



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

Civil Case 90 Of 2005

AMALO CO. LIMITED PLAINTIFF

VERSUS

INVESTMENTS & MORTGAGES BANK LIMITED DEFENDANT

RULING

In paragraph 6 of the plaint, the plaintiff avers:

"After having made the aforesaid advances the defendant pursuant to a letter of offer dated 20th April 1999, agreed to offer to the plaintiff another facility of KSh.75 million made up of KSh.25 million being overdraft facility and KSh.50 million being loan facility."

The above paragraph reflects the business relationship between the plaintiff and defendant, which has now gone sour. The plaintiff sought and obtained an injunction against the defendant on the strength of the plaint dated 25th July 2005, in prayer F of the plaint the plaintiff seeks:

"A declaration that the charge registered against land parcel number Kisumu Municipality/Block 7/359, Block 11/133 and 12/163 is null and void."

The defendant filed a defence but subsequently filed the present application seeking two main prayers:

- 1) That this Honourable Court be pleased to grant defendant/applicant leave to amend its defence in terms of the draft amended defence and counterclaim annexed hereto.**
- 2) That, the draft amended defence and counterclaim be deemed to have been duly filed and served after the payment of the requisite Court fees.**

The defendant intends to introduce a counter claim in the sum of KSh. 75 million plus interests against the plaintiff. The applicant states that it wishes to plead the existence of a contract of lending between the parties herein. And as a result of that contract in which the plaintiff made financial benefits, the defendant wishes to make a counterclaim. It is the contention of the applicant that it would not have any other recourse apart from seeking the current amendment. And without the counterclaim the Court may not be in a position to conclusively determine the issues raised in the plaint and defence.

It is further contended that the defendant wishes to plead a declaration of the charge, the plaintiff is disputing. And above all the amendment is not introducing a new subject matter or changing the character of the matter. In paragraph 19 of the proposed defence and counterclaim the applicant

introduces the debt and in paragraph 20 adds anew cause of action that the lending was secured, resulted and/or created by an equitable mortgage within the meaning of the Equitable Mortgages Act.

The application was strenuously opposed by Miss Pandit Advocate who contended that the application is bad in law and took great exception to the introduction of the new cause of action, as being an abuse of the judicial process. It was submitted by Miss. Pandit Advocate, that a party seeking the enforcement of an equitable Mortgage can only do so under Order 36 Rule 3A. And such a relief can only be granted if a party comes to Court by way of originating summons and not by plaint. It is the case of the defendant that the plaintiff by depositing title deeds, with the defendant, notwithstanding the regularity of the charges, an equitable mortgage has been created.

Order 36 Rule 3A states:

"Any mortgagee or mortgagor, whether legal or equitable or any person entitled to or having property subject to a legal or equitable charge or any person having the right to foreclose or redeem any mortgage whether legal or equitable, may take out as ofcourse an originating summons, returnable before the judge in chambers, for such relief of the nature or kind following as may be by the summons specified, and as the circumstances of the case may require, that is to say sale, foreclosure, delivery of possession by the mortgagor, redemption, reconveyance, delivery of possession by the mortgagee."

Order 36 Rule 3A talks of a party having legal or equitable rights under or over property, which is subject to a legal or equitable charge may commence it's cause of action by way of originating summons.

In my understanding Order 36 Rule 3A does not require wholesomely a party who intends to establish an equitable right to commence his cause of action only by way of originating summons. The word used is "**may**" which is optional and in my view is not a restriction to the present matter under my determination. It is the contention of the defendant that by depositing the titles of the three parcels, the plaintiff intended to create an equitable mortgage over the suit properties for it derived beneficial and financial interests from such action. It is the contention of the plaintiff that there is no legal charge over the suit premises to enable the defendant to exercise its statutory power hence the purported charge would be illegal.

In paragraph 10 of the plaint, the plaintiff states that it is not indebted to the defendant under the charge and therefore cannot derive any right from the charge which is illegal. In essence the plaintiff contends that the charges created over the suit premises is unenforceable charge, which is null and void for want of legality. In short the plaintiff contends that there is no legal charge over the suit premises. The relevance is that the plaintiff has sought for declaration that the charge registered over the suit premises is null and void.

The paramount and fundamental question is that an amendment meant to overreach or with ulterior motive would not be allowed. The Court is duty bound to determine the materiality of the proposed amendment without deciding the merit of the new cause of action. It is important to bear in mind that a party would be allowed or permitted to make amendments to its pleadings at any stage of the proceedings may be even to add a new cause of action or reframe or reformulate his cause of action so as to bring out the real questions in the controversy between the parties. As a matter of caution the Court is empowered to ensure that the party seeking amendment is acting in good faith and the opposite party would not suffer or sustain irreparable injury or prejudice of which compensation by an award of costs would be inappropriate.

