



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
HCCC NO. 86 OF 2003

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

ALI MOHAMMED ABDI.....1ST DEFENDANT

MIRIAM ABDI.....2ND DEFENDANT

AS CONSOLIDATED WITH NAIROBI (MILIMANI) HIGH COURT CIVIL SUIT NO.1466 OF 2001

NATIONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

ABDI MOHAMED ABDI.....3RD DEFENDANT

RULING

1. It is now almost legal mantra that leave to amend Pleadings should be freely granted at any stage of proceedings, provided that the amendment will not result in prejudice or injustice to the other party which cannot properly be compensated in costs.
2. That is the principle that guides this Court in considering whether or not to allow the Applications by the 1st and 2nd Defendants to amend their Statements of Defence and to file Counterclaims. The requests are made in the 1st and 2nd Defendants Notices of Motion dated 10th December 2015 and 8th October 2015 respectively. The matters sought to be introduced into the Statements of Defence and to be taken up in Counterclaim are not dissimilar and can be discussed together.
3. So as to understand the impact of the amendments sought, it is necessary to set out the Plaintiffs' claim. The same is contained in the Further Amended Plaintiff of 12th October, 2007.
4. Grains and Goodies Bakery Limited (**the Principal Debtor**) was at all material times to the suit, a customer of the Plaintiff and maintained an account at the Plaintiffs Harambee Avenue Branch. By two

Letters of Offer dated 6th February 1997 and 3rd March 1997, the Plaintiff agreed, at the request of the Principal Debtor, to advance the Principal Debtor a sum of Kshs. 9,716,465.05 in form of loan and overdraft facilities.

5. Amongst securities taken to secure the said facilities were guarantees by Directors of the Principal Debtor supported by a further charge over LR.No.209/3707, Mchumbi Road, South 'B' Shopping Centre, Nairobi (**the charged property**). That property was already charged by the Plaintiff to secure facilities granted to the 2nd Defendant in another transaction.

6. It is alleged that there was default and in exercise of its Statutory Powers of Sale under the further charge, the Plaintiff, by public auction, sold the charged property on 27th October 1999 for a sum of Kshs.6,500,000/=. Those sums were duly credited to the 2nd Defendant's Personal loan account by the Plaintiff. That the amount did not fully satisfy the outstanding loan and interest in the 2nd Defendant's account and no surplus was available from the sale proceeds to credit the principal debtors account.

7. Subsequent to the sale of the charged property the Plaintiff sold an old Bread Baking Oven for Kshs.180,000/- and the sale proceeds credited to the Principal debtors account leading to an outstanding amount of Kshs. 21,840,431.90 as at 31st March 2005. That Oven is said to have been the only asset left after the Principal Debtor dismantled its equipment and moved them away to an unknown destination. The Plaintiff's prayer is for Judgement against the Defendants jointly and/or severally for:-

(a) Kshs. 9,716,465.05 with interest thereon.

(b) Interest on (a) above at Court rates from the dated of filing suit until payment in full.

(c) Costs of the suit.

8. In a statement of Defence dated 18th March, 2003 the 1st Defendant avers that the Principal Debtor furnished securities that were more than sufficient to cover the loan amount together with interest. The 1st Defendant further avers that the Plaintiff made no effort to realize the true value of the Charged Property and has failed to account and/or disclose the sum realized after the sale of the charged property and machinery.

9. On the part of the 2nd Defendant, she, too, takes a similar position as the 1st Defendant but in addition contends that the Plaintiff did not act in good faith and in the interest of the 2nd Defendant by levying illegal penalties, unlawful or unspecified Rates and interests. She then sets out the following particulars of illegality:

(a) Failure to furnish the second defendant with a statement of accounts so as to accord and offer her an opportunity to gross-check whether any monies are payable to the Plaintiff or not and to verify whether of not the sums demanded were due and owing.

(b) Levying interest in contravention of the Banking Act.

(c) Selling property at a gross undervalue.

(d) Charging both excessive and illegal rates and interest.

(e) Failure to give statutory notice.

(f) Failure to advertise the sale.

