



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

Civil Case 28 of 2007

HARITH ALI EL-BUSAIDY.....PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LTD.....DEFENDANT

R U L I N G

By a Chamber Summons application dated 12th October 2007, pursuant to the provisions of Order VIA Rule 3, 5 and 8 and Order VIII Rule 2 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act, the applicant seeks orders:

- 1. That this honourable court be pleased to grant leave to the defendant to amend its defence to introduce a counterclaim in terms of the draft amended defence and counterclaim annexed hereto.**
- 2. That the draft amended defence and counterclaim be deemed as duly filed upon the payment of the requisite court fees.**
- 3. Costs of this application be provided for.**

The application is based on the grounds:

- (a) That the intended amended defence will enable the court to completely and effectively adjudicate upon the issues before the court.**
- (b) That the intended counterclaim arises from the issues the subject matter of the instant claim.**
- (c) That it is decisive that the defendant's claim as evinced from the counterclaim be tried together with the instant suit to avoid duplicity of the proceedings and to save the honourable court's time.**
- (d) That no prejudice whatsoever will be occasioned to the plaintiff by the granting of leave to amend.**

The application is predicated upon the annexed affidavit of **Evans Olwale** sworn on the 12th day of October 2007.

On behalf of the applicant it was argued, that the plaintiff charged the suit property to the defendant to secure the payment of a loan advanced to Cleopatra Theatre Ltd.

That as at 1st August 2007 the plaintiff was indebted to the defendant in the sum of Kshs. 4,275,908/50. The said sum has now grown to Kshs. 11,789.390/45 as at 31st May 2006 by reason of accrual of interest and other charges.

That in view of the consent order, recorded herein to have the main suit listed for hearing, the defendant now wishes to counterclaim the said sum against the plaintiff.

The defendant consequently craves leave of this court to amend the defence in terms of the draft amended statement of defence and counterclaim exhibited as "EO 1".

That the amendment will enable the court to effectively and completely adjudicate upon all issues in the subject matter before the court. That the amendment will occasion no injustice whatsoever to the plaintiff. If anything the amendment of the pleadings to include the counterclaim will help avoid duplicity of proceedings and save the court's time in addition to costs.

The respondent filed and relied on the grounds of opposition dated 22nd October 2007. On behalf of the respondent it was argued, that amendment can be granted under Order VIA Rule 3:

- (a) To correct the name (Order VI Rule 3) of a party or substituted party.
- (b) To alter the capacity in which a party sues (Order VI Rule 3(4))
- (c) If the cause of action arose out of same facts or substantially the same facts as a cause of action on which the relief has already been prayed for in the suit by the party requesting for the amendment (Order VI Rule 3(5)).

The proposed amendment under paragraph 19 of the proposed counterclaim states that the defendant reiterates the contents of paragraph 1-17 and claims against the plaintiff the sum of Kshs. 11,789,390/45 outstanding as at 31st May 2006 together with accrued interest at bank rates.

Paragraph 1-17 includes paragraph 4 of the original defence whereat the claim is in respect of a charge which was extended in or about December 1985. A counterclaim being a cross-claim is subject to the law of limitation. The counterclaim proposed is a claim upon a charge or mortgage which under Section 19 of the Limitation of Actions Act (Cap 22) Laws of Kenya may not be brought to recover the principal sum of money secured on land or movable property to recover proceeds of land after the end of 12 years.

The proposed amendment does not disclose when the cause of action arose except as set out in paragraph 4 of the original defence. It does not plead interest which is not recoverable after 6 years under the Limitation of Actions Act (Cap 22) Laws of Kenya. In effect the court is not being asked to add anything to the pleadings.

Moreover, the proposed amendment is not sought within a reasonable time. The defence was filed on 26th September 2003. The lapse of 4 years amounts to inordinate delay. The proposed amendment is also sought on the hearing day after the filing of issues and list of documents – after due compliance with Order 10 Rule 11A.

