



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

**CIVIL CASE NO. 620 OF 2014**

**INTRA AFRICA ASSURANCE COMPANY LIMITED.....PLAINTIFF**

**VERSUS**

**KENNETH KIRIKA WATENE.....DEFENDANT**

**RULING**

1. The Defendant/Applicant moved the Court vide his application dated **3<sup>rd</sup> March, 2014** seeking leave to amend his Defence to include a counterclaim. The application is based on the ground that the Defendant/Applicant has, since the close of pleadings, been able to ascertain the nature and amounts of the counterclaim, and that it is in the interests of justice that he be allowed to amend the Defence and include his counterclaim to enable the Court effectually determine all the questions in controversy between the parties at once.

2. The application is supported by the affidavit annexed thereto, sworn by the Defendant/Applicant, **Kenneth Kirika Watene** on **3<sup>rd</sup> March, 2015**. In that affidavit, the Defendant/Applicant deponed that upon being served with Summons To Enter Appearance he commenced consultations with various professionals to determine the effects of the obligations created by the mortgage. That as a result thereof he has since realised that he has overpaid the Plaintiff and hence the need to file a counterclaim in terms of the draft Amended Defence and Counterclaim annexed to his affidavit.

3. In support of the application, Counsel for the Applicant, in the Written Submissions filed herein on **26<sup>th</sup> May, 2015**, urged the Court to allow the application on the basis of the principles laid down in the following authorities:

- a. **Central Kenya Limited Versus Trust Bank Limited & Others Court of Appeal No. 222 of 1998 (CA) as followed in AAT Holdings Limited Versus Diamond Shield International Limited (2014) eKLR;**
- b. **Eastern & Bakery Versus Castelino of (1958) EA 461 as followed in Dolphin Transporters Limited Vs Bank of India Limited. [2012] eKLR**
- c. **Simonian Versus Johar (1962) EA 336 as followed in Dalbit Petroleum Limited Versus Victory Construction Company Limited HCCC 122 of 2008**

He therefore argued that the proposed amendment is neither immaterial nor merely technical as it seeks to bring to light a detailed account of the events that took place with regard to the mortgage. It was his further submission that the application has been brought promptly and in good faith; and that no prejudice will be suffered by the Plaintiff/Respondent thereby as it will have an opportunity to respond to the

counterclaim if the amendment is allowed.

4. The Plaintiff/Respondent opposed the application contending that the same is misconceived, unmeritorious, in bad faith, frivolous and vexatious; and that the application is an afterthought, intended only to delay the finalization of this suit. The Plaintiff/Applicant relied on the Grounds of Opposition filed herein on 4<sup>th</sup> June, 2014 and the Written Submissions filed on 10<sup>th</sup> June, 2015.

5. On the authority of Eastern Bakery Versus Castellino (1958) EA 461 and Mulla's Code of Civil Procedure, the Plaintiff/Respondent argued that whereas the Court has wide discretion to allow amendments there are exceptions to this general rule, such as:

- a. **where the amendment is not necessary for the purpose of determining the real question in controversy between the parties, as, where it is merely technical or of no substance.**
- b. **when the Plaintiff's suit would be wholly displaced by the proposed amendment.**
- c. **where the effect of the amendment would be to take away from the Defendant a legal right which has accrued to him by lapse of time.**
- d. **where the amendment would introduce a different, new and inconsistent case and the application is made at a late stage of the proceedings.**
- e. **where the application for amendment is not made in good faith.**

6. It was the Plaintiff/Respondent's contention that the facts sought to be introduced through the amendment being facts that were well within the knowledge of the Defendant/Applicant when he was drafting his Defence, ought to have been included at the initial stage; that the Defendant/Applicant intends to introduce a new cause of action through the fresh amendments, which action is time barred given that the last of the alleged payments was made in October, 1994. It was the Plaintiff/Respondent's case therefore that effect of the proposed amendment would be to take away the Plaintiff/Respondent's legal right to plead statutory time bar which has accrued by lapse of time.

7. Lastly, it was urged on behalf of the Plaintiff/Respondent that the proposed amendment would result in a complete change of the Defendant/Applicant's position which would not only be unfair but would also cause prejudice to the Plaintiff/Respondent Company, which stands to have its case wholly displaced thereby. For this proposition, reliance was had on the case of Kyalo Versus Basyusuf Brothers Limited CA 38 of 1981. The Court was therefore urged to find that the Application dated 3<sup>rd</sup> March, 2014 is without merit and to dismiss the same with costs.

8. The Court has considered the grounds set out in the instant Notice of Motion, the averments in the Supporting Affidavit, the Grounds of Opposition filed by the Plaintiff/Respondent as well as the Written Submissions filed by either side and the useful authorities cited. Under Order 8 rule 3 of the Civil Procedure Rules, it is in the discretion of the court to allow any party to amend his pleadings at any stage of the proceedings so long as it is deserved and on such terms as to costs or otherwise as may be just. The Court of Appeal thus held in the case of Central Kenya Limited vs. Trust Bank Limited (2002) 2 EA 365:

**"...all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated in costs... The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation for costs."**

9. Accordingly, the issues to consider in this application can be summarised as follows:

- a) whether the amendment sought is necessary for the purpose of determining the real issue in controversy between the parties.
- b. whether limitation is a legal right that has accrued to the Plaintiff and if so whether the proposed amendment will have the effect of taking away that right.

