



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA**

**Commercial Civil Case 27 of 2008**

**DOMINIC ALOISE GEORGE OMENYE  
T/A OMENYE & ASSOCIATES.....PLAINTIFF  
VERSUS  
KENYA COMMERCIAL BANK LTD.....DEFENDANT**

**RULING**

This is an application expressed to be brought under the provisions of Order VIA Rules 3, 4, 5, 6, 7 and 8 of the Civil Procedure Rules and section 3A of the Civil Procedure Act. The application is brought by the plaintiff who seeks leave to re-amend his plaint. The application is made on the following grounds:-

- (i) **That it has come to the plaintiff's knowledge that Mr. J. W. Kagwe was not qualified to practice as an advocate at the time he drew and executed the charge subject matter of this suit and the original defence herein.**
- (ii) **That the charge herein is an illegality, null and void *ab initio* and it is imperative that the issue be pleaded.**
- (iii) **That the further amendment is imperative so as to bring all relevant issues before the court for a just and conclusive determination.**
- (iv) **That the defendant's claim for money is time barred and the initial advocate omitted pleading the issue specifically.**
- (v) **That no prejudice will be occasioned to the defendant by allowing the amendment.**

The application is supported by an affidavit sworn by the plaintiff. The application is opposed and there is a replying affidavit sworn by one Meggie H. Kalunda, the defendant's Officer In charge of advances at the defendant's Kilindini branch. Counsel agreed to file written submissions which were duly in place by 3<sup>rd</sup> June, 2010.

I have considered the application, the affidavits, the annexures thereto, the pleadings and the submissions of counsel. I have also read the relevant case Law on the subject. Having done so, I take the following view of the matter. It is settled that to grant or not to grant leave to amend pleadings is a matter of discretion. Each application has to be determined according to its special circumstances. The discretion however is exercised on known principles and not on whim or idiosyncrasy. In this case, the gist of the plaintiff's application is that the plaintiff has learnt that Mr. J. W. Kagwe was not qualified to practice as an advocate at the time he drew the charge, the subject matter of this suit, and the original defence herein which event renders the said charge and defence incompetent. The plaintiff further contends that the defendant's counter-claim is time barred which issue was not pleaded in the defence delivered by his former advocates. He urges that those matters can only be pleaded with the leave of the court which proposed pleading will not prejudice the defendant but shall infact bring relevant issues before the court for a just and conclusive determination. To buttress his arguments the plaintiff has cited the Court of Appeal decision of **National Bank of Kenya Limited – v – Wilson Ndolo Ayah [Nairobi C.A. No. 119 of 2002] (UR)**.

The defendant's position on the other hand is that the application for leave to amend is an afterthought given that this suit is part heard. In its view the proposed amendment is aimed at defeating its defence and counter-claim and is not necessary to determine the real dispute between the parties. The defendant's further argument is that if allowed, the proposed amendment will deprive it of accrued rights and is prejudicial to its case in view of the fact that the plaintiff owes it a substantial amount advanced to him on the basis of contracts validly and freely entered into by the parties herein. The defendant has also contended that the issues raised in this application were determined by this court's ruling on the plaintiff's application dated 10<sup>th</sup> February, 2009.

I have perused the plaintiff's application dated 10<sup>th</sup> February, 2009. By that application, the plaintiff sought the striking out of the amended statement of defence and counter-claim. The reasons for the application were, *inter alia*, that the said counter-claim was statute barred and that the said defence which was the foundation of the counter-claim was drawn by an unqualified person, viz an advocate without a practicing certificate who had also drawn the charge the subject matter of this suit. For the same reason the plaintiff contended that the charge was void *ab initio* in Law. I conclusively determined that application in a ruling dated 20<sup>th</sup> November, 2009. With regard to the plea of limitation, I held that the same had not been pleaded and that in any event the plaintiff had specifically and un-equivocally acknowledged owing the defendant Kshs. 595,987/= in his reply and defence to the said counter-claim. I also found that the plaintiff had, in his testimony at the commencement of his case, admitted owing the said sum to the defendant.

With regard to the plaintiff's challenge against the charge and defence, I held on the material availed to me that the challenge had not been well taken.

The plaintiff has apparently not appealed against my said decision nor has he sought a review of the same. In those premises, the basis of the plaintiff's present application for leave to re-amend his plaint has not been entirely honest. He cannot, without betting an eyelid, assert that in March, 2010 he had come to know that the charge and initial defence were drawn by an unqualified person and that the defendant's counter-claim is statute barred.

I agree with the defendant that the plaintiff by his proposed amendment seeks to deprive it of a right which has accrued to it. I have held that there was no basis to find that the charge document and the initial defence were drawn by an unqualified person. I have further held that on the material availed to the court, the plea of limitation is not available to the plaintiff. It cannot in the premises be gainsaid that the defendant will be prejudiced if the leave sought is granted. I also agree with the defendant that the proposed amendment shall in effect contradict the plaintiff's existing pleadings and indeed his own oral testimony in court.

I am alive to the general principle that amendments sought before hearing should be freely allowed. However, that general principle has a caveat. The amendments will only be allowed if they can be made without injustice to the other side which cannot be compensated by costs. (See Eastern Bakery – v – Castelino (1958) EA 46). It is also a basic consideration in determining an application for leave to amend that the application be made with promptitude. This application has been lodged more than 13 years since the suit was filed. The Court of Appeal in Kyalo – v – Bayusuf Brothers Limited [1983] KLR 229 held that applications for leave to amend pleadings should be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. In that case the application for leave to amend was brought six (6) years late. It was further held that amendments which would contain allegations completely inconsistent with previous pleadings in the same suit cannot be allowed especially if they are late as they would delay fair trial and would prejudice the other side.

The cases cited to me by counsel for the plaintiff viz Central Kenya Limited – v – Trust Bank and 4 others [CA No. 222 of 1998] (UR), Celtex Oil (K) Limited – v – East African Specter Limited [HCCC No. 324 of 2003], Crown Berger (K) Limited – v – Pasta Hardware (K) Limited [HCCC No. 1017 of 2002] UR and Alpha Knits Limited – v – Kenindia Assurance Company Limited [HCCC No. 2030 of 2000] (UR) considered completely different circumstances and are clearly distinguishable from the facts of this case.

In the end for the reasons discussed above and in the special and distinct circumstances of this case, I refuse to exercise my discretion to allow the plaintiff to re-amend his plaint. His application dated 1<sup>st</sup> March, 2010 is dismissed with costs.

It is so ordered.

**DATED AND DELIVERED AT MOMBASA THIS 7<sup>TH</sup> DAY OF JULY 2010.**

**F. AZANGALALA**

**JUDGE**

Read in the presence of:-

No appearance for either party.

**F. AZANGALALA**

**JUDGE**

7<sup>TH</sup> JULY 2010