



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 148 OF 2011

CLESOI HOLDINGS LIMITED PLAINTIFF

VERSUS

PRIME BANK LIMITED DEFENDANT

R U L I N G

1. The Application before the Court is a Notice of Motion dated 16th February 2016. It is brought under Order 2 Rule 5, Order 7 Rule 8 and Order 8 Rules 3, 5 and 8 of the Civil Procedure Rules, 2010 and Sections 1A and 1B of the Civil Procedure Act and all enabling Provisions of the Law. It is based on the grounds on the face of it and the Affidavit sworn by **ALKA SHAHI**.

2. It seeks for orders that:

- ***This Honourable Court be pleased to grant leave to the Defendant herein to amend its Defence and to plead a Counterclaim against the Plaintiff, Jay Agencies Limited, Camp North Limited, Nipti Rajesh Shah, Rajesh Khimji Shah and Pramod Khimji Shah.***
- ***The time for filing and serving the Draft amended Defence and Counterclaim and the Verifying Affidavit be fixed by the Court.***
- ***The Defendant be granted leave to serve the Defence and Counterclaim upon the parties not already party to the suit.***
- ***Costs of this application be in the cause.***

3. The Applicant's case is that, it's Company granted facilities to two Companies namely **JAY AGENCIES LIMITED** and **CAMP NORTH LIMITED**. The facilities were guaranteed by joint and several guarantees. There was default by the borrowers, and as a result, the Applicant issued a Statutory Notice of sale to the Plaintiff/Respondent. The notice was to the effect that security property charged, namely LR. No. 209/10830/5 would be realised.

4. The demand notices were addressed to the Borrowers and copied to the Guarantors. However, when the Applicant attempted to sell the charged property, the Respondent filed the suit herein. Subsequently the Court issued an injunction on 15th March 2012 restraining the Applicant from exercising its statutory powers of sale.

5. As a consequent, the Applicant has elected to pursue a Counterclaim against the Borrower and the Guarantors. The Applicant told the Court that, it initially did not join the Respondents in the suit, and choose to await the outcome of the realization of the security, so as to avoid delay in the prosecution of

the case. However, in view of the time taken in the trial, it has become necessary to make a claim against the Borrowers and Guarantors.

6. The Applicant submitted, that to a large extent, no new evidential, or substantial material, shall be required to proceed with the trial, considering that the Defendant had produced most of the documents to sustain its Defence. That, the Respondent has called only one witness whose cross-examination has not even been concluded and so it will not suffer any prejudice, as the Respondent is already enjoying the injunctive order.

7. The Applicant submitted that, its effort to realise the charged property has been put on hold by the Court for five (5) years due to no fault of either the Court or the Applicant's bank. That, the amendments are necessary in view of the fact that, they shall bring forth all the real questions in issue, and had the suit been concluded earlier, its right to exercise the Statutory Powers of sale would have become clearer and would have either proceeded to exercise the power of sale or consider other remedies. Thus, it is in the interest of justice to allow the Application, for the true and just dispensation of justice.

8. The Application was opposed through a Replying Affidavit sworn by **NIPTI RAJESH SHAH** on 4th April 2016. It was opposed primarily on the grounds that, it has been brought after an unreasonable and inexcusable delay which is not reasonably explained.

9. That, the Applicant intends to introduce a fresh cause of action which is unrelated to the present suit, as the intended cause of action does not arise out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed by the Applicant herein. He deponed that, if the proposed amendment is allowed, it will mutate the suit into one of the substantially different character, which could more conveniently be made the subject of a fresh action. That, the amendments proposed, will not bring out the real issues or real controversy between the parties but rather seek to introduce fresh controversy against persons not parties to the present suit. Hence, it is intended to repair the Applicant's case after hearing the Respondent's case which will prejudice the Respondent, if the Application is allowed.

10. I have considered the Application in total; I find that the issue for determination in this matter is, whether the Applicant has satisfied the conditions for allowing an amendment to pleadings. These conditions include but are not limited to whether:

- the proposed amendments are necessary for the determination of the real issues in dispute,
- there has been a delay in making the application herein for the proposed amendments,
- the proposed amendments will introduce a new cause of action, or will cause prejudice to the Respondent.