10. The Amendments sought to be made by the Defendants are alike. Abridged, the Defendants state that the loan applied for and obtained by the Principal Debtor was under the Global Private Enterprise Loan-

11 initiative operated by the Plaintiff as an agent of Central Bank of Kenya. The loan was to attract concessionary Rate of Interest contrary to what was imposed by the Plaintiff. Further that the Borrowing of the Principal debtor fell in the category that was eligible for Debt service discharge in the circumstances of insolvency of the final beneficiary. That these were not disclosed to the 1st and 2nd Defendants.

11. That due to delay in the commencement of the Bakery Projects the Principal Debtor suffered a loss of about 11,634,375/= within a period of 18 months and was financially exhausted when it began production. That the Principal Debtor requested for further funding but this was declined by the Plaintiff. This contributed to the insolvency of the Principal Debtor. That the Plaintiff was under duty to bring the issue of the insolvency to the attention of Central Bank of Kenya so that it would request the European Investment Bank for discharge of the Principal Debtor but it failed to do so.

12. The Plaintiff's Bank is also accused of selling the charged property at an under value.

13. The above is reiterated in support of the proposed counterclaim which seeks the following prayers:-

a. A declaration that the circumstances set out in paragraphs 5,6,7,8,9,10,,11,12,13,14,15,16 and 17 of the Amended Defence herein above excused the Principal Debtor and by extension the Defendants herein from the obligations imposed on them by the agreements and the charge referred to in paragraphs 5,6,7 and 8 of the Plaintiff.

b. The moneray equivalent of LR No.209/3707 MCHUMBI ROAD SOUTH B SHOPPING CENTRE, NAIROBI in the sum of Kshs.450,000,000/=.

c. Costs to the suit and interests thereon at Court rates.

d. Such other and/or further relief that this Honourable Court may deem fit and just to grant.

14. In an Affidavit sworn on 10th December, 2015 in support of the Application for Leave the 1st Defendant explains the timing of the Application. That he has since the filing of the Defence come across very vital information and documents which change the course of his Defence. As for the 2nd Defendant she says no prejudice that the Plaintiff can suffer if Leave is granted.

15. The Plaintiff opposes the application and in an Affidavit sworn by Samuel Wanjohi Mundia on 18th February 2016 depones as follows:-

- The Application is made too late in the day when issues have been framed, pretrials concluded and the main suit set down for hearing.

- The proposed amendments are only intended to scuttle, if not to greatly delay the expeditious hearing of the main suit and to make the conduct of the hearing as difficult as possible.

- Right from the outset the Principal Debtor and the guarantors were fully aware of the role of The European Investment Bank.

- The claim for wrongful sale, validity of the Plaintiff's right and power of sale including lack of Statutory Notice, and the damages sought are time barred by Section 4(1) of the Limitation of Actions Act.

- The Plaintiff is greatly disadvantaged as it does not have equal opportunity to respond to the proposed amendments.

16. In that Affidavit, the Plaintiffs also point out that the proposed Amendments and Counterclaim lack merit. For instance, that the Defendants are not privy to the separate agreement entered between the

Plaintiff and Central Bank of Kenya, and Central Bank of Kenya and European Investment Bank. In the circumstances the claim for breach of contracts is completely misconceived. That the Central Bank had advised the Plaintiff that the Principal Debtor was not entitled to an equity debt relief because it had not met the stipulated preconditions, its debt was secured by a legal charge and legal insolvency of the Principal Debtor had not occurred.

17. The Power of court to grant Leave to a party to amend Pleading is found in Order 8 Rule 3 (1) which reads:-

“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”.

18. While Leave may be granted at any stage of the Proceedings, the same should be sought at the earliest opportunity. Inordinate and/or unexplained delay may deprive an Applicant of an Order for Leave. Now, it is not in doubt that the two Applications come extremely late in the day. They are made some 12 years or so after the statements sought to be amended were filed. The Respondent takes the view that this delay is inordinate and by itself a sign of bad faith.

