



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 152 of 2012**

**CITY FINANCE BANK.....PLAINTIFF**

**- VERSUS -**

**CEDAR BAND ENTERPRISES LTD.....DEFENDANT**

**AND**

**COMMISSIONER OF LANDS.....THIRD PARTY**

**RULING**

1. The application before the court is a **Notice of Motion** dated **14<sup>th</sup> March 2012**. The application seeks the following orders:-

- 1) That the Honourable Court be pleased to grant the Defendant leave to amend its defence.
- 2) That the Draft Amended Defence Counterclaim annexed to the affidavit in support hereof and marked “**MN 1**” be deemed as properly filed and served.
- 3) That the costs of this application be in the cause.

2. The application is premised on grounds set out therein namely:-

1. The Defendant has pleaded that the Third Party is liable to the Defendant for its losses as enumerated in the defence.
2. That the Third Party has issued instructions to the Attorney General to the effect that the allotment of the land to Kikabi Homes Limited and the subsequent acquisition of a grant in the name of the Defendant was riddled with irregularities that are attributable to the conduct of both the Defendant and Kikabi Homes Limited.
3. That the irregularities intended to be placed in the amended defence only go to show that the Defendant and Kikabi Homes Limited were guilty of complicity in the illegal acquisition of the grant subject matter of this suit.
4. That it was necessary that Kikabi Homes Limited be enjoined to this suit in a for the purpose of bearing liability for its part in the illegal acts leading to the issuance of the grant by the Third Party in the names of Cedar Band Enterprises Limited yet the Defendant did not join it at the commencement. The

proposed amendment would pave the way for the issuance of a second Third Party Notice to Kikabi Homes Limited by the Third Party in the event that the Defendant does not take that course of action.

5. That the purchase price claimed from the Third Party by the Defendant was paid to Kikabi Homes Limited and refund of the purchase price by Kikabi Homes Limited rather than by the Third Party would be the necessary effect of a probable determination of the issue of liability against Kikabi Homes Limited upon the amendment of the defence.

6. That evidence in support of these claims and orders can only be properly adduced in this court if the Defendant files an amended defence and counterclaim.

7. The Plaintiff will not be prejudiced by the orders sought if they are granted.

8. The suit concerns matter of great public interest and it is in the interests of justice that the orders sought be granted.

3. The application is supported by affidavit sworn by **MWANGI NJOROGE** dated **14<sup>th</sup> March 2011**. In the affidavit Mr. Njoroge describes himself as the State Counsel handling the matter on behalf of the Third Party. The affidavit mainly expands on the above grounds.

4. The application is opposed by the Defendant vide a Notice of Grounds of Objection filed in court on **8<sup>th</sup> June 2012**. The opposition sets up grounds as follows:-

- 1) Third Party's application is an abuse of the court process.
- 2) Third Party's application is filed to delay the hearing of the suit.
- 3) Third Party is in guilty of *laches*.
- 4) Third part's application is frivolous and mischievous.
- 5) Third party's application is time barred by Limitation of Actions act.

5. By the leave of court parties filed written submissions to the application. The Third Party/Applicant filed its submissions on **25<sup>th</sup> July 2012** while the Defendant/Respondent did so on **6<sup>th</sup> September 2012**.

6. The brief history of the application is that the Plaintiff filed the suit against the Defendant on **31<sup>st</sup> July 1997** for recovery of a sum of **Kshs.45,340.075.15** advanced to the Defendant on the strength of a charge executed over L.R. No. 209/12851 in favour of the Plaintiff by the Defendant. Upon default of payments by the Defendant, the Plaintiff demanded full payment which was unsuccessful.

The Plaintiff in an attempt to sell the property was unable to execute the sale transaction as it discovered upon lodging the document with the Commissioner of Lands the existence of two grants for the subject property. The second grant had been registered by the Commissioner of Lands in favour of the Defendant as I.R. No. 68265 and I.R. 12015. The first grant had been registered as L.R. No. 209/5001. The Defendant then asserted its legal ownership over L.R. 209/12851 as a purchaser for value without notice for a consideration of Kshs.2,500,000. The Defendant further asserted that this purchase was pursuant to the Commissioner of Lands approval and consent to transfer having been given on **18<sup>th</sup> January 1996**. The defence is premised on both breach of contract and negligence by the Commissioner of Lands.