11. The law on amendment of pleadings is well developed and crystallized. In case of **Joseph Ochieng and 2 others vs. First National Bank of Chicago Civil Appeal No. 149/1991**, it was held that, an amendment should be allowed freely, it should be timeously applied for and the power to amend can be exercised by the Court at any stage of the proceedings (including the Appeal stage).

12. Similarly, an amendment should be allowed if sought for, in good faith and if the other side can compensated with costs. Finally, an amendment to change the action or introduce a new case or new ground of defence, can be allowed, unless it would change the action into one of a substantially different character and which could more conveniently be made subject to a fresh action.

13. In the case of **AAT Holdings Ltd vs Diamond Shields Ltd 2014 eKLR** the Court laid down the principles that, the power of the Court to amend pleadings draws from section 100 of Civil Procedure Act. **ADD OTHER POINTS Central Bank of (K) Ltd vs Invest Bank Ltd & 5 Others eKLR Civil Appeal No. 222 of 1998.**

14. Order 8 Rule 3 of the Civil Procedure Rules, 2010, provides that an amendment will be allowed if, it is necessary for determining the real question in controversy, to avoid multiplicity of suits and provided

there has been no undue delay. It will not be allowed, where a new or inconsistent cause of action, does not arise out of the same facts or substantially the same facts as the existing cause of action, or where vested interest or accrued legal right is affected and if it occasions prejudice or injustice to the other side which cannot be properly compensated for in costs.

15. The Respondent argued that the Applicant is guilty of delay in filing this Application and that, it has admitted that all along they have been live to the alleged circumstance giving rise to the amendments, yet, they have not explained the delay. They relied on the cases of:

- **Kingsway Tyres Limited v Corner Garage Transporters Limited (2012) eKLR;** and
- **Kassam v Bank of Baroda (K) Ltd (2007) 1 KLR 294.**

The Respondent invited the Court to consider that Equity aids the vigilant and not the indolent.

16. The Respondent further submitted that, the Application herein is an afterthought as the Applicant has admitted that they were ready to await the determination of the issue of realization of the security, save for the time the trial has taken. The Respondent also submitted that, a new cause of action cannot be pleaded by a way of amendment to the Defence to introduce a counter-claim in a part-heard matter. That, for a party to introduce a new cause of action under Order 8 Rule 3, of the Civil Procedure Rules 2010 they must demonstrate or show that the new action arises from the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed and such a relief claimed is claimed by the Applicant.

17. Hence, the amendment to introduce a new cause of action can only be allowed to “**add**” or “**substitute**” but not to introduce a new cause of action. That, a perusal of the annexed draft Defence herein, reveals that, there is no relationship between the cause of action sought to be introduced and the facts pleaded in the Defence or plaint. That, the counter-claim is premised on paragraph 13, an independent paragraph sought to be introduced, whereas the main suit is based on an alleged contract between the Applicant and the Respondent. Thus, the intended counter-claim is based on an agreement for loan between the Applicant and the principal debtors.

18. The Respondent argued further that, the Applicant has not made a claim for a specific relief, save for the relief in his defence for the dismissal of the suit. The Respondent relied on Order 7 Rule 12 of Civil Procedure Rules 2010, and submitted that even where a counter-claim has been properly pleaded, the Court has the power to order it to be excluded.

19. In further submission the Respondent told the Court that, a chargee cannot seek to exercise statutory power of sale and at the same time sue for the debt. That, under Section 90 (3) of the Land Act 2012 Laws of Kenya, the word used is “**or**” meaning the remedies given to the charge can only be exercised in alternative but **not** contemporaneously.