The supporting affidavit is defective in so far as the same is sworn by a person not competent to do so. Moreover, the deponent does not state when the property was charged and what was the interest. All these omissions, it was submitted, was meant to avoid Section 19 of the Limitation of Actions Act (Cap 22) Laws of Kenya.

Last but not least, ground (b) of the application does not conform with Rule 3(5) of Order VI hence irrelevant.

I have carefully analysed all the issues raised by this application. I have read and appreciated all the

authorities cited before me by either side. Having done so, I wish to restate the general law on amendment of pleadings and then zero in on the specific issues raised by the application.

The overriding consideration in application for leave is whether the amendments are necessary for the just determination of the controversy between the parties. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs. The paramount consideration is whether the amendment sought is necessary for the effectual and complete adjudication of all the questions involved in the suit.

In my view the submission on either side raises three main issues for determination.

First, and most important, whether the proposed amendments are sought to be made, after the relevant periods of limitation and accordingly offend the rules of pleadings.

Second, if made without undue delay.

Three, whether made in good faith.

Regarding the first issue, I have noted that the proposed amendment does not disclose when the cause of action arose except as set out in paragraph 4 of the original defence. Moreover, it does not plead interest which is not recoverable after 6 years under the Limitation of Actions Act (Cap 22) Laws of Kenya. To my mind, the only amendments in respect of which the court has a discretion to allow even though made outside the limitation period are those contemplated in subrules (3), (4) and (5) of Order VI Rule 3(2). These are amendments to correct the names of the parties, or to alter the capacity in which a party sues, or add or substitute a new or substituted cause of action by the party making the amendments provided the new or substituted cause of action arises from same or substantially same facts as the earlier cause of action by him/it.

It is clear to me that the amendments proposed by the defendant are not contemplated by the above rules. Accordingly, they would be impermissible if they are caught up by the Limitation. The period of limitation for claims upon a charge or mortgage is now settled. The claim may not be brought to recover the principal sum of money secured on land or movable property or to recover proceeds of land after the end of 12 years. The claim herein is in respect of a charge which was executed in or about December 1985. Moreover, interest on a charge or contract is not recoverable after 6 years under Section 19(4) of the Limitation of Actions Act. In the premises the defendant's counterclaim to the extent it seeks to recover the principal sum and interest outstanding since 1985 is statute-barred and hence illegal. The original claim is not yet stale. However, the defendant is at liberty to amend the defence provided the proposed amendment does not include a claim outside the limitation period.

Regarding the second issue-delay-a mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the other party beyond monetary compensation in costs. This is not one such delay. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.

I also note that the suit was filed on 9th August 2003. Appearance entered on 12th September 2003. Defence filed on 26th March 2003. Then several interlocutory applications made in between. Last but not least, the plaintiff's list of "agreed" issues dated 3rd July 2001 was filed on 25th July 2007. The same was not signed by the defendant. Only the plaintiff has filed issues. In effect the parties have not fully complied with order X Rule IIA of the Civil Procedure Rules. Hence the application for amendment has been made without undue delay.

Regarding the third issue – good faith- I am of the view that there is no bad faith exhibited so far. I am satisfied as to the truth and to the substantiality of the proposed amendment subject to the law of limitation as aforesaid. The amendment has been sought at a time when the parties are in the process of complying

with Order X Rule 11A. That is comparatively an early and opportune moment having regard to the progress of the case. The amendment is thus not sought in bad faith.

The upshot of this application is that leave is granted to the defendant to amend its statement of defence and to introduce a counterclaim as proposed **provided that the claim is confined to a period not exceeding limitation of 12 years as regards the principal amount or six years as regards interest.**

The amended statement of defence and counterclaim to be filed and served on the plaintiff within 14 days from the date of this order. The plaintiff shall reply to the amended defence and answer to the counterclaim within 14 days of being served with amended defence and counterclaim. The plaintiff shall have the costs of this application.

DATED and delivered at Malindi this **21st** day of **February 2008**.

N. R. O. Ombija

JUDGE

Mr. Gekanana for Mr. F. N. Mulwa for Respondent

Ms. Korir for Waweru for applicant