



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS COMMERCIAL AND TAX DIVISION)
CIVIL SUIT 717 OF 2006

FIDELITY COMMERCIAL BANK LIMITED PLAINTIFF

VERSUS

AZIM JIWA RAJWANI DEFENDANT

RULING

The motion falling for consideration is dated 22nd February, 2012 brought under order 8 Rules 3(1) and 5 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Rules. The same seeks leave of court to amend the Defence and introduce a counterclaim. The Defendant swore an Affidavit on 22nd February, 2012 in support thereof.

The Defendant contended that this suit was filed in December, 2006 but had not been heard yet, that the suit sought a permanent injunction to restrain the Defendant from lodging or proceeding with a winding-up petition. The dispute was all about Kshs.10,222,532/17 in the Defendant's account No.11303731 held with the Plaintiff at the Plaintiff's City Branch which the Plaintiff had been unable to release to the Defendant upon demand, that the Defendant's claim on the said sum would be time barred if the same is not claimed at this stage and that it was therefore necessary to amend the Defence as prayed so that all the issues in dispute between the parties can be adjudicated upon.

Ms. Sewe, learned Counsel for the Defendant submitted that there will be no prejudice to be suffered by the Plaintiff if the amendment sought was allowed, that the claim in the Plaintiff and the proposed counterclaim are intertwined and that therefore the application should be allowed.

The Plaintiff filed Grounds of Opposition to the application. These were four broad grounds to the effect that, the application was an afterthought being brought after undue delay, that the proposed counterclaim encompasses a totally separate cause of action, that there is no discovery of any new material to warrant the amendment sought and that in the interests of justice the application should be dismissed.

Mr. Kanjama, learned Counsel for the Plaintiff expounded the said grounds and submitted that the suit having come up for trial on 1st March, 2012, the filing of the application a few days before that date was mischievous and was meant to delay the trial of the suit, that a counterclaim being a separate cause of action it should be dealt with separately, that since the suit was seeking to stop the process of winding-up the claim was under the Companies Act whilst the proposed counterclaim was an ordinary claim, that therefore the two claims cannot be dealt with together. Mr. Kanjama further submitted that by seeking to introduce the claim the Defendant was giving up the process of winding up and judgment on the Plaintiff should be given, that allowing the application would put the Plaintiff into double jeopardy in that the Plaintiff had come to court on the basis that there was no debt in respect of which a winding-up proceeding could be commenced, and that by introducing the counterclaim, the Plaintiff will be called upon to deal with a completely new level of proof in this case. Counsel therefore urged the court to dismiss the application.

I have considered the Affidavit in support the Grounds of Opposition and the submissions by Counsels.

The law regarding amendments of pleadings is well settled by the Court of Appeal for Eastern African in the case of Eastern Bakery –vs- Castelino (1958) EA 461 wherein at page 462 the court held:-

“It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change 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 amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ”

The main principle is that an amendment should not be allowed if it causes injustice to the other side.”

In the Kenya Court of Appeal case of Joseph Ochieng & 2 Others –vs- First National Bank of Chicago C.A. No. 149 of 1991 which was relied upon by both parties, Shah J.A (as he then was) held:-

***“The ratio that emerges out of what was quoted from the said book is that 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 so amend can be exercised by the court at any stage of the 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 proposed amendment sought ought to be formulated and be submitted to 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 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 it 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 his claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of 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.*”**

These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our Order VI A Rule 3 sets out all such principles which have been gone into on many previous occasions.”

The foregoing are therefore the principles that the courts apply when dealing with an application such as the one under consideration.

How do those principles apply to the application under consideration? The main grounds by the Defendant is that there is a discovery of new material, that the claim sought to be introduced in the counterclaim is intertwined with the Plaintiff's suit, that by introducing the counterclaim it will enable the court to adjudicate upon all the issues in dispute between the parties.