20. The Respondent submitted that, similarly, under Section 91 of the said Act, the chargee may sue for money secured by the Charge only if, firstly, the chargor is personally bound, to repay the money and yet in the instant case, the chargor is the guarantor, and therefore not personally bound to repay the money. Secondly, the security ought to have been rendered insufficient and yet, in this case the security has not been rendered insufficient. Thirdly, the court can postpone any proceedings until the chargee has exhausted all other remedies relating to the charged land before suing unless, the chargee agrees to discharge the charge, yet in the instant case the chargee has not exhausted all other remedies relating to the charged land.

21. The Respondent further submitted that, the Order 8 Rule 3 (3) of Civil Procedure Rules 2010, only covers an amendment made to correct the name of a party, but not to introduce a new party, while Rule 3 (4) thereof, provides for amendment to determine the capacity in which a party is suing and not introduce new parties to the suit.

22. Finally, the Respondent submitted that, if the Application is allowed, the pleadings will reopen, and

cause additional delay, as a result, the suit will have to commence afresh, right from pre-trial, and the amendment will render meaningless the effort put in by the Plaintiff. It will also defeat the overriding objective as well as the objectives of pre-trial direction and case management generally. They relied on the case of **Eastern Bakery vs Castelino (1958) EA 46**, which held that, an amendment should not be allowed if it causes injustice to the other side. They submitted that no justice will be suffered by the Applicant, if the orders sought for herein are not allowed, as they can conveniently institute the intended counter-claim as an independent suit.

23. In response to the submissions by the Respondent, the Applicant argued that, the chargee has several remedies available to it under Section 69 B of the Transfer of Property act 1882, (now repealed). That, these remedies are, Sale of the charged property, Placing the company or property under receivership and Suit for the debt and against the guarantors.

24. They submitted that, under Order 40 Rule 6 of Civil Procedure Act 2010 (I think they intended to cite the Civil Procedure Rules 2010 and not the Act), a suit in which an injunction has been granted ought to be heard and concluded within twelve (12) months, yet it is now four (4) years since the Ruling herein on the injunction suit was delivered.

25. On the issue of introduction of a new cause of action, the Applicant submitted that the Plaintiff and the proposed Defendants have admitted that, they all signed the letter of offer. That, the Plaintiff gave the common immovable property as security. Therefore the fact that there is interconnection in the matters arising between the Plaintiff and the Defendant and the proposed parties cannot be denied. They further submitted that, under Order 8 (3) (1) (2) (5) of Civil Procedure Rules 2010, the Rules that guide conduct of proceedings expressly support amendment of pleadings at any stage. Furthermore, the Rules expressly support introduction of a new cause of action, provided that the same is connected with the same or substantially the same facts. They submitted that, in the instant case, the loan facilities were granted to **JAY AGENCIES LTD and CAMP NORTH LIMITED** as Borrowers, and guaranteed by **NIPTI RAJESH SHAH, RAJESH KHIMJI SHAH, and PRAMOD KIMJI SHAH** as Guarantors. That, the only new step being undertaken is to try the injunction suit together with the suit between the Bank and the Guarantors and that, coincidentally; the Plaintiff was also a Guarantor of the Borrowers facilities.

26. On the issue of delay, the Applicant submitted that, there is no delay at all and the allegation of delay is not bona fide. That, the suit was filed on 9th May 2011 and, due to the delay in serving the amended plaint and summons, the Defence and other documents were not served until 9th November 2011. Subsequently, the injunction Application and the Ruling thereon was delivered on 15th March 2012. The trial begun on 3rd February 2015. Consequently, there is no delay of five (5) years, as alleged by Respondent.

27. As regards the issue of limitation of Actions, the Applicant submitted that, there is no basis for the same, as the demand letters against the borrower and guarantors were dated 13th January 2011 which is less than the six (6) years period. The Applicant relied on the case of, **Edwin Kamau Muniu vs. National Bank of Kenya Ltd and 2 others**, where the Court allowed a party to be enjoined as a Defendant in the counter-claim, as she was one of the Guarantors to the loan advanced. They also cited the case of **Crown Berger (K) Ltd vs. Pasta Hardware (K) Ltd (2005) eKLR** in which it was stated that:

“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 opposition side would be prejudiced or suffer injustice which cannot properly be compensated for in costs”.