- c. whether the amendment will have the effect of introducing a different cause of action that is new and inconsistent with the pleadings filed herein.
- d. whether the application has been promptly made.

10. A perusal of the court record shows that the Defendant/Application manifested his desire to apply for amendment of his Written Statement of Defence soon after the pleadings closed. This he did by filing the instant application as well as seeking the transfer of this case from the Chief Magistrate's Court where it had been filed, for the specific purpose of enabling him to ultimately ventilate his counter-claim. The application for transfer was not finalized until 21<sup>st</sup> November 2014; where after, he has since taken steps to prosecute the application for amendment of his Written Statement of Defence. The draft Amended Defence and Counterclaim seeks to introduce, in paragraphs 8, 9 and 10 that he paid a sum of Kshs. 5,580,000 to the Plaintiff Respondent through International Business Services Ltd in reduction of the debt, with the result that he overpaid the Plaintiff/Respondent by some Kshs. 4,505,251.02/-. What is more, the Defendant/Applicant contends that the Plaintiff wrongfully received a sum of Kshs. 4,600,000/- that was due to him, which sum is the subject of **Nairobi ELC No. 741 of 2011**. He thus intends to counterclaim all the sums aforesaid if his application is allowed and have ELC 741 of 2011 consolidated with this case. It is evident that the proposed issues raised in the draft Amended Defence and counterclaim are indeed so relevant and proximate to the Plaintiff's claim that it would be in the interests of efficacious disposal for the same to be introduced herein by way of amendment.

11. As to whether a right of limitation has accrued in the Plaintiff's favour which would be taken away should the amendment be allowed, I have noted the concern of the Plaintiff/Respondent that the effect of the proposed amendment would be to deny it the right to plead the defence of limitation. That cannot be the case granted that it is the Defendant that is resisting the claim herein. It would be the case that once the amendment is allowed, that the Plaintiff will then be at liberty to plead that defence of limitation. It is thus premature then to say that its right will be pre-empted by the proposed amendment. Also noteworthy is that in Order 8 Rule 3(2) of the Civil Procedure Rules, it is now the law that:

**“Where an application for leave to make an amendment such as is mentioned in sub-rule (3) (4) and (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub-rule if it thinks just so to do.”**

In any event, the court is of the same view that was taken in the case of **Mitchell vs. Harris Engineering Co. (1967) 12 QB 703 at p. 718**, by Lord Denning thus:

**“Some of the Judges in those cases spoke of the Defendant having a “right” to the benefit of the Statute of Limitations: and said that “right” should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitation does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff...”**

In the premises, I find no merit in this argument.

12. As to whether the effect of the amendment would be to introduce a new cause of action that is inconsistent with the existing case herein, again the answer is in Order 8 Rule 3(5) of the Civil Procedure Rules, which provides that an amendment may be allowed notwithstanding that its effect will be 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. It is evident therefore that even this ground of objection by the Plaintiff/Respondent cannot hold.

13. The fourth and final issue is whether the application for amendment was timeously filed. In this respect, the Defendant/Applicant contended that as soon as he was served with summons to enter appearance, he embarked on a process of consulting various professionals with a view of determining:

- a) the financial consequences of the relations created by the mortgage and transactions forming the subject matter of this suit;

b) the conduct of the parties involved with regard to the said mortgage and/or transaction;

c) the financial effects of the said mortgage and/or transactions. That it was after this exercise that the he arrived at the figure that he now claims from the Plaintiff/Respondent in the proposed counter-claim. He thereafter filed the instant application within three months thereafter. This posturing is largely uncontroverted and the court is therefore satisfied not only that there was no inordinate delay, but also that the application has been brought in good faith to enable the court effectually and completely adjudicate upon and settle all the issues in contention between the parties and to prevent a multiplicity of suits.

Indeed, even where there appears to be inordinate delay, such an amendment could still be allowed if made in good faith. **(See Joseph Ochieng & 2 Others Vs First National Bank of Chicago, Civil Appeal No. 149 of 1991)**

14. In the result, it is the court's finding that that the application for amendment is merited and is hereby allowed. I grant the following orders:

- a. leave is hereby granted to the Defendant to amend his Written Statement of Defence in terms of the draft attached to his application.
- b. the Defendant is hereby directed to file and serve his amended Written Statement of Defence and Counterclaim within fourteen days from today's date.
- c. the Plaintiff to be at liberty to file a Reply to the amended Defence and Counter Claim within the timelines set out in Order 7 Rule 11 of the Civil Procedure Rules.
- d. costs of the application to be in the cause.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 27<sup>TH</sup> DAY OF OCTOBER 2015**

**OLGA SEWE**

**JUDGE**