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The Defendant subsequently applied for and was granted leave to join the Commissioner of Lands as 3<sup>rd</sup> party, and has made claims against the 3<sup>rd</sup> Party as per the pleadings.

7. The Third Party submitted that the records at the companies registry are indicative of two companies registered under the names “*Kikabi Homes Limited*” which is indicative of intent to deceive in that the Defendant has never identified which of the two Kikabi Homes Limited it dealt with in the sale transaction. The Third Party submitted that the purchase price was paid to Kikabi Homes Limited and averred that the Defendant has wrongly enjoined him in this suit to meet the Defendant's claim instead of joining the said Kikabi Homes Limited to the suit.

8. On their part the Defendant submitted that the application is an abuse of the process of the court and is filed to delay the hearing of the suit. The Defendant further submitted that the application is guilty of laches, is frivolous and mischievous and is time barred by Limitation of Actions Act and that the 4 year delay erases any cause of action which the intended amendment may occasion.

9. I have carefully considered the submission of both parties. The **Civil Procedure Rules 2010, Order 1, Rule 10 (2)** provides that:-

**“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined . . . and that the name of any person who ought to have been joined, whether as Plaintiff or Defendant, or whose presence before the court may be necessary in order to enable the court effectively and completely to adjudicate upon and settle all questions involved in the suit be added.”**

The court in the case of **Eastern Bakery – Vs – Castelino [1958] EA 461** (Sir Kenneth O’Connor) reviewed the previous case and summarises the principles which would act as beacons in guiding the court in granting or refusing amendment of pleadings. He stated as follows:-

**“It will be sufficient . . . to say that amendments of 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. The court will not refuse to allow an amendment simply because it introduces a new case. But there is no power to enable one distinct cause of action to be substituted for another. The court will refuse to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment.**

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

The same position has been cited with approval in **Hagod Jack Simonian – Vs- Johar and Others (1962) IEA 336.**

In the 12<sup>th</sup> Edition of their book on **Precedents of Pleadings** at page 130, **Bullen and Leake and Jacob** give an overview of the primary considerations which come into play in determining whether to allow or disallow amendments. They say –

**“The circumstances, in which amendment of pleadings may be sought are infinitely various . . . each case must be decided having regard to all the surrounding circumstances of the particular case . . . The first and in a way the paramount consideration is whether the application for leave is made in good faith. For this purpose, good faith means that the amendment is sought for the purposes of raising real question in controversy between the parties, and is not dishonest or intended to over reach the opposing party, or made for any ulterior motive and relies on facts which are substantively true and germane to the matters in controversy between the parties.”**

As the law clearly states, this court has a wide discretion when faced with an application for leave to amend proceedings. That discretion, however, must be exercised most judiciously. It is true that there is a considerable delay in bringing this application. However, the merits of the application is that if it is granted the court will have the chance to hear all parties on merit and on the evidence available. The court

cannot wholly ignore the allegation by the Applicant that the party who could be responsible for the Defendant's claim, if at all, may be presently out of these proceedings. This court also cannot ignore the fact that the amount being claimed, with interest is a large sum of money, which, if found due to the Defendant, will be paid out of the public purse. It is best in the interest of justice that all necessary parties to this suit be joined in order that the court can determine where the liability if any, lies, and a more informed decision is needed. I am therefore inclined to allow the application.

**10.** However, I must note for the purposes of record that the Attorney General's office has been lethargic in defending this suit for several failures to attend the court proceedings. This behavior gives credence to the allegations by the Defendant that this application is intended to delay the finalization of the suit. With this observation in mind, I direct the Applicant to file and serve its amended defence within the next **10 days**. The Applicant must also prepare, file and serve its Bundle of Documents, Witness Statements and agreed issues within **30 days** of filing its Amended Defence.

**11.** For the foregoing reasons I allow the Notice of Motion application dated **14<sup>th</sup> March 2012** as prayed except that that costs shall be for the Defendant.

It is so ordered.

**DATED, READ AND DELIVERED AT NAIROBI**

**THIS 7<sup>TH</sup> DAY OF DECEMBER 2012**

**E. K. O. OGOLA**

**JUDGE**

**PRESENT:**

N/A for the Plaintiff

M/s Ochieng H/B for Billing for the Defendant

N/A for 3<sup>rd</sup> Party

Teresia – Court Clerk