REPUBLIC OF KENYA

High Court at Nairobi (Milimani Commercial Courts)

Civil Case 335 of 2008

PRINTING INDUSTRIES LIMITED …….…… 1ST PLAINTIFF

MULTIPLE INDUSTRIES LIMITED …… 2ND PLAINTIFF

VERSUS

BANK OF BARODA KENYA LIMITED …….. DEFENDANT

R U L I N G

1. By a Notice of Motion dated 2 October 2012, the Defendant herein prayed for orders that leave be granted to it to re-amend its Defence as per the draft re-amended Defence annexed to the Application. The Defendant put forward the ground that it was necessary for the Defendant to re-amend its Defence so as to bring out the real issues in controversy as between the parties. Further, the Defendant maintained that it had a valid counter-claim as against the Plaintiffs. The Application was supported by the Affidavit of **David Ogega Nyaboga** who deponed to the fact that he was the Branch Manager of the Industrial Area Branch of the Defendant bank. He maintained that the Plaintiffs were truly and justly indebted to the Defendant in the amount of Shs. 49,132,286.25 consisting of 2 demand loans advanced to the Plaintiffs by the Defendant as well as overdraft facilities and letters of credit. The Defendant also counterclaimed in the amount of Shs. 3,293,108.00 in respect of receivership costs which the Defendant maintained were payable by the Plaintiffs. The deponent maintained that it was necessary for the Defendant to re-amend its Defence to include this counterclaim and he was of the opinion that the proposed amendment would not prejudice the Plaintiffs in any way.

2. The Application was opposed by the Replying Affidavit of one **Horatius Da Gama Rose**, a director of the first and second Plaintiff companies. He noted that the Defendant herein had filed its original Defence on 10 July 2008 and subsequently its amended Defence on 10 August 2010. The parties had complied with all the requirements under **Order 11** in respect of discovery including the filing of agreed issues and exchange of documents. He noted that the suit hearing had commenced on 20 March 2012 and three witnesses had presented evidence on behalf of the Plaintiffs. The matter had been fixed for further hearing on 8 October 2012 with the Plaintiffs intending to call their final witness when, all of a sudden, the Defendant served the Plaintiffs' advocates with the current Application before court. The deponent maintained that the proposed amendments contained in the draft re-amended Defence were extremely prejudicial to the Plaintiffs' case. He maintained that the amendments should not be entertained for the following reasons:-

"(a) The Applicant has offered insufficient reasons for presenting this Application for amendment after the close of pleadings and the commencement of hearing contrary to the mandatory requirements of law.

(b) There has been inordinate and inexcusable delay in seeking the Court's leave to present this Application.

(c) The proposed amendments introduce a new cause of action.

(d) The present Application, if allowed, will lead to delay and disruption of Judicial administration.

(e) The proposed amendments exhibit a gross abuse of the process of the court."

In concluding his Affidavit, Mr. Da Gama Rose detailed that he had been advised by the Plaintiffs' advocates on record that, in view of the Defendant's conduct, this Court should not exercise its discretion in permitting the proposed amendment.

3. The Defendant filed its submissions as regards the Application on 4 December 2012. It opened its submissions by detailing that it relied upon the Affidavit in support of the Application entirely. It also noted the 5 objections to the proposed amendment made in the Replying Affidavit as above. Thereupon, the Defendant referred this court to **section 100** of the *Civil Procedure Act*, as well as **Order 8** of the *Civil Procedure Rules, 2010* under which the Application had been brought. According to the Defendant, the authorities cited were quite clear in that before the Court pronounces its judgement in any matter, a party is always at liberty, with the leave of the court, to amend its pleadings. In the Affidavit in support of the Application, the Defendant had explained that that it had a valid claim against the Plaintiffs and such had been pleaded in both the original and the Amended Defence but it had not been counter-claimed. It submitted that by seeking to re-amend the Defence, the Defendant was not introducing a new cause of action as it had already been reflected at paragraph 18 of the Defendant's Amended Defence. The Defendant further submitted that there had been no inordinate or inexcusable delay in bringing the amendment Application. It pointed out that the Plaintiffs' case as against the Defendant had not been closed at the hearing thereof and consequently they would have further opportunity to call evidence in support of any Defence to the proposed Counterclaim.

