



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 73 OF 2014

B & K DESIGN LIMITED.....PLAINTIFF

VERSUS

EMMACULATE MWAURA NJERI.....DEFENDANT

RULING

Amendments of pleading

[1] This is an application for amendment of plaint. The application is dated 24th February 2015 and is expressed to be brought under Order 8 Rule 3 of the Civil Procedure Rules, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law. The specific orders sought are inter alia;

- 1. That the Plaintiff to be allowed to amend its Plaint in the manner shown in the annexed draft Amended Plaint.**
- 2. That cost of the application to be provided for.**

[2] The application is predicated upon the grounds:-

- a) That the Plaintiff had come across new material that was not within its knowledge at the time of filing the Plaint, and
- b) That it would be in the interests of justice for the amendments to be allowed as they are necessary to enable the court make a determination on all the issues.

[3] The application is supported by the affidavit of Jamlick Butali sworn on 24th February 2015. He deposed that the Plaintiff had come across the fact that a new account at Chase Bank Kenya Ltd, being account number 0012068285002, had been opened in the Plaintiff's name, ostensibly for the purposes of defrauding the Plaintiff. It was further averred that the opening of the account was done fraudulently and in a manner to suggest that the proposed 2nd Defendant was either negligent or complicit in the said opening of the accounts.

[4] The above grounds were elaborated upon in the Plaintiff's submissions dated 7th April 2015. They submitted that the Plaintiff became aware of a second account opened in the name of the Plaintiff on 30th September 2014 after receiving statements on the said account. The Plaintiff urged that, that upon perusal

of the statements, it discovered that withdrawals and transfers from this account were made by the Defendant. According to the Plaintiff amendment to the plaint may be made at any time before judgment. The proposed amendments are necessary in the determination of the issues in controversy. They will also not alter the character of the suit. They referred the court to the cases of (1) **Molo & Another v Kenya Railways & Another [2002] 2 KLR 551**, and (2) **Kassam v Bank of Baroda (Kenya) Ltd [2002] 1 KLR 294**. They stated that the Defendant had not raised any ground of opposition that suggest any prejudice that she would suffer and which would not be compensated by an award of costs.

Amendment was opposed

[5] In opposing the application, the Defendant filed her Replying affidavit sworn on 13th March 2015. She averred that the account at Chase Bank Kenya Ltd was opened on or about August 2013 when she and her estranged husband were both directors of the Plaintiff. She denied that there was fraud perpetuated in the opening of the said account as alleged by the Plaintiff. In any event, she claimed that there has been no evidence adduced to show that she had singly and without authority opened the said account. According to her, adding the bank to the suit would serve no meaningful purpose and would add no value to the case.

[6] The Defendant further claimed in her submissions dated 18th May 2015 that the amendment to include Chase Bank Kenya Ltd was meant to put her in bad reputation by alleging fraud. She was certain that the course taken herein would ruin her reputation with the Bank to an extent that would not be adequately compensated by costs. She cited, the case of **Ann Muthoni Karanu v LANyavu Gardens Ltd [2015] eKLR** in which Onguto, J citing with approval the cases of **Central Kenya Ltd v Trust Bank Ltd (2002) EA 365** and **Cobbold v Greenwich LBC 9th August 1999 (Unreported)**, reiterated that amendments ought to be allowed as long as no prejudice was occasioned to the other party, and which may, in any event, be adequately compensated for in an award for costs. Further, it was submitted that applications for amendment have to be timeously. See the case of **Joseph Ochieng & 2 Others T/A Aquiline Agencies v First National Bank of Chicago Civil Appeal No 149 of 1991**.

DETERMINATION

[6] The law on amendment of pleadings is replete with sufficient precedents. I need not multiply them except to state what Gicheru JA in the **Central Kenya Limited vs. Trust Bank Limited & 5 Others, (supra)** stated that:-

“...a party is allowed to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side”.

[7] See also **Cobbold v Greenwich (supra)** that;

“Amendments in general ought to be allowed so that the real dispute between the parties can be adjudicated upon provided that any prejudice to the other party caused by the amendment can be compensated for in costs, and the public interest in the administration of justice is not significantly harmed.”

[8] I add nothing except, since the amendment seeks to join a party, such proposed party must be necessary or whose presence in court may be necessary in order to enable the court to effectually and completely adjudicate upon and settle all questions or issue in controversy. I will apply the said tests here. The Court has been urged to allow amendment to the Plaint and further to join Chase Bank Kenya Ltd as a party in the suit. The plaintiff claims that the purpose of the amendment and joinder is such that it would enable the dispute arising between the parties to be conclusively determined. On my part, there is no doubt that the application to amend has been made timeously. I note that the concerns of the Defendant are about her reputation which she says will be ruined to an extent that cannot be compensated for in an

award for costs. The anticipated risk of injury to her reputation is premised on the fact that the amendments are introducing allegations of fraud against Chase Bank Kenya Ltd. She does not, however, establish or show how her reputation was at risk of injury by the amendments. I need not state that a claim based on fraud is justiciable against any party as long as it is not being made maliciously. Therefore, introduction of a claim based on fraud *per se* is not a source of prejudice that cannot be compensated in costs. See the cases of (1) **Waljee's (Uganda) Ltd v Ranji Punjabhai Bugerere Tea Estates Ltd (1971) EA 188** and (2) **Eastern Bakery v Castelino (1958) EA 461**.

[9] Applications for amendment should be freely allowed, and it is only in exceptional cases where prejudice may be occasioned to the other party that the Court would reserve its unfettered and discretionary power. The purpose of amendment is for the real issues in controversy to be determined in a fair, equitable and expeditious manner. Allowing amendments would not take away any rights from the Defendant, who in any event, would be given the opportunity to defend the cause. The proposed amendments and joinder of Chase Bank Kenya Ltd as a party in the suit will not produce prejudice on the Defendant that would not be compensated for by an award in costs. The intended Amended Plaintiff will not obfuscate, but give clarity to the issues at hand. Accordingly, allow the application for amendment. In the circumstances, the application to amend the Plaintiff dated 24th February 2014 and also join Chase Bank Kenya Ltd in the suit is hereby allowed. Costs of such applications normally are awarded to the Defendant because it is presumed that the Plaintiff is the author of the inconveniences which he is now rectifying by way of amendment. Although the Plaintiff claims that it became aware of the new account much later, there are really no exceptional circumstances to depart from this norm. Accordingly, costs of the application are awarded to the Defendant. It is so ordered.

Dated, signed and delivered in court at Nairobi this 27th day of July 2015.

F. GIKONYO

JUDGE