



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 596 OF 2003

GIRO COMMERCIAL BANK LIMITED.....PLAINTIFF

VERSUS

MICHAEL PHILIP THEURI.....1ST DEFENDANT

PATRICK NG'ANG'A NJINU.....2ND DEFENDANT

JOSEPH KURIA THARAO.....3RD DEFENDANT

PETER KAMAU NJINU.....4TH DEFENDANT

DAVID M. GITHERE.....5TH DEFENDANT

### RULING

1. The **Notice of Motion** application before the court is dated **15<sup>th</sup> July 2014** and filed by the 2<sup>nd</sup> and 4<sup>th</sup> Defendants in court on 16<sup>th</sup> July 2014. The application filed under Order 8 Rule 3 & 5, Order 51 Rule 1, 4 & 13 of the Civil Procedure Rules & Section 3A of the Civil Procedure Act. It seeks the following orders:-

***1. That this Honourable court be pleased to grant leave to the 2nd and 4th Defendants to amend the Statement of Defence dated 17th March 2004 and filed in court on 18th March 2004 in terms of the annexed Amended Draft Defence.***

***2. That costs of this application be costs in the cause.***

2. The application is premised on the grounds set out thereon and is supported by affidavit of **Patrick Ng'ang'a Njiru**, the 4<sup>th</sup> Defendant, dated **15<sup>th</sup> July 2014**. The application seeks to amend the Defence herein and to introduce a counter-claim on the grounds that the proposed counter-claim is intertwined with the Plaintiff's case and that the Applicants will suffer great prejudice if the application is not allowed.

3. The application is not opposed by 1<sup>st</sup> and 3<sup>rd</sup> Defendants. However, the Plaintiff has opposed the application.

4. The brief history of the application is as follows. By a guarantee in writing dated 30th October 2010 the 3rd and 4th Defendants/Applicants herein jointly and severally guaranteed payment to the Plaintiff of monies advanced to the 1st and 2nd Defendants as consideration for the advance of such monies by the Plaintiff/Respondent. The 5th Defendant also guaranteed payment of monies by the Plaintiff to the 1st and 2nd Defendants by a guarantee in writing dated 30th October 2010 as consideration for the Plaintiff advancing such monies with his liability under the guarantee being limited to Kshs.3,500,000/=. The Plaintiff lent and advanced Kshs.3,000,000/= with interest at 23% per annum and a further sum of Kshs.500,000/= with interest at 23% per annum to the 1st and 2nd Defendants by a letter of offer dated 19th August 2000 which was accepted and signed by the 1st and 2nd Defendants on 30th August 2000. The 1st and 2nd Defendants defaulted in payment of the monies lent and advanced and as at 31st May 2001, the 1st and 2nd Defendants were indebted to the Plaintiff in the sum of Kshs.5,293,920/93. The Plaintiff demanded payment of the full sums owed to the Plaintiff from the 2nd and 4th Defendants, the Applicants herein, by a letter dated 9th July 2001 but they failed to make such payment. The Plaintiff filed suit for recovery of Kshs.4,293,920/93 against the 1st, 2nd, 3rd, 4th and 5th Defendants on 24th September 2003. The 2nd and 4th Defendants filed their defence on 18th March 2004. By an application dated 15th July 2014 the 2nd and 4th Defendants seek leave to

amend that defence.

5. Parties filed written submissions to the application. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants/Applicants submitted that for the court to determine the real question in controversy between the parties, it is important that the 2nd and 4th Defendant be allowed to amend their Statement of Defence in terms of the draft annexed amended defence. It is the 2nd and 4th Defendant's case that the counter claim is intertwined with the Plaintiff's claim. The said counter-claim cannot be tried on its own. It is pleaded by the Plaintiff in the Plaint that there was a borrowing transaction between the Plaintiff and 1st and 2nd Defendant while 3rd, 4th and 5th Defendants were guarantors to the said borrowing. The issues raised in the counter-claim arise from the same borrowing transaction and cannot be tried separately.