4. The Defendant noted that the power to amend Pleadings is donated by the law and is intended to do justice between the parties by allowing the court to determine the real issues in controversy. In the circumstances, the Defendant submitted that it would only be fair that it be allowed to bring forward its claim against the Plaintiffs so that both claims could be determined at the same time. It pointed out that the Plaintiffs could be adequately compensated by costs by the court allowing the amendment Application. The Defendant then relied upon the various authorities that it had produced to court as per its List of Authorities filed on 6 November 2012 as follows: **Central Kenya Ltd versus Trust Bank Ltd (2000) 2 EA 365; Molu & Anor. Versus Kenya Railways & Anor. (2002) 2 KLR 551; Daniel Migwi Njai versus High View Farm Ltd & Anor. Civil Appeal No. 139 of 1989 (Unreported); Caltex Oil Kenya Ltd versus East Africa Spectre Ltd HCCC No. 324 of 2003** reported at **(2005)eKLR; Rosemary Muthoni Msafiri versus Elizabeth Msafiri Mombasa HCCC No. 365 of 1999 (Unreported); Edward G. Kihia versus Thomas Caroll Nakuru HCCC No. 217 of 2004** reported at **(2010) eKLR; and Kimani versus Attorney General (1969) EA 29**. The Defendant particularly emphasised the finding of the Court of Appeal in the **Daniel M. Njai** case where the Court of Appeal at page 3 of the Judgement stated: –

"There is no question that the court has power, under Order VIA Rule 3 (1) of the Civil Procedure Rules (as the Order and the Rule were at that time) **to allow an amendment, at any stage of the proceedings, on such terms as to costs or otherwise as may be just and under rule 5 (1) of the said Order for the purpose of determining the real question in controversy between the parties. There is no doubt that an amendment can always be allowed if the interests of justice so requires."**

Later in the judgement the three learned Judges of the Court of Appeal observed:

"But the power of the court specifically provides that an amendment may be made at any stage of the proceedings".

Then on the final page of the judgement, the Judges noted:

"The amendment enables the court to determine the real question in controversy between the parties. We are, therefore, inclined to think that the interest of justice was best served by allowing the application to amend. In any event, the grant of such an amendment is a matter of judicial discretion".

Thereafter, the Defendant commented upon the findings of other Judges of this court more particularly the **Edward G. Kihia** case. The Defendant then proceeded to distinguish the various authorities as cited by the Plaintiff more particularly **Kyalo versus Bayusuf Brothers Ltd (1983) KLR 2 to 9; Kassam versus Bank of Baroda (2002) 1 KLR 294; Joseph Ochieng T/A Aquiline Agencies versus First National Bank of Chicago Civil Appeal No. 149 of 1991 (unreported); Ketteman versus Hansel Properties Ltd (1998) 1 All ER 38; Julia Akelo Kunguru versus Seth Lugongo & Ors HCCC No. 197 of 2001 (unreported); Eastern Bakery versus Castelino (1958) EA 461 and Kenya Court Authority versus East African Power & Lighting Co. Ltd. Mombasa Civil Appeal No. 41 of 1981 (unreported).**

5. In turn, the Plaintiffs in their submissions filed on 11 December 2012 stated that they vehemently opposed the Application and relied upon the said Replying Affidavit of the Horatius Da Gama Rose. The Plaintiff's noted that it was the general rule that a party is at liberty to amend its pleadings and any time before judgement if the court is satisfied:

'a. The party applying is not acting *mala fide*.

b. The amendment will not cause some injury to the other side which cannot be compensated by costs.

c. The amendment is not an abuse of Court process.

d. The amendment is necessary for the purpose of determining the real question in controversy between the parties see Kassam versus Bank of Baroda [2002] 1 KLR 294.'

