



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL & ADMIRALTY DIVISION**

**CIVIL SUIT NO. 993 OF 2002**

**TRIPLE EIGHT INVESTMENTS (KENYA) LTD.....PLAINTIFF**

**-VERSUS-**

**CITY FINANCE BANK LIMITED.....1<sup>ST</sup> DEFENDANT**

**NYANJA HOLDINGS LIMITED.....2<sup>ND</sup> DEFENDANT**

**NDUNG’U, NJOROGE & KWACH ADVOCATES..... 3<sup>RD</sup> PARTY**

**CONSOLIDATED WITH MILIMANI HCCC NO. 1506 OF 2000**

**BETWEEN**

**NYANJA HOLDINGS LIMITED.....PLAINTIFF**

**VERSUS**

**CITY FINANCE BANK LIMITED..... 1<sup>ST</sup> DEFENDANT**

**TRIPLE EIGHT INVESTMENTS (KENYA) LTD.....2<sup>ND</sup> DEFENDANT**

**R U L I N G**

**INTRODUCTION**

1. The application before the court is a Chamber Summons dated 26th July 2010 filed by the Defendant. The application seeks two main orders namely:-

***1. That the honourable court be pleased to grant leave to the 1<sup>st</sup> defendant/applicant to substitute its names in this suit and in Milimani Hccc 1506 of 2000 with its new names, Jamii Bora Bank Limited***

***2. That the 1<sup>st</sup> Defendant be granted leave to make consequential amendments of its defence herein and further be granted leave to make other amendments in the defence herein as per the draft amended 1<sup>st</sup> Defendant’s defence annexed hereto.***

2. The application is premised on the grounds set out therein being that the 1st Defendant has changed its name to **Jamii Bora Bank Limited** and it is in the interest of justice and good order that the 1st Defendant's name be changed appropriately. The 1st Defendant also wishes to make some amendments to its defence to include new paragraphs 7A and 7B in the proposed draft amended defence annexed to the application.
3. Only the Plaintiff opposes the application vide Grounds of Opposition filed in court on 27th July 2010 stating that the application is incompetent, bad in law, misconceived and an abuse of the court's process. The Plaintiff further states that the application is meant to obtain an adjournment of a matter which is part heard and long standing, and is meant to delay the expeditious conclusion of this matter, and that the orders sought, if granted, would be highly prejudicial to the Plaintiff/Respondent whose case is at an advanced stage of hearing. The application, it is submitted, upsets and is contrary to the overriding objectives of the Civil Procedure Act, is contrary to the Law of Contract Act Cap 23 and the Evidence Act, Cap 80 Laws of Kenya, and that the 1st Defendant/Applicant has not provided any material upon which the court can exercise its discretion, and that there is unreasonable delay in bringing the application.
4. Parties filed written submissions which were highlighted in court.
5. The Plaintiff does not oppose prayer number 2 of the application which seeks leave to have the 1st Defendant change its name from **City Finance Bank Limited** to **Jamii Bora Bank Limited**. I therefore allow that prayer without any further delay.
6. The Plaintiff challenges the introduction of the said paragraphs 7A and 7B in the proposed amended defence. The Plaintiff contends that there has been inordinate delay in bringing this application. The defence was filed on 17th September 2002 and this application is made more than eight (8) years down the line. The Plaintiff further submitted that the proposed amendment introduces new cause of action, and that in any event the Plaintiff's main witnesses have since testified. If amendment is allowed, there will be prejudice to be suffered by the Plaintiff.
7. On their part the 1st Defendant in the draft amended defence marked "**RV 5**" proposes to introduce paragraphs 7A and 7B. In those proposed paragraphs, the 1<sup>st</sup> Defendant pleads the defence of mistake in the agreement in clauses 2 (c) and 9 of the agreement for sale. Clause 2 (c) of the agreement states that:

***"All rents for the property shall be apportioned as at the date the total balance of the purchase price is paid. This shall be the date the purchaser shall take possession for purposes of the apportionment."***

Clause 9 of the agreement for sale states as follows:-

***". . . for avoidance of any doubt this shall be at the date the purchaser shall take possession of the property"***.

8. The 1st Defendant/Applicant submitted that the Plaintiff's case as pleaded in paragraph 9 of the plaint is based on the 1<sup>st</sup> Defendant's alleged failure to yield vacant possession of the property. The Plaintiff pleads in paragraph 9 of the plaint thus:-