6. The Applicants submitted that under Order 8 Rule 3 (1) a party can amend its pleading at any stage of the proceedings. The rules provides as follows:-

***“Subject to order 1, Rules 9 and 190, Order 24, Rules 3, 4, 5 and 6 and the following provisions of this Rule, the court may at any state 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.”***

The Applicant submitted that although the Plaintiff has closed his case and 1st, 3rd and 5th Defendants have given evidence, that would not be reason enough to deny the 2nd and 4th Defendant a chance to amend their statement of defence. If the 2nd and 4th Defendants are denied their chance to amend their defence, they will suffer great prejudice as opposed to the Plaintiff. In any event the Plaintiff will be at liberty to re-open its case and call further evidence if need be. The Applicant further submitted that an application for amendment cannot be denied on the ground of limitation or time barred. Under Order 8 (2) the court has a wide discretion to allow an amendment notwithstanding the limitation. The rule provides as follows:-

***“Where an application to the court for leave to make an amendment such as is mentioned in Subrule (3), (4) or (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 Subrule if it thinks just so to do.”***

7. On their part the Plaintiff/Respondent submitted that the proposed amendments seek to introduce new claims that are time barred. The 2nd Defendant proposed to introduce a counter claim against the Plaintiff for the impounding and selling the security provided under the contract between the Plaintiff and the 2nd Defendant signed by the 2nd Defendant on 30th August 2000. The Plaintiff sold the vehicles that had been provide as security by a tendering process in 2002. The 2nd Defendant contends that the sale by the Plaintiff to realise its security under the facility agreement between the Plaintiff and the 2nd Defendant was wrongful. This is a totally new clam which was not pleaded by the 2nd Defendant in the defence filed on 18th March 2004. The Respondent cited the High Court in **Pan African Bank – Vs – Crescent Construction Co. Ltd. & Another HCCC No. 68 of 2005** (unreported) (pages 4 to 7 of the Plaintiff's list and Bundle of Authorities) where the court declined to grant leave to amend the defence on grounds that the proposed amendments sought to introduce new claims. Similarly the High Court in **Eres N. V. & Another – Vs – peschaud & Cie International SA & 3 others Civil Suit 187 of 1994** (pages 36 to 40 of the Plaintiff's Further Bundle of Authorities) dismissed a claim which was introduced by amendment of the pleadings on grounds that the claim sought to be introduced was time barred under the Limitation of Actions Act.

8. The Plaintiff submitted that Section 4 (1) (a) of the Limitation of Actions Act provides that actions founded on contract may not be brought after the lapse of six years from the time that the cause of action accrued. The cause of action which the 2nd Defendant seeks to please and introduce accrued in 2002. It has now been 12 years since the sale of the vehicles and as such the 2nd Defendant's claim is barred by the effluxion of time. The Plaintiff submitted that the amendments proposed by the 2nd and 4th Defendants are new claims that re time barred. Therefore the court should reject the proposed amendments.

9. The Plaintiff further submitted that the 2nd and 4th Defendants seek to amend the defence after a lapse of 11 years since the suit was filed. The suit has progressed significantly over this period of time and the plaintiff's case has been closed. Relying on the Court of Appeal in **Kyalo - vs - Bayusuf Brothers Ltd (1983) KLR 229** held that applications for leave to amend should be brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. The court also held that amendments that contain allegations that are inconsistent with the previous pleadings should not be allowed especially if they are late and it would prejudice the other party. The Plaintiff submitted the present case, the second and fourth defendants have not explained the reason for the prolonged delay over a period of 11 years. The new facts to be introduced have always been in the defendants' knowledge. Furthermore, the amendments proposed by the second and fourth defendants will be prejudicial to the plaintiff as most of the witnesses who are competent to testify with regard to the new matters introduced are no longer in the plaintiff's employment. As such the plaintiff will not be able to defend itself against the proposed counter-claims by the 2nd and 4th defendants.

10. The Plaintiff submitted that the 2nd and 4th Defendants only sought to make the proposed amendments after the plaintiff's suit had advanced significantly. The application for leave to amend has only been made in order to seal the loopholes that emerged during the course of the nearly concluded trial. It is clear from the second and fourth defendant's conduct that the application for leave to amend had been made in bad faith.