In **Bullen and Leake**, Chapter on Amendment of pleadings at page 1, 2, & 3 it was stated:

"The Rule that a party is bound by his own pleading is to very large extent mitigated by the powers to amend pleadings. The object of the amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts or the true relief or remedy which the parties really and finally intend to rely

on or to claim. The powers of amendment are intended to make more effective the function of the Courts to determine the true substantive merits of the case, to have more regard to substance than to form and thus to free the parties and the Court from the technicalities or formalities of procedure. Sometimes the litigant may find it necessary to revise his own pleading to re-state or reframe his case, before the action proceeds to trial in order to bring out the real question in controversy between the parties. Under its general powers of amendment, for the purposes of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings, the Court may at any stage of the proceedings and either on its own or on an application of any party to the proceedings, order any document in the proceedings to be amended on such terms as to costs or otherwise as may be just and in such manner if any as it may direct."

It is clear that in fulfilling its core primary function of determining the dispute on the real and pertinent issues, the Court is empowered to allow amendment at any stage, provided no prejudice shall be visited to the opposite party. The only way to inject or improve a cause of action is to seek an amendment so that any matter with even semblance of cause of action can be injected with real life by an amendment. The purpose of an amendment is to bring out the real questions and controversies between the parties before court. All the issues important for the just determination of the dispute must be placed on the table. In my understanding an amendment must be intended to make more effective and efficient the primary function of the Court, which is to determine the dispute on substantive merit. It is intended to lay on the field the real controversy and would essentially and effectively shape the landscape of the case as between the parties

It is the case of the applicant that the amendment is a necessary attempt to canvass the whole cause of action of the defendant to expedite the dispute that concerns the parties in a more focussed manner. However the respondent avers that the amendment is going to raise a new cause of action and it would be a complete departure of the case in its original position. It is clear that the dispute between the parties is based on a contractual relationship, the centre of which is the charge document over the three suit properties. The parties had a mutual or cordial financial relationship until the defendant attempted to exercise **what the plaintiff calls non-existent statutory power.** The contention by the plaintiff is that the defendant has no statutory right to base its statutory notice because the charge is invalid. If I understand the case of the plaintiff, **the defendant has no statutory right or power because of the invalidity of the document, which is central to the exercise of the statutory power.** It states that the charge document does not reflect the terms and condition as agreed between the parties but was fraudulently altered and varied after it was executed by the plaintiff and defendant. As a result the plaintiff alleges that it is not indebted to the defendant under the charge, as the alteration is a deliberate deception by the defendant to gain a false advantage over it. Thus the defendant would have no right of demand and the exercise of the statutory power under the purported charge would be illegal and would not be available to the defendant. In short the defendant is being accused of incorporating clauses into the original charge document without the consent of the plaintiff and such adulterated document cannot be a true representation of the contractual obligation of the parties, hence no right has accrued from such invalid document. In essence the plaintiff **asserts that the alleged alterations released the plaintiff from its obligations under the charge.**

As a result of the above may be genuine and innovative piece of pleadings, the defendant found itself in a dilemma and may be in a precarious financial position. Faced with the dilemma and bleak financial situation in respect of the subject matter, the defendant has now sought to introduce two fundamental issues, namely:

1) A counterclaim of KSh. 73 million with interest.

2) That it is holding the titles to the three suit properties by virtue of having acquired an equitable right under the Equitable Mortgages Act. The defendant states that the plaintiff deposited the said titles to secure financial accommodation amounting to KSh.75 million and the lending having taken place, there is a creation of an equitable mortgage over the suit properties. Miss. Pandit Advocate complains that the defendant in the proposed amendment wants to introduce a new issue and such

offends Order 36 rule 3A.

The pleadings including the counterclaim would reflect that the titles in issue are properties registered under the land registered Act Cap 300, However Miss. Pandit Advocate alleges that there is no provision for creation of a charge by way of Equitable Mortgages under Cap 300. Miss. Pandit Advocate further submits that the applicant cannot take refuge under the Equitable Mortgages Act, in a matter solely governed by Cap 300 Laws of Kenya. The dispute between the parties is at its infancy stage and I do not want to make some conclusive statements of facts and law, However it suffices to say that in situations of war, you cannot determine the nature and kind of weapons the opposite party would use against you to achieve its desired goal of winning the war, provided the rules, conventions and known principles of engagements are observed. The kind of arsenals or weapons to be used in situations of war usually depends on the exigencies at the ground and whether such weapon of attack or defence would annihilate the enemy into total submission or surrender. What the defendant intends to do is to make an appropriate defence or attack on the weapons directed on its face with a likely result of destroying or defeating its cause of action. The battle has just started and it is only right for the parties to put all their weapons on the field in order to resolve the real controversy. The defendant would not have any other forum to agitate or fight the deadly weapons directed on its interest, other than seeking to avail proper material or weapon to answer the innovative and inventive pleading by the plaintiff. And a such an amendment to include the counterclaim is necessary to show the correct and true position of the dispute.