***"The 1<sup>st</sup> Defendant has to date not given possession of the property aforesaid that is to say L. R. No. 37/256/3 to the Plaintiff in breach of the agreement and despite the transfer thereof having been registered in the Plaintiff's favour and the total purchase price paid . . ."***

To the application has been annexed some of the correspondence exchanged between the then Plaintiff's and 1<sup>st</sup> Defendant's Advocates. See "**RV 2**". In the correspondence, there is an indication by the 1<sup>st</sup> Defendant's Advocate that the 1<sup>st</sup> Defendant was not in possession of the suit property and was not in a position to provide information about the tenants. Under Order 6 Rule 8 of the Civil Procedure Rules, a party is required specifically to plead certain matters. The Applicant submitted that in the context of this case, it is very important for the 1<sup>st</sup> Defendant to

plead mistake as a defence. A court of law only decides the matters that are in issue. The corollary of this is that matters cannot be in issue unless they are properly pleaded. By pleading the defence of mistake the 1<sup>st</sup> Defendant shall be raising an important issue against the Plaintiff's claim for loss of rent.

9. I have considered the application in terms of prayer number 3 and the opposition to it. The only issue for determination is whether this court can exercise its discretion to allow the same.
10. The Plaintiff objects to the application mainly on the grounds of delay; on the ground that a new cause of action could be introduced; and on the ground that the Plaintiff shall suffer prejudice since its main witnesses have testified. All these misgivings can safely be answered by the provisions of the law and case law. It is clear that a court can allow amendments to proceedings at any stage of the matter and whether or not the amendment is likely to introduce a new cause of action. In the case of **CENTRAL KENYA LTD VS TRUST BANK LTD & 4 OTHERS, CIVIL APPEAL NO. 222 OF 1998 NAIROBI (unreported)**, the Appellant was denied leave to amend plaint on grounds, *inter alia*, that the proposed amendments would introduce a completely new cause of action and that they were calculated to unreasonably delay the expeditious finalization of the of the suit. On appeal the court of appeal at page 9 of the unanimous decision stated thus:

***“As we stated earlier the learned trial judge took issue with the length of the proposed amendments. In his view they were too long. Mere length of proposed amendments is not a ground for declining leave to amend. 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”***

11. Similarly, in **Central Bank of Kenya vs Kamal Z. Shah & Another (2004) eKLR**, Justice Azangalala was also faced with a similar application for leave to amend Notice of Motion. The Respondent opposed the application on grounds that the applicant was guilty of inordinate delay in bringing the application. The learned Judge allowed the amendment application and stated thus:

***“It is our law that amendments may be allowed at any stage before judgment provided that the damages which may arise as a result of the amendment can be cured by way of costs. The main prejudice the Respondents will suffer is some delay in the conclusion of this matter. This per se is not sufficient to refuse leave to amend. It has also not been demonstrated to me that the delay in bringing this application has caused the Respondents damage or injury which cannot be cured by an award of costs”***

12. In the case of **MECHANIZED SYSTEMS LTD VS GUARDIAN BANK LTD (2005) eKLR**, which was a decision of this very court, I had the occasion to state thus:-

***“From these authorities, it seems to be the law that an application for amendment of pleadings is always in the discretion of the court. Provided the application is made in good faith, and without undue delay, amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs. Even where there is delay, an amendment will be granted provided the other side can be compensated by costs. ”***

13. As for the submission that the Plaintiff that its main witnesses have already given evidence, this can be cured by recalling the said witnesses, if need be. Of paramount interest to me, however, are the paragraphs 7A and 7B of the draft amended defence. Those paragraphs appear to me to be

critical to the 1st Defendant's defence, and it is in the interest of justice that the issues raised be heard so that the court may have the privilege of hearing and determining all relevant issues surrounding this suit.

14. In light of the foregoing, I make the following orders:-

- a. *The application in issue herein is herewith allowed as prayed.*
- b. *The 1st Defendant shall file and serve the amended defence within 7 (seven) days of this Ruling.*
- c. *The Plaintiff shall reply to the amended defence within 7 (seven) days of service of the amended defence.*
- d. *The Plaintiff shall be at liberty to recall any of its earlier witnesses, or file new additional Witness Statements if need be.*
- e. *Costs of this application shall be for the Plaintiff.*

Orders accordingly.

**DATED, READ AND DELIVERED AT NAIROBI THIS 26TH DAY OF MARCH 2015**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Mr. Ochieng Oduol for the Plaintiff

Mr. Akech for the 1st Defendant

Mr. Ondati holding brief for Gichumbi for the 2nd and 3rd Defendant

Teresia – Court Clerk