11. The Plaintiff also submitted that the 2nd Defendant seeks to introduce a counter-claim by way of amendment for damages for the sale of the security granted to the plaintiff under the agreement dated 19<sup>th</sup> August 2000 and signed by the second defendant on 30<sup>th</sup> August 2000. The Court of Appeal in **James Ochieng Oduol t/a Ochieng Oduol & Co Advocates – vs - Richard Kuloba Civil Appeal No. 2 of** set aside an order granting leave to amend on the grounds that the proposed amendments were all along in the knowledge of the applicant and that they had failed to plead them in their pleadings. In the present case, the Plaintiff submitted, the particulars of the second defendant's proposed counter claim were within his

knowledge all along. The plaintiff sold the vehicles in question through a public tendering process in 2002 but the second defendant failed to bring the proposed counter claim at the time of filing his defence.

The Plaintiff submitted that the 2nd Defendant has been negligent and that the court should not allow the proposed amendment as it would be aiding his negligence.

12. Firstly, the Plaintiff submitted that the the application for leave to amend is an abuse of the process of the court. In addition to being brought at a very late stage in time, it seeks to enable the applicants to carry out piece meal litigation at the expense of the court's time. The Court of Appeal in **Eastern Bakery - vs - Castelino (1958) EA 461** held that leave to amend pleadings would not be granted where the amendment would prejudice the rights of the opposite party or cause injustice to them. The plaintiff submitted that the applicants seek to make these amendments in light of the developments in this case. The applicants wish to make the propose amendments to fill any gaps that have since emerged in their defence. This is an abuse of the process of the court in addition to being prejudicial to the Plaintiff's case. As such the respondent submitted that the application for leave to amend should not be granted.

13. I have carefully considered the submissions of the parties, and the application. While I agree with Mr. Ndurumo counsel for the Applicants that under Order 1 Rule 9, 10 and Order 24 Rules 3, 4 and 5 of the Civil Procedure Rules, this court has the discretion to allow amendments at any stage of the proceedings, it is also the duty of the court to make sure that such an amendment does not cause prejudice to other parties in the matter. In this particular instance, Mr. Murugara for the Plaintiff/Respondent has through his submissions outlined with case law why this application should not be allowed. I agree with all his submissions which I have outlined above. However, for avoidance of doubt the suit has been proceeding before me and the Plaintiff and the 1st, 3<sup>rd</sup> and 5<sup>th</sup> Defendants have closed their cases. The Applicants have always been represented by counsel. Initially they were represented by Mr. Nyakiangana, and later again Mr. Ndurumo returned to represent them. The conduct of the Applicants have not been good. At one time they were not represented and Mr. Nyakiangana had on 26<sup>th</sup> June 2012 to apply to court for leave to allow the Applicants cross examine the Plaintiff's Witness whom they did not have the opportunity to cross-examine. The court allowed the application even though the Plaintiff had already closed its case. The Applicants have by and large not been serious in the suit, and I view the current application as a continuation of that strategy. I agree with the Respondent that this application, is brought in bad faith, after a long time, in fact, 11 years. The amendment now seeks to introduce a counterclaim for Kshs.37,000,000/=. This information must have always been with the Applicants for the last 11 years. It is not explained how all this time it escaped the Applicants that they had a claim reaching Kshs.37,000,000/=. Besides, this claim is also time barred, and if the amendment is allowed the same may greatly prejudice the Plaintiff. This is more so since most of the witnesses who are competent to testify with regard to the new mattes to be introduced may no longer be in the Plaintiff's employment as submitted by the Respondent.

14. For the foregoing reasons, the Notice of Motion application dated 15<sup>th</sup> July 2014 and filed in court on 16<sup>th</sup> July 2014 is dismissed with costs to the Plaintiff/Respondent.

Orders accordingly.

**READ, DELIVERED AND DATED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

Makori for Plaintiff

No appearance for Defendant

Teresia – Court Clerk