19. The 2nd Defendant does not proffer any reason for delay at all. As for the 1st Defendant he says as follows in paragraph 2 of his Affidavit:-

“THAT I have since the filing of my defence herein, come across very vital information and documents, which change the course of my defence”.

Yet the 1st Defendant does not tell Court when it learnt of the information or the nature of the information.

20. But if, as is evident from the proposed amendments, some of the information is in relation to the role of the European Investment Bank then this Court accepts the Plaintiff contention the Defendants were aware of this by at least October 2007 when the Plaintiff filed its further Amended Plaintiff. In paragraph 4A the Plaintiff avers:-

‘By a letter of application dated 20th July 1996, the Principal Debtor applied to the Plaintiff for loan and overdraft facilities part of which was under a Credit Scheme operated by the Plaintiff known as European Investment Bank (E.I.B) Loan Scheme, all in the aggregate total sum of Kshs.9,716,465/= in connection with its business’.

21. It is also clear from the witness statements filed by the 1st and 2nd Defendants that they had known about the role of European Investment Bank. In a witness Statement filed by the 1st Defendant on 7th May 2012, he states as follows, partly;-

“I do recall sometime in the year 1994, when my company through its directors, approached National Bank of Kenya (the Plaintiff herein) and requested for a loan facility. The purpose of the loan was to enable us finance Bakery project for our company. The terms and conditions that were governing this loan facility was by the European Investment Bank, it being a scheme that was being operated by the Plaintiff. We took a loan of Ksh.9.5 million”.

The 2nd Defendant also makes reference to that arrangement in her statement of 16th April, 2013;-

“I was dismayed when the Plaintiff purportedly auctioned my house one year into the business, despite numerous letters suggesting that:-

a) We sell my house by private treat as we had already secured someone willing to pay more than what was realized at the auction.

b) The EQUITY CLAUSE in the Agreement with the European Investment Bank be adopted.

c) The Plaintiff adopt EQUITY CLAUSE as suggested by the European Investment Bank.

22. Incontrovertibly, there is lack of candor in the explanation given by the 1st Defendant for the delay in seeking leave. Yet mere delay may not disentitle the Defendants. As the Court of Appeal held in **Central Bank of Kenya Ltd Vs. Trust Bank Ltd & 5 others** [2000]eKLR:-

“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.”

In considering whether or not to nevertheless entertain this very late application the Court bears in mind that though undoubtedly late, the application has been brought before hearing of this matter has commenced. What must now concern the Court is whether the delay will prejudice the Plaintiff.

23. Mr. Samuel Wanjohi Mundia explains that one of the reasons why the Plaintiff resists the amendments is because:-

“The proposal Amendment and the Counterclaims drastically alter the nature and scope of the original claim premised on guarantors without affording the Plaintiff an equal opportunity to respond to its great disadvantage and therefore legally incapable of being set up inside an amendment”.

What was not explained was how the Plaintiff is deprived of an opportunity to respond. The Court has not been told that because of passage of time witnesses who need to respond to the new allegations are no longer available, or their memories have faded or documents are no longer available. There was no evidence placed before court that the march in time has hampered the Plaintiff’s ability to confront the issues sought to be introduced by the amendments.

24. What about the argument by the Plaintiff that the Application should be viewed as part of the scheme by the Defendant to delay the hearing? That argument invited the Court to study the Court record to see whether it indeed reveals such a scheme.

25. The record shows that the hearings of 17th July 2004 and 5th December 2006 did not take place because the matter was taken out from the list of those days by consent of the parties. On 7th March, 2006 and 7th May 2009 hearing did not proceed as the 1st Defendant was unwell. The Plaintiff did not begrudge this. On 11th May 2015 Mr. Esonga for the 2nd Defendant sought an adjournment because he wanted to cease acting. Mr. Onyango for the Plaintiff did not oppose the application.

26. On 6th October, 2010 the hearing could not proceed as the 2nd Defendant was giving evidence in P&A 241/1999. On 6th March 2012 Mr. Onyango for the Plaintiff indulged the 1st Defendant who was said to be out of the Country. On 24th September 2012, the matter could not proceed because of non-compliance with pre-trials. On 22nd May 2014, the 2nd Defendant was caught up in some fracas during a demonstration and was admitted at Menelik Hospital. The Plaintiff’s Counsel accepted that explanation and that matter could not proceed.

