



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI (MILIMANI COMMERCIAL COURTS)

CIVIL SUIT 406 OF 2004

GEORGE GIKUBU MBUTHIA.....PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.....RESPONDENT

RULING

The application before me is a Chamber Summons application dated 22nd February 2008 brought under **Order VI, rule 3(1), Order VIA rule 3(1) and 5(1) of Civil procedure Rules**. It seeks leave for the Applicant, who is the Defendant in the suit, to amend its defence in terms of the draft amended defence as annexed.

The Applicant has set out the matters intended to be pleaded in the proposed amended defence on the face of the application and has annexed the draft amended defence. The grounds for the application are cited as ground 3 and 4 of the application as follows:

“3. It is necessary for the defendant to amend its defence in order to plead the above matters which it relies on for its defence.

4. The proposed amendments will assist this Honourable court to determine the real issues in controversy between the parties.”

There is also an affidavit by **JULIUS MWANIKI** sworn in support of this application.

The application is vehemently opposed. The Plaintiff who acts in person filed a replying affidavit sworn by himself dated 24th March, 2008, in opposition to the application with annexures thereto.

I have considered the submissions by both Counsel for the Applicant and the Respondent/Plaintiff together with all the cases relied upon by both. I have also considered the pleadings as filed, the intended amendments, the affidavits by both parties and annexures thereto.

The Applicant’s contention is that it desires to amend its defence in order to plead to matters of fact and law. These matters of facts are meant to greatly assist the court determine the real issues between the parties, according to **Mr. Njeru** for the Plaintiff. Learned Counsel for the Applicant submitted that the Defendant wished to plead to facts to demonstrate two points of law;

one, that the Plaintiff’s suit is bad in law under Order XXI Rule 81(3) of Civil Procedure Rules,

owo, that the plaintiff's suit is *res judicata* and that the court had therefore no jurisdiction to entertain it.

Counsel relied on the case of **Central Kenya Limited vs. Trust Bank Limited and Others [2002] 2EA 365** where **Gicheru, Bosire and Owuor JJA** held:

“The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided (i) there had been no undue delay, (ii) no new or inconsistent cause of action was introduced, (iii) no vested interest or accrued legal right was affected and (iv) the amendment could be allowed without injustice to the other side. Accordingly, all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs; Beoco Ltd. v. Alfa Laval Co. Ltd. [1994] 4 All ER 464 adopted. Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend. The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.”

Counsel also relied on the case of **Joseph Ochieng and Another vs. First National Bank of Chicago CA No. 141 of 1991** where **Gachuhi, Tunoi and Shah JJA** set out the principles that should be applied by a court in determining an application of this nature as follows: -

“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 the 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 the 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 could 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 plaint 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.”

Counsel also relied on the case of **Eastern Bakery vs. Castellino 1958 EA 461** holding (ii) where **Sir, K O'Connor, P.** held that amendments should freely be allowed unless they would cause injustice to the other party, which cannot be compensated by an award of costs.

The Respondent has opposed the application and vehemently so. If I understood him clearly, the Respondent's contention was that the Applicant should not be allowed to amend its defence as to allow it would in effect be giving the Applicant the right to bring in a party into the suit. I think that the Respondent's mind was that the Applicant had no *locus standi* to amend its defence to plead to facts, which took place before it came into being. According to the Respondent, the facts being introduced took place in 1998, long before the Applicant came into being by operation of Law in 2002, 15th July. The Respondent cited **Njoroge vs. Mbiti, 1986 KLR 519**, which deals with *locus standi* to bring an application for review where one of the parties to the suit had died. The case can be distinguished from

the instant case since the application before court is for amendment of pleadings and not review.