The Defendant maintained that there were cases where the Court would not exercise its discretion and permit applicants to amend their pleadings. Some of those factors included delay and lack of reason given for the delay, the addition of fresh causes of action and the judicial disruption of the administration of justice. The Defendant maintained that the Plaintiffs would suffer great prejudice as the Application before court was presented 4 years after the Plaint was filed. In the **Kyalo** case the delay was 6 years and in the **Kassam** case (both supra) the delay had been 3 years. In both cases the application to amend had been disallowed. In any event it was incumbent upon the Defendant to explain the delay which it had not done so in this matter. Further, the Defendant maintained that the Amendment sought put forward an additional cause of action. In this regard the claim for receivership charges was being raised for the first time as such had not been raised in either the original Defence or the Amended Defence. The Defendant also maintained that the Application would disrupt the administration of justice as such would necessitate the re-calling by the Plaintiffs of at least the first and third of the Plaintiffs' witnesses who had already been to give their evidence before court. Finally, the Plaintiffs called upon the court to examine the conduct of the Defendant herein. They noted that the Defendant had on numerous occasions accused the Plaintiffs of sitting on orders of injunction and attempting to delay the hearing of the suit. The Defendant had insisted that the process of discovery and inspection had been unduly hastened. The Plaintiffs also noted that throughout the conduct of this matter, it had been the Defendant who were urged the court to give the parties an early hearing date and to expedite the hearing of the matter. The Plaintiff laid particular stress upon the finding of **Shah JA** in the **Joseph Ochieng** case in which he quoted extensively from the speech of **Lord Griffiths** in the **Ketteman** case (supra) as follows:

"Another factor that the judge must weigh in the balance is the pressure on the courts caused by the great increase in litigation and the consequent necessity that, in the interests of the whole community, legal business should be conducted efficiently. I can no longer afford to show the same

indulgence towards the appellant's conduct of litigation as was perhaps possible in a more leisured age. There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing an amendment at a very late stage of proceedings."

6. I have considered the Application and the fact that it has been brought 4 years after the Plaint was filed in this suit and, perhaps more significant, after the Defence herein has already been amended once. One asks the question as to why the Defendant did not consider the necessity for its counterclaim being brought in at the time when the Defence was originally amended in August 2010 which in itself was two years after the suit was filed. The **Joseph Ochieng** case has proved particularly helpful to this court in that the learned Judges of Appeal reviewed the law in relation to the allowing of amendments with reference to a number of authorities to which they had been referred. **Shah JA** with reference to **Bullen and Leake & Jacob's Precedents of Pleading 12th Edition** had this to say in relation to the principles upon which the court acts in allowing or disallowing any proposed amendments:

"The ratio that emerges out of what was gleaned from the said book is that the powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to allow amendments can be exercised by the court at any stage of proceedings (including appeal stages); that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of the proposed amendments sought ought to be formulated and be submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence they can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or if his claim is by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of the court to still allow such an amendment notwithstanding the expiry of current period of limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment."

7. I believe that the above quotation from **Bullen and Leake & Jacob** says it all. So much so, that I do not consider it necessary to consider that I need specifically to refer to the other authorities cited to me by both the Plaintiffs and the Defendants herein, on a one by one basis. Further, **section 100** of the *Civil Procedure Act* details the general power to this court to amend as follows:

"The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceeding."

There is no doubt that the amendment for which the Defendant is applying for leave, arises out of the same facts as the overall cause of action in this case. I cannot see that the Plaintiffs will suffer any real prejudice by such amendment being allowed. There is no doubt in my mind that this whole suit revolves around the fact that the Defendant advanced pecuniary facilities to the Plaintiffs. If one is talking about

saving this court's time, then much better in my opinion, that the Defendant's proposed counterclaim is dealt with in this case rather than its having to go to the extent of filing a separate suit. This goes for the monies it claims are owed to it, as well is for its claim for receivership expenses, which, in any case, it will have to prove at the further hearing of this suit in due course. Accordingly, I grant the Defendant's Notice of Motion dated 2 October 2012 and give leave to the Defendant to re-amend its Defence as per the draft re-amended Defence annexed thereto. However, I have taken cognizance of what the Plaintiffs have submitted as regards the conduct of the Defendant during the proceedings in hand. As noted above, I am concerned that the Defendant has been dilatory nay hesitant in bringing this Application for leave to amend the particularly where it has already amended the Defence once. Accordingly, I believe that the Plaintiffs should be compensated in some way and that it would be judicious that I award to them the costs of this Application. Order accordingly.

DATED and delivered at Nairobi this 30th day of January 2013.

J. B.HAVELOCK
JUDGE