27. Again on 24th September 2014 the matter could not proceed as the matter was not ready for hearing. Finally on 13th July 2015 the suit was certified as ready for hearing. Thereafter the matter was not fixed for hearing, ostensibly, because of the Applications before Court.

28. Given this record, the delay cannot be attributed to the Defendant alone and no deliberate scheme to delay can be read into it. On the occasions when the Defendants have not been ready to proceed, either because of illness or non-availability, their explanations have been readily accepted by the Plaintiff. For this reason I am not persuaded by the Plaintiff's argument that the bringing of the Application before Court is simply in furtherance of Defendants' wish to delay the hearing and determination of this old Dispute.

29. The Plaintiff also contends that the claim for wrongful sale, validity of the Plaintiffs right and power of sale and consequential damages sought to be introduced by the counterclaim are statute barred by Section 4(1) of The Limitation of Actions Act. There is a plethora of Judicial texts and authorities that generally speaking an amendment whose effect is to defeat a defence of Limitation should not be allowed. On the other hand the Defendants argue that in certain exceptional and peculiar circumstances amendments may be allowed notwithstanding that the effect will be to defend a defence of Limitation. Counsel for the 2nd Defendant cited the holding in **Diamond Trust Bank Kenya Ltd Vs. John Waliaba Joseph** [2013] eKLR where Mabeya J. quoted the following passage from the Court of Appeal Decision in **JAMES OCHINEG ODUOR t/a OCHIENG ODUOL & CO. ADVOCATES Vs. RICHARD KUBOBA** [2008] eKLR:

“In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (Barclays Bank D.C.O Vs Sham sudin (1973) EA 451). However such amendments can only be allowed where peculiar circumstances are present.

A careful reading of order VIA Rule 3 of the Civil Procedure Rules clearly shows that amendment to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances.”

30. Mr. Mundia states that the sale of the charged property was concluded on 27th October 1999. This is not controverted by the Defendants and the Court will accept it to be so. However, the challenge to the Plaintiffs' right and power of sale (including failure to give a Statutory Notice and the validity or otherwise of the sale) were issues already raised in the 2nd Defendants Statement of Defence which was filed on 25th June, 2003 well within the six (6) year Limitation period. This is paragraph 7 of the Defence:-

7. The second defendant shall further contend that Plaintiff did not act in good faith and in the interest of the second defendant by levying illegal penalties, unlawful or unspecified Rates and Interests and when realizing securities.

Particulars of illegality

(a) Failure to furnish the second defendant with a statement of accounts so as to accord and offer her an opportunity to gross-check whether any monies are payable to the Plaintiff or not and to verify whether of not the sums demanded were due and owing.

(b) Levying interest in contravention of the Banking Act.

(c) Selling property at a gross undervalue.

(d) Charging both excessive and illegal rates and interest.

(e) Failure to give statutory notice.

(f) Failure to advertise the sale.

As a matter of fact the issue as to whether the sale was valid in law was identified by the parties as one of the issues for the Court's determination in the Statement of issues filed herein on 10th February 2009.

31. I take a view that the issues sought to be introduced by the amendment to the Defences and bringing of the Counterclaim relate back to issues that were flagged out and alive at the time the original pleadings were filed. In as far as the issues may not have been time barred then, this Court leans on the side of granting Leave. I consider that the amendments are necessary for the effective, complete and just determination of the controversy between the parties.

32. However, because of the delay in filing the two Applications costs shall be to the Plaintiff.

33. Leave is granted to the 1st and 2nd Defendant to file Amended Statement of Defence and Counterclaim as set out in the Drafts annexed to their Application of 10th December, 2015 and 13th October 2015 respectively.

Dated, Signed and Delivered in Court at Nairobi this 27th day of October ,2016.

F. TUIYOTT

Odhiambo for Plaintiff

Kamau for Esonga for 1st Defendant

N/a for 2nd Defendant

Alex - Court clerk