As far as I can comprehend the pleadings of the parties, it is the plaintiff who raised the invalidity of the charge and since the charge is attacked, the defendant may have genuine apprehension of its statutory powers. If the statutory power is lost through the invalidity of the charge, the engine of the defendant's case would have been destroyed or lost. In an attempt to salvage such unforeseen legal situation, the defendant is saying that notwithstanding the attempt by the plaintiff to invalidate the charge, we shall still be exercising an equitable right over the suit titles. The raising of equitable right as a counterclaim is in my view genuine attempt to answer the allegations of the plaintiff in rubbishing the central document.

If such a defence is not put forward at this early stage, the defendant would be completely bereft of any opportunity of putting forward its case to be determined on merit. The plaintiff states that it is not indebted to the defendant, However by the amendment, the defendant is saying that you may attack our statutory power but nevertheless, we have a liquidated debt of KSh. 73 million against you. And further despite your attempt to defeat our statutory right, we shall still exercise or reserve our equitable right over the suit titles by virtue of you having derived some financial and beneficial interest.

In Civil Appeal Number **784/1976 OMAR VS E. A. CARGO HANDLING SERVICES LIMITED**,
Aragon J. held:

"I am only too well aware that amendments may be allowed at any time upto delivery of judgment and that applications for amendment of pleadings should generally be viewed sympathetically provided that any damage which may arise as a result of the amendment can be cured by way of costs."

There is no justification to show that the proposed amendment would defeat or take away a position or an advantageous position obtained by the plaintiff. I fail to comprehend or appreciate the nature of injustice that would be suffered by the plaintiff if the proposed amendment is allowed. It is the plaintiff who wants to displace the defendant of its position by attacking the central document and I do not expect the defendant to fold its hands behind its back to await eminent danger directed at its doorsteps. The necessity to introduce the counterclaim is obviously and reasonably important to enable the defendant to safeguard its interest in the dispute and more so to enable the Court to decide the matter on substantial merit.

It is true that the titles in issue are properties registered under Cap 300 but by raising a defence in the alternative of an equitable right under the Equitable Mortgages Act, the defendant does not in my view depart from known rules of pleadings. The raising of the equitable right is a fallback if the statutory right is defeated or destroyed by the plaintiff. There is nothing wrong in raising an alternative defence

especially when it is the plaintiff who started to displace the cardinal principle of the exercise of statutory power. By making an alternative defence or counterclaim by way of equitable right, the defendant does not take refuge under the equitable Mortgages Act. In any case there is nothing wrong in taking a refuge in another place when your shelter has been attacked or earmarked for attack. Thus it would appear to be sufficient to plead against the plaintiff any counterclaim related to the current cause of action, so that the amendment can bring before Court the real questions or issues between the parties to the dispute.

It may be true as stated by Miss. Pandit Advocate, that there is no reason by the applicants as to why no counterclaim was filed at the time of filing the defence. The plaintiff may be aggrieved by the false hope it got from the earlier defence that did not address the substantial issues raised in its plaint, However the crystallization of a right cannot be a consideration to refuse an amendment and cannot in my view extinguish the right of a party to seek amendment of his cause of action. The proposed amendment does not take away or extinguish a right acquired and cannot be said to circumvent an already disclosed defence or point of attack. A party has the right to reframe, restate and/or reformulate his case to bring out the real controversy in the open.

Having taken the above view, it is my decision that the amendment is a genuine and ingenious attempt to make good, what was not discovered at the time the defence was filed. There is no prejudice or irreparable harm that would be suffered by the plaintiff if the amendment is allowed. The amendment is an adequate answer to the sophisticated plaint put forward by the plaintiff to achieve its version of justice. Justice must look at both sides of the road. Having given this matter my utmost consideration, the application is proper and deliberate attempt to seek justice and bring out the real questions to be answered by the Court during the trial.

Order:

The application is allowed with costs. Let the defendant file and serve it's amended defence within the next 10(ten) days. The plaintiff shall be at liberty to respond within 3(three) days of service.

Dated and Delivered at Kisumu this 19th day of January, 2005.

M. Warsame

Judge

19.01.2006

Coram Warsame - J.

Miss. Pandit for the respondent.

Miss. Shaw for the applicant.

Olivia Court Clerk.

Court:

Ruling read in open Court in the presence of both Advocates.

M. Warsame

Judge

Miss. Pandit:

There were some interim orders which were in force and we need to extend upto the hearing date.

Miss Shaw:

I pray for two days.

Court:

Hearing 22.03.2006. Interim orders extended. A copy of the ruling be supplied to the parties.

M. Warsame

Judge

MW/moo