The Respondent also relied on the ruling of **Osiemo, J.** in the case of **Nationwide Finance Co. Limited vs. Meck Industries Limited & Others HCCC No. 3231 of 1985** where the learned Judge observed:

“First when Hamilton, Harrison & Mathews instituted the process and applied to set aside the auction sale, they were not properly on record, since 1998 the Consolidated Bank had not taken over the assets of Nationwide Finance Co. Ltd. who were the holders of the decree which led to the sale of the suit property. Consolidated Bank took over the assets of Nationwide Finance Co. Ltd. on 15th July, 2002 pursuant to Consolidated Bank of Kenya (vesting) Order 2002. The order obtained by the Consolidated Bank was a nullity for it did not establish any locus on the basis of which it instructed Hamilton Harrison & Mathews to apply for the Sale of 18th March, 1998 to be set aside. This ought to have been done by Nationwide Finance Co. Ltd.”

I must state here that what was before **Osiemo, J.** was the original case between *inter alia* the Lender Bank and the borrowers. The case is related to the instant case in that the Plaintiff herein, bought the property charged in favour of the Lending Bank by the borrower, but which sale was nullified by the High Court in that suit. It is the nullification of that suit that led to the Plaintiff/Respondent herein filing this suit against the Defendant, which is the Bank that was vested with all liabilities and assets of the ‘collapsed’ **Nationwide Finance Limited**, the Plaintiff Bank in **HCCC 3231 of 1985**. These are the facts which, according to the draft amended defence the Applicant wishes to plead and which is the subject of this application. I will get back to this later.

Finally the Respondent relies on the **Mom. HCCC No. 58 of 1998, Borka Ahmed Salim and Anor. vs. Stephen C. Ngale** in which **Maraga, J.** in an application for review of courts order on grounds of “error on the face of the record” observed that since the summons to enter appearance gave the Defendant less than 10 days contrary to the requirement under the rules, the same was invalid and all pleadings filed and proceedings held thereafter were a nullity. Clearly, the case does not apply to the instant suit. The general principle of law is however correct.

The Applicant has demonstrated that the facts intended to be introduced in the proposed amendment are necessary to enable the court to determine the real issue in controversy. The Respondent on the other hand, has not only explained how the facts intended to be introduced in the Applicant’s defence came to be but has relied on one of the ruling made in the previous suit by **Osiemo, J.** **HCCC No. 3231 of 1985**. In that ruling, **Osiemo, J.** set out the facts of that case.

As I have already stated, there is a clear relationship between the previous suit, being **HCCC No. 3231 of 1985** and the instant suit. The Respondent by introducing the ruling of the learned Judge has confirmed the Applicant’s pleaded facts in the amended defence. That in itself is proof that the Respondent recognizes the importance of those facts being disclosed to the court. Secondly, it is a clear demonstration that in the Respondent’s mind, he will suffer no prejudice or injustice if those facts are disclosed. Even though the Respondent was using the earlier case to demonstrate *locus standi*, I do believe that the facts pleaded in the draft amended defence are necessary and that the Defendant should be allowed to rely on them.

I do find that the facts pleaded by the Applicant in the Amended Plaintiff are necessary to enable the court to determine the real issue in controversy between the parties. I am also satisfied that no prejudice or injustice will be suffered by the Respondent which an award of costs would not adequately compensate.

The delay in bringing the Application is not inordinate. As I find no good cause not to allow the proposed amendments; and being satisfied as to the truth and substantially of the proposed amendment in the sense that the Respondent was himself well versed with the facts; and being satisfied that the proposed amendments are material and necessary for the determination of the suit, the same are allowed. In the result, I will allow this application by granting leave to the defendant to file and serve its amended defence within 14 days from date herein.

The Respondent has leave to amend his Complaint, in any event within 14 days from date of service with the amended defence.

The Applicant will pay thrown away costs and costs of this application to the Respondent before suit is set down for hearing subject to taxation if parties are unable to agree.

Either party has leave to apply.

Dated at Nairobi, this 18th day of April 2008.

LESIIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Njeru for the Applicant

The Respondent in person

LESIIT, J.

JUDGE