



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1276 of 2001

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

SHASHERALI KARIM KURJI.....1ST DEFENDANT

ZAHERALI KARIM KURJI2ND DEFENDANT

R U L I N G

1. This suit was filed in 2001 to, inter alia, enforce personal guarantees given by the Defendants. This I have gathered from the proposed draft amended Plaint as I did not see the copy of the original Plaint or the Defence on record. The suit commenced trial on 11th February, 2010 when the Plaintiffs first witness testified and was cross-examined at length. The same was adjourned for further hearing on 21st April, 2010 when for reasons recorded it was further adjourned to 10th June, 2010.

2. Come the 10th June, 2010, the Plaintiff indicated to the court that it had filed an application dated 7th June, 2010 for the amendment of the Plaint which required to be determined first. Parties were given directions to file written submissions by the Hon. Njagi J which they did and a ruling therefor was reserved for 4th November, 2010. This matter was referred to this court for ruling on the said application and this is the ruling on that application.

3. In the application, the grounds relied on were that it was necessary to amend the Plaint for determining the actual matters in controversy and to ascertain liability and that the Defendants will not be prejudiced. In the supporting Affidavit of Phillip Muoka, it was sworn that since the filing of the suit, the Plaintiff had sold by Public Auction the collateral securing the facilities and it was necessary to plead this fact.

4. In his submissions, Mr. Hira told the court that there was apparent and honest error in the pleadings which it was necessary to correct, there would be no injury caused to the Defendant if the amendments are allowed and that the court has a discretion to grant the prayers sought. Counsel referred to the cases of **Jashbhai C. Patel –vs- B.D Joshi (C.A No. 39 of 1959) CA EA Eastern Bakery –vs- Castelino (1958) EACA 461, Muka Mukuu –vs- Co-operation Bank of Kenya (2005) e KLR, Rajday Alal –vs- Karimbahi & Quarbanlite Ltd (2005) e KLR at page 4, Mwangi –vs- Mwangi & Anor 2005 e KLR Menginga Njunge Salim Mungai –vs- KRA 2005 e KLR pages 4 & 5** amongst others in support of the application. Counsel urged that the application be allowed.

5. The Defendants opposed the application vide Grounds of Opposition dated 24th June, 2010. It was therein contended that there was inordinate delay in seeking to amend the plaint nine (9) years after the

filing of the suit, that there was no reasons advanced why the amendments were being sought at this time yet the public auctions were conducted in 2002 and 2003, respectively and that the intended amendments were meant to defeat the Defendant's defence arising out of the cross examination of the Plaintiff's first witness.

6. It was submitted on behalf of the Defendants that because of the delay in bringing the application, the Defendants would be prejudiced. The case of **Joseph Ochieng & 2 others –vs- First National Bank CA no. 149 of 1991 (UR)** was relied on by the Defendant.

7. I have considered the Affidavit on record, the submissions of counsel and the authorities relied on. Amendments may be allowed at any stage of the proceedings, amendments should be allowed to clarify issues but pleadings ought to be settled at some point for all to be certain about a given case (see **Muka Mukuu –vs- Co-operative Bank of Kenya Ltd (supra)**); the discretion to allow or refuse an application for leave to amend pleadings is wide as the object of allowing amendments is to determine the real controversy between parties (**Rajdaj Alal –vs- Karimbhai supra**), 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 (**Eastern Bakery –vs- Castellino page 461 supra**). Those then are some of the principles applicable in considering an application for amendment.

8. The challenge raised against the application is that, firstly there has been undue delay in making the application, since the filing of the suit. Secondly, that the application has been made to plead matters that occurred in 2002 and 2003 and finally, that it is meant to defeat the Defendant's defence established through cross examination of the Plaintiffs first witness.

9. On the first and second issue, I note that the application was being made nine (9) years after the filing of the suit and seven (7) years ever since the properties were sold. The Affidavit of Phillip Muoki in support of the application is lacking in details as to the delay in bringing this application. Although amendments are to be allowed freely and at any stage of the proceedings, when there is a long delay in applying for amendment, I think an applicant should give an explanation. My opinion is informed by the spirit of the overriding objective contained in Sections 1A and 1B of the Civil Procedure Act that civil disputes be resolved expeditiously.. By its very nature, an application to amend a pleading delays a trial. If it is made during pre-trial stage and when the suit is not ready for trial, I do not think any amount of delay will raise eyebrows. However, if a party waits until pretrials are completed then immediately before or at the hearing springs up with an application for amendment, I think a plausible explanation for the delay will be required. In the instant case, no explanation was advanced for the delay between 2003 and June, 2010. It is not lost to this court that lists of documents were exchanged way back in 2004.

10. On the third issue, the defendants claim that the amendment will prejudice their defence which crystallized on cross-examination of the Plaintiffs first witness. The Plaintiff retorted that no prejudice would be suffered. I have noted the long cross-examination that the Plaintiff's first witness was subjected to. I note that he was cross-examined on whether and when the securities were realized by the Plaintiff. In **Eastern Bakery Vs Castellino (supra)**, the Court of Appeal for Eastern Africa put in aptly: -

“The court will refuse leave to amend where the amendment would charge the action into one of a substantially different character...., or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendments, e.g. by depriving him the defence of limitation accrued since the date of the writ.. The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

11. As I have already stated, the Defendants contended that the evidence so far produced tends to bolster their defence, that the intended amendment is intended to prejudice their defence. Considering that the facts sought to be introduced were at all times within the knowledge of the Plaintiff and that no explanation has been given for failure to introduce the proposed amendments before the hearing had commenced, I am persuaded that the proposed amendments are not bona fides. They are being introduced during trial. I do not think it is part of our public policy that litigation be conducted by instalments. If

parties are to be allowed to amend their pleadings every time an issue arises during trial, there may be no certainty in litigation. Pleadings ought to be settled at some point for all the parties to be certain of the case they face to enable them prepare for the same. So did Mwera J (as he then was) hold in **Muka Mukuu Vs Co-operative Bank of Kenya Ltd (supra)** while declining an application for amendment.

12. For the foregoing reasons, I think that it will not be proper to allow the introduction of the amendments sought at this stage. It will, in my view prejudice the Defendant's case. Accordingly, the application is declined and is dismissed with costs to the Defendants.

DATED and DELIVERED at Nairobi this 29th day of April, 2013.

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A. MABEYA
JUDGE