application and the dispositions made by the parties, and the submissions filed in that regard. The Plaintiff makes her application pursuant to the provisions of Order 8 Rules 3 & 5. At sub-rule (1) of rule 3, it is provided that;

‘Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings’.

Further at rule 5(1), the said provision reads;

‘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’.

6. Pursuant to the above mentioned provisions namely Order 8 rules 3 & 5, the Court has wide and unfettered jurisdiction to allow, and to order for the amendments of pleadings, save that the application for such amendments should be made before judgment is entered and further, that the proposed amendments should not prejudice the rights of the opposing party. In this regard, the Court, in **Eastern Bakery v Castellino (1958) E.A 461** had held that;

“Amendments to pleadings sought before the hearing should be freely allowed if they are made without injustice to the other side, and there is no prejudice if the other side can be compensated by costs. But there is no power to enable one distinct cause of action to be substituted for another, not to change by amendment.”

Further, in the Court of Appeal case of **Central Kenya Ltd v Trust Bank Ltd (2000) 2 EA 365**, it was determined inter alia;

“A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected, and (iv) the amendment could be allowed without injustice to the other side.”

7. In the objections reiterated by the Defendants, it was averred that the Plaintiff in its draft amended Plaint went contrary to the dicta in **Central Kenya Ltd v Trust Bank Ltd** (supra), in that (a) the Plaintiff sought to introduce new causes of action, and (b) the amendments as proposed by the Plaintiff were not in conformity with the provisions of Order 2 Rule 10(1)(a) of the Civil Procedure Rules. Further, it was

contended that the ruling of Gikonyo, J dated 27th August 2015 did not include some of those who had been proposed to be enjoined in the suit, and that therefore, there would be an injustice caused on the other side.

8. Under Order 2 Rule 10(1)(a), it is provided that;

‘Subject to sub-rule (2), every pleading shall contain the necessary particulars of any claim, defence or other matter pleaded including, without prejudice to the generality of the foregoing

a. particulars of any misrepresentation, fraud, breach of trust, wilful default or undue influence on which the party pleading relies; and(emphasis added).

It was the Defendants contention that the draft amended Plaintiff did not include the particulars of fraud or alleged fraudulent conduct by the Defendants, and that in any event, such amendments were introducing new causes of action not anticipated under the ruling and order of Gikonyo, J delivered on 27th August 2015. They further contended that as at 22nd July 2003 when the said suit was filed, some of the proposed Defendants were not members of the 2nd Defendant, and that therefore, the amendments should not be allowed to include parties that were not parties to the suit at its institution.

9. From a reading of the two authorities in **Eastern Bakery v Castellino** (supra) and **Central Kenya Ltd v Trust Bank Ltd**(supra), the Court has the unfettered discretion to allow for the joinder of parties to the suit if it would assist the Court in determining the real issues in controversy, and further, if it would not cause an injustice to the other party. This is what the Court had considered when on 27th August 2015, it allowed the Plaintiff to enjoin parties to the suit that it deemed fit would enable it deal with the issues in controversy and avoid a multiplicity of suits dealing with the same issue as presently before the Court. It was therefore in issuing such orders, which could be deemed to have been in exercise of the provisions of Section 1A and 1B of the Civil Procedure Act as with regards to expedient and fair disposition of matters, that the Plaintiff filed the instant application.

10. With regards to the application by the Plaintiff dated 15th August 2015, the learned Judge rendered himself as follows;

“This application was filed by S Gichuki Waigwa & Associates by the plaintiff to join 185 persons. Applying the parameters I have set out above, I allow the proposed plaintiffs to join as parties except applicant number 159 and those customers of banks which have ceased to be banks. On the death of a legal person as provided in law, such person cannot be sued. This, however, does not include successors in title or through merger. Delphis Bank is a good example. All the other issues of misjoinder or lack of evidence of being account holders are matters for trial. As I have stated above, section 6 of the Civil Procedure Act is not offended by joining party number 26 in the Schedule to the Notice of Motion as stated in paragraph 12 (a) of Mr Olaka’s Affidavit of 14th January, 2015. Also Mr Olaka’s Affidavit as well as Further Affidavit relate to failure to trace or lack of record to show these persons ever had accounts with the banks cited. As I stated earlier, these are matters of evidence which can only be unravelled in the trial and appropriate orders for costs shall be made where the party fails to establish his case to the required standards. I also note that arguments that Equity Bank Limited, Family Bank Limited, Gulf Bank Limited and Housing Finance Company of Kenya Limited are not involved in this suit. I take the view that those customers who claim that section 44 was violated have same interest in these proceedings. Whether they will succeed or not in their respective causes of actions is a different matter altogether which is for trial. It is so ordered.”

11. The court did not see any contravention of the law in allowing for the sought prayers in the application to be allowed; and neither does the Court in the instant application. The issues in contravention were similarly adduced in the previous Plaintiff, and have not been merely introduced in the draft amended Plaintiff. Further, the draft amended Plaintiff has set out the particulars of fraud in the Plaintiff;

whether the same is sufficient to sustain the claim as against the Defendants is an issue to be canvassed at trial, the Court may not have the purview to consider such issues presently. Conversely, the Defendants have not shown what prejudice or injustice they stand to suffer should the application be allowed. This, to the mind of the Court, is one of the crucial issues that would have had to be considered in the event that such an application for joinder is disallowed, as well as introduction of new causes of action, delay and if any accrued right was effected. No such objections have been sustained by the Defendants.

12. In that regard, and in consideration of the a foregoing, the application by the Plaintiff is meritorious, and the same is hereby allowed in terms of prayers (1) and; (2) with regards to costs, the same shall be in the cause.

Dated, signed and delivered in court at Nairobi this 23rd day of March, 2016.

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C. KARIUKI

JUDGE