I do not agree that there has been any discovery of any new material that was not in the knowledge of the Defendant either at the time of filing the Defence or before 22nd February, 2012. I reject that ground.

As regards the submission that the proposed counterclaim is intertwined with the Plaintiff's claim, Mr. Kanjama was of the view that the Plaintiff's claim is under Company Law whilst the proposed counterclaim will be an ordinary claim I have examined the Plaintiff and the Defence on record. In the Plaintiff, the Plaintiff is seeking to restrain the Defendant from commencing winding up proceedings under the Companies Act. The Plaintiff came to court on the basis that the alleged debt asserted by the Defendant was disputed and therefore not a proper debt by virtue of which winding up proceedings could be commenced against the Plaintiff. My view of the matter is that the Plaintiff came to court to prevent the Defendant from asserting his claim by way of a winding up petition; the Plaintiff's contention was that the Defendant's claim was disputed and should be claimed in the normal ordinary suit and not through winding up proceedings under the Companies Act. Accordingly, I do not agree with the submission that the Plaintiff's suit is under Company Law. In my view, the Plaintiff's case in the Plaintiff and the Defendant's claim are intimately intertwined. In the present suit, the issue before the court at the trial would be, is there an undisputable plain debt by the Plaintiff owed to the Defendant for which the Defendant can be left to enforce by way of a winding up petition or is it a disputed debt that needs to be proved by way of ordinary suit? That being the main issue, I do not see any prejudice if in this very same suit the court is called upon at the trial to establish if the Defendant is actually owed by the Plaintiff. In my view, the two issues are intimately intertwined that they cannot be separated.

In view of the foregoing, I reject the Plaintiff's contention that its claim is under Company law. To my mind, the Plaintiff's suit is under the ordinary law which basically sought to restrain and bar the Defendant from enforcing his alleged claim under Company Law and the Plaintiff's claim is therefore intimately intertwined with the proposed counterclaim.

Whilst I am in agreement with Mr. Kanjama that the proposed counterclaim is a separate cause of action, I do not however agree with him that the same ought to be tried separately. I believe that since the issues are intertwined, the documents to be relied will be the same and that the witness may well be the same. In my view, in terms of Section 1A of the Civil Procedure Act, it will be prudent to try the issues between the parties at the same time since that will save judicial time. Holding separate trials in my view will not be achieving the overriding objective of the Civil Procedure Act of expeditious, proportionate and affordable disposal of this civil dispute between the parties herein. I am of the view therefore that the Plaintiff will in no way be prejudiced if the amendment sought is allowed.

For the foregoing reasons, I am satisfied that in order to wholly determine all the issues in dispute between the parties herein and for expeditious disposal of the dispute between the parties herein, it is just and proper that the amendment sought be granted.

One thing however requires comment, it is deplorable that the Defendant would wait for nearly six (6) years before he could bring the present application. Although it is not this application that caused the adjournment of 1st March, 2012, its timing of its filing is suspect. One other thing, I am in agreement with Mr. Kanjama that by seeking to bring the counterclaim in respect of the debt which the Defendant had initially sought and/or threatened to enforce in a summary manner by way of a Petition for winding up, the Defendant may be making a belated admission that after all, his claim should have been litigated in the normal manner and not by a winding up cause as earlier threatened. Accordingly, I will allow the application on the following terms:-

- (a) The Defendant is granted leave to amend his Defence and he should file and serve the amended Defence and counterclaim within 14 days of the date hereof.
- (b) The Plaintiff do file and serve its Reply to the Defence and Defence to Counterclaim within 14 days of service.
- (c) The Defendant to file his Reply to Defence to Counterclaim, if any, within 7 days of service of the same.
- (d) The Defendant to pay the Plaintiff thrown away costs of the suit so far.
- (e) Due to the age of this suit, this suit be mentioned on 11th July, 2012 to take directions on pretrial.

Orders accordingly.

DATED and delivered this 28th day of May, 2012.

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A. MABEYA
JUDGE