



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**  
**CIVIL CASE NO. 541 OF 2005**

**BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF**

**VERSUS**

**ABDI ABSHIR WARSAME.....1<sup>ST</sup> DEFENDANT**

**DAQARE TRANSPORTERS LIMITED.....2<sup>ND</sup> DEFENDANT**

**RULING**

1. The application herein is a Notice of Motion Application dated 19<sup>th</sup> November 2014.
2. The Applicant is seeking for orders that;
  1. That leave be granted to the 2<sup>nd</sup> Defendant to amend the First and Second Defendant's Written Statements of Amended Defence, the set off and Counterclaim dated 6<sup>th</sup> October 2006 and filed in court on 16<sup>th</sup> October 2006 as per the annexed draft amended defence.
  2. That the proposed amended Defence be deemed to have been duly filed and served.
  3. That all parties be at liberty to apply.
  4. That the court be at liberty to issue any other or further orders and or directions at its discretion, and in the interest of justice.
3. The Application is based on the grounds on the face of it and supported by the Affidavits sworn by ENOS I. IGESA and FANUEL ONDIEK DATED 19<sup>th</sup> November 2014. It is opposed through a replying affidavit sworn by WAWERU MATHENGE dated 20<sup>th</sup> April 2015.
4. The Applicant's case is that at the time of filing the 1<sup>st</sup> and 2<sup>nd</sup> Defendants written statement of the Amended Defence, both Defendants were under the representation of one advocate, however, they have since secured separate advocates. Upon subsequent consultation, they now seek for the proposed amendments so that all issues on the matter can be addressed and determined.
5. The Applicant submitted that the failure to originally capture all the issues was partly due or owing to:
  - **Bona fide error;**

- **Probably to representation by one advocate for both parties;**
- **Having not been able to ascertain the willingness of some witnesses to testify on the relevant aspects of the case; and**
- **Multiple preliminary interlocutory applications some of which gave the erroneous impression that the suit had been concluded as against the 2<sup>nd</sup> Defendant and judgment obtained thereof**

6. The Applicants further submitted that, if the amendment is allowed none of the parties will suffer any prejudice, on the reverse, all issues in controversy will be determined as the suit has not yet commenced, therefore it is in the interest of justice that the Applicant's request for leave be granted.

7. The Respondents opposed the Application on the grounds that, it is an abuse of the court process, is defective and lacks merit. In their submission, the Respondents told the court that 1<sup>st</sup> Defendant is a Director of the 2<sup>nd</sup> Defendant. That, the Honourable court rejected the 2<sup>nd</sup> Defendant's application dated 17<sup>th</sup> July 2006 seeking to lift the injunction order affecting the Defendants account number 7175184, on the grounds *inter alia* that although the 2<sup>nd</sup> Defendant is a distinct person, the 1<sup>st</sup> and 2<sup>nd</sup> Defendant are same persons having two faces. To date the Applicant has not appealed against that order. Therefore the application herein is an attempt to circumvent that ruling.

8. Consequently, if the amendments are allowed the Respondent will suffer grave prejudice as the 2<sup>nd</sup> Defendant will be in a position to access the account number 7175814, which is subject to a consent order entered on the 12<sup>th</sup> of October 2005, that required the 2<sup>nd</sup> Defendant's account be frozen for the due performance of an obligation by the 1<sup>st</sup> Defendant. Similarly the Applicant has filed a civil suit No. 30 of 2007 against the Plaintiff praying for orders in respect of account number 7175184 which is the subject of the injunction herein. Therefore the 2<sup>nd</sup> Defendant's mischief in the proposed amendment is made clear from prayers in the set off and counterclaim, where the 2<sup>nd</sup> Defendant seeks for damages for the alleged harassment visited upon its director which director is the 1<sup>st</sup> Defendant herein.

9. The Respondent submitted further that, the amendment sought at paragraph 4 of the draft amended 2<sup>nd</sup> Defendants statement of Defence is mischievous as the 2<sup>nd</sup> Defendant seeks to deny an issue of fact which has been brought before this court by numerous affidavits sworn by the 1<sup>st</sup> Defendant on his own behalf and on behalf of the 2<sup>nd</sup> Defendant, as a director of the 2<sup>nd</sup> Defendant. That the failure to serve the application upon the 1<sup>st</sup> Defendant is evident of the same, and indeed, at the time of the cause of action, the 1<sup>st</sup> Defendant was a director of the 2<sup>nd</sup> Defendant, is still such director. Therefore the 2<sup>nd</sup> Defendant cannot seek the help of this court to hide from the fact.

10. Finally, the Respondents submitted that the 2<sup>nd</sup> Defendant seeks to introduce a whole and different defence somersaulting from its original defence which is prejudicial to the Plaintiff as the pleadings closed almost 10 years ago. That the Application is an abuse of the judicial process which is contrary to law and justice, and there are no valid grounds to enable this court exercise its discretion in allowing the amendments.

11. In their submissions, the Applicant invited the court to determine whether or not, the 2<sup>nd</sup> Defendant's application has merit and allow it and the Respondent invited to consider whether the Application is misconceived, mischievous and an abuse of the process of court and whether the amendment sought will only prejudice the Plaintiff.

In my opinion, I find the issue for consideration is, basically to determine if the Application's has or does not have merit.

12. The law on amendment of pleadings is provided for under order 8 Rule 3 of the Civil Procedure Rule 2010. In a nutshell, it provides that, the court may at any stage of the proceedings, and 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 the

pleadings. sub-rule 5 provides that, an amendment may be allowed even if it's effect is 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.

