

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

Civil Case 86 of 2005

SAMUEL ONYANGO OKELLO 1ST PLAINTIFF

EXHIBITION LIMITED: 2ND PLAINTIFF

UMANI LIMITED.....3RD PLAINTIFF

VERSUS

CITIBANK N.A.....: DEFENDANT

RULING

The defendant's chamber summons dated the 17th March 2006 seeks leave of this court to amend the defence to join Fintea Limited as a defendant in this case and counterclaim against it sums of Kshs. 43,410,785/- and USD 1,352,973. It is brought under **Order 1 Rule 10, Order 6A Rules 3(1)(5) and 8, and Order 8 Rules 2,6,7,8 & 20** of the **Civil Procedure Rules** as well as **Section 3A** of the **Civil Procedure Act**. It is predicated on the grounds, *inter- alia*, that at the time they filed the defence the defendants advocates did not have full instructions as the documentation relating to the matter which span a period of over 10 years were archived in both the Mombasa and Nairobi branches of the defendant bank and were therefore not readily available; that the proposed counterclaim relates to the self same transaction pleaded in the plaint; that Fintea Limited is a necessary party in this suit and to effectually dispose of the matter they should therefore be joined; and that the amendment will obviate a multiplicity of suits. The application is supported by two affidavits of Nathan Njoroge, the East Africa legal officer of the defendant.

The application is opposed by the defendants and Fintea Limited mainly on the grounds that the counterclaim sought to be brought against Fintea Limited arises from a different cause of action which if allowed to be lumped together with the claim in this suit will not only confuse issues but will also be prejudicial to both the defendants and Fintea Limited; and that the proposed counterclaim is time barred under the Limitation of Actions Act. In the replying affidavit Andrew Ogot, a director of Fintea Limited, deposed, *inter- alia* that the defendant's claim against Fintea Limited ought to be brought in a separate suit as the issue between those two parties would be whether the latter owes any money arising from their relationship spanning from 1994 to 1996 whereas the issue between the plaintiff and the defendant is whether there was consideration from the defendant for the various properties that the defendant took a charge over and got title deeds deposited with it. He also stated that the defendant's proposed claim against Fintea Limited is statute barred and therefore bad in law.

Counsel for the parties submitted along their respective clients' averments as summarized above and cited several authorities.

It is trite law as stated by Sir Kenneth O'Connor in **Eastern Bakery Vs Castelino [1958] E.A.461 at page 462** that:-

"... amendments to 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"

Having given due consideration to this matter I find the plaintiffs' contention disingenuous. The main claim in this suit is that by a false representation made by the defendant to the first plaintiff, as a director of Fintea Limited, that the defendant was to make advances to Fintea Limited, the first plaintiff charged his property situate in Mombasa and known as L.R. No.1191/1/ Mainland North and persuaded the second and the third plaintiffs to deposit with the defendant title deeds relating to their five properties. The defendant, the plaintiffs further claim, never made any advances to Fintea Limited but instead now claims that those securities were meant to secure Fintea Limited's then existing unsecured debts. The plaintiffs therefore claim mainly for a discharge of the first plaintiff's said property and the return to the second and third defendants' of their title deeds for failure of consideration.

The defendant on the other hand, while admitting that the securities were meant to secure Fintea Limited's existing indebtedness, contend that they also secured further advances that it (the defendant) did thereafter make to Fintea Limited. They further contend that the proposed counterclaim includes those further advances.

It is therefore clear to me that both the plaintiffs' claim and the defendant's proposed counterclaim arise from the same transaction and as stated in **Order 6A Rule 5(1)** of the **Civil Procedure Rules-**

“For purposes of determining the real question in controversy between the parties, or of correcting any defect or error in any proceeding, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise.”

and to avoid a multiplicity of suits, they should be tried together. In so doing no prejudice will be caused to the plaintiffs which cannot be compensated by costs. I therefore allow this application with costs to the plaintiffs.

DATED and delivered this 6th day of December 2007.

D. K. MARAGA

JUDGE