28. The other cases referred to are, **Macharia vs Guardian Bank Ltd and another (2003) KLR**, **Safi**

Petroleum Products Ltd vs Abdirahimani Abdi (2007) eKLR and Suleiman vs Karasha (1889) KLR 2001 203/204.

29. I shall now address the issues raised herein for consideration; I note that, the instant case is part-heard. The Plaintiff witness is still under cross-examination. In view of the fact the law allows amendment at any stage of the proceedings, the amendment sought can be allowed even at this stage of the trial.

30. I have perused the proposed amended defence and counter-claim annexed to the Affidavit sworn in support of this Application. I find that the only amendment that is substantive is the introductions of the 1st to 6th Defendants, as new parties and as Defendants to the counter claim. I have looked the main prayers in the counter-claim and it's a monetary claim against the said defendants jointly and severally. The question that needs to be answered is whether the counter-claim introduces a new cause of action.

31. In that regard I find the questions that arises are, does Order 8 Rule 3 Civil Procedure Rules allow an Applicant to introduce a new cause of action against 3rd parties by way of amendment and can a Defendant enjoin a party to a suit under Order 8 Rule 3 without taking out third party proceedings.

32. In my plain reading of Order 8 Rule 3 Civil Procedure Rules, it only covers an amendment which is intended to, correct the name of a party, and whose effect may lead to substitution of a new party based on a genuine mistake and which sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued, to correct the capacity in which a party sues (whether as a Plaintiff or as Defendant by counter-claim) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued and to add or substitute a new 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.

33. In the instant, case the Applicant wants to enjoin and introduce a counter claim against the Defendants because, the main suit by the Respondent is taking too long, and the Applicant is thus frustrated by the injunction order issued therein.

34. I have looked at the contents of the main suit and it involves realization of the security that guaranteed the loan facility advanced by the Applicant to the Borrowers. Basically this matter is based on a contract of Guarantee. Guarantees are basically, secondary obligations although the general principle is that the guarantor's liability is co-extensive with that of the principal debtor. As Lord Selborne said in *Lakeman vs Mount Stephen* 1874 LR 7 HL at page 24 to 25:

“until there is a principal debtor, there can be no suretyship nor can a man guarantee anyone else's debt, unless there is a debt of some other person to be guaranteed”.

35. In this matter, the Applicant has chosen the remedy of realization of the security vide the sale of the charged property. Under section 90 (3) of the Land Act 2012, the remedies available to the charge cannot be exercised simultaneously. The Chargee who sues for money secured, will have to realize the security first, and if the security is rendered insufficient, then can it resort to the other alternatives remedies which includes, suing of the chargor on the personal covenant under the charge document. Thus the chargee cannot set to realize the security at the same time, file a suit against the principal Borrower and the Guarantors. It will definitely be prejudicial to the Respondents if both causes of action are allowed to run simultaneously, and in the end the Court allows the Chargee to proceed to realize the security and at the same time it makes an order of award of payment of the sum sought under the counter-claim. That will amount to double Jeopardy against the Borrower and the Guarantors. Equally, it will be unjust enrichment Creditor and an injustice to the Respondents. In that regard, I find that, the claim in the counter-claim is pre-mature.

36. However, to protect the interest of the Applicant and ensure that the main suit must be finalized urgently. The must impose necessary conditions for the same.

37. I find the other issue on Limitation of Actions well explained by the Applicant and it does not lie. I think I gave said enough, other issues which may arise or are pending, will be determined in the main suit.

38. In that regard, I make the following order:

- *The Notice of Motion Application dated 16th February 2016 is disallowed.*
- *The suit should be set down for hearing and finalized within 6 months from today's date.*
- *The costs of this application to wait the outcome of the case.*

39. Those then are the orders of the Court and orders accordingly.

Dated and delivered on this 25th day of July 2016.

G. L. NZIOKA

Read in an open Court before:

Mwangi -----for the Applicant

J. Mwangi----- for the Respondents

Tereasia-----Court clerk

G. L. NZIOKA