13. In the instant case, the Applicant's invited the Court to consider the overriding objective set out under section 1A, 1B and 3A of the Civil Procedure Act cap 21 Laws of Kenya and the relevant provisions under the Civil Procedure Rules, 2010. The following authorities were also cited:

***Central Kenya Ltd – vs – Trust Bank and 5 Others [2000] eKLR***

*It was held that amendment should be allowed freely at any stage of the proceedings provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot be compensated for in costs.*

***Edward G. Kihia –vs- Thomas Carlo, [2010] eKLR***

*Held that, the power to amend pleadings is discretionary and is exercised with the sole aim of determining the real question in issue in controversy before the court*

***Joseph Tiveiti –vs- Jacob Kipsugot Arap Lagate & Another [2013] eKLR***

*It was stated that, amendment must be made with the aim of ensuring justice will prevail and no prejudice will be caused to any party. However, the chances of being given leave to amend diminish with the progress of the matter and also with the effluxion of time.*

***Silverster Martin Kyalo and 2 Others –vs- Bayusuf Ltd (UR)***

*The Court held that to grant leave to amend the defence which proposes to make a complete somersault from the original one would be both unfair and cause prejudice to the respondent*

14. I now turn to the issue for determination namely, the merit of the application. I have gone through the initial defence filed by the 1<sup>st</sup> and 2<sup>nd</sup> Defendants and the subsequent amended defence and set-off and counter claim dated 16<sup>th</sup> October 2006. I have compared the same with the second Defendant's draft written statement of further amended defence, set off and counter claim, annexed to the supporting affidavit in support of this Application. I find that the main amendments which the Applicant intends to introduce are:

- ***under paragraph 2, substitute the firm of lawyers representing the 1<sup>st</sup> Defendant,***
- ***delete paragraph 3, 5, 6, 7 and 13 which pleadings substantially relate to the 1<sup>st</sup> Defendant only,***
- ***delete parts of paragraph 4 and 9, in so far as they relate to the 1<sup>st</sup> Defendant.***
- ***delete paragraph 17 relating to the 1<sup>st</sup> Defendant under the set off and counter-claim.***
- ***paragraph 16 and 18, are amended to make reference to the 2<sup>nd</sup> Defendant only, and***
- ***the prayers sought remain the same, save that, they now relate to by the 2<sup>nd</sup> Defendant alone.***

In a nutshell, the pleadings relating to the 1<sup>st</sup> Defendant will be expunged. I also note from the record that the Plaintiff/Respondents filed a reply to the said amended Defence and a Defence to the set off and counter-claim dated 23<sup>rd</sup> October 2006.

15. I also, appreciate the fears expressed by the Plaintiff/Respondent that the intention of the amendment is to lift an injunction order issued in relation to the 2<sup>nd</sup> Defendant's account and which was rejected by the court in the application filed by the Defendants dated 17<sup>th</sup> July 2006. In that regard I wish to make it clear that, the orders issued herein by the Court on 4<sup>th</sup> day of April 2008 are not under consideration for review, varying and/or setting aside in this ruling. The application before the Court is for leave to amend

pleadings NOT to set aside or otherwise interfere with the Injunctive orders herein. I have no intention and WILL NOT in any way in this ruling purport or attempt to interfere or deal with the same. Those orders remain in force until they are otherwise lawfully varied and/or complied with.

16. I find that most of the issues raised in the Respondents submissions and which I find to be salient, are matters of evidence which can still be canvassed at the hearing of the suit. As I have already observed the only amendment sought is to ex purge the pleadings that relate to the 1<sup>st</sup> Defendant. After going through the proceedings on record, I find that, the Respondent has a consent Judgment against the 1<sup>st</sup> Defendant, although the Applicant has conveniently kept away the 1<sup>st</sup> Defendant, but the Respondent will not suffer any prejudice as the consent settlement order is on record. Similarly, if the Respondent wish to amend the reply to the 2<sup>nd</sup> Defendant's further amended statement of Defence and a defence to the amended set off and counter claim, they will have a right or be at liberty to do so and therefore will not suffer prejudice.

17. The Respondents filed Notice dated 17<sup>th</sup> April 2016 to cross-examine ENOSY L. IGESA and PHANUEL A. ONDIEK who swore affidavits in support of the 2<sup>nd</sup> Defendant's application. However, that notice seems to have fallen by the way, as nothing much turned on it. Thus, the purpose of thereof has not been brought to the court's knowledge. I will leave that issue to rest where it has fallen.

18. In conclusion, I find that the Spirit of Article 48 of the Constitution of Kenya 2010, and the objective of the Overriding principles referred to herein, is to allow parties to a suit to have access to Justice, in a fair, just and expeditious manner. In a nutshell, the court has unfettered powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the court for and just determination of the proceedings.

19. I therefore find firstly, that the application to amend pleadings herein has been brought before the commencement of the hearing of the suit. Secondly, it does not introduce any new cause of action thirdly, it will not occasion prejudice to the Respondents nor change the character of the suit, and fourthly, pleadings are usually allowed freely, by the court (best on the legal authorities cited herein) unless it will prejudice the other party.

20. In the resultant I make the following orders:

- ***Leave is hereby granted to the 2<sup>nd</sup> Defendant as prayed for in prayer 1 of the application.***
- ***Subject to the filing fees being paid, the draft amended Defence and I believe though omitted from the prayer 2, (the set-off and counter claim) be deemed as having been duly filed and served.***
- ***The Plaintiff/Respondent is at liberty to apply to amend its reply to the 2<sup>nd</sup> Defendants amended defence, and a defence to the amended set off and counter claim.***
- ***The costs of the application to the Plaintiff /Respondent.***

Orders accordingly.

THIS 20th DAY OF JUNE 2016.

**G. L. NZIOKA**

**JUDGE**

**Ruling Read in open court in the presence of:**

Miss Mochama for Nduoy for Plaintiff/Respondent

Miss Machama for Defendant/Applicant

Teresia – Court Clerk