



**REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAIROBI  
COMMERCIAL DIVISION, MILIMANI**

**Civil Suit 1437 of 1999**

**MICHAEL THOMAS KINYANY.....PLAINTIFF**

**VERSUS**

**BULLION BANK LIMITED  
UNDER STATUTORY MANAGEMENT OF THE**

**CENTRAL BANK OF KENYA LIMITED.....DEFENDANT**

**RULING**

What is before the court is the defendant's chamber summons, brought under Order VIA Rules 3 and 8 of the Civil Procedure Rules. The defendants seek a further amendment to the defence to include a counter claim.

The application is brought under the grounds that the plaintiff who obtained credit facilities from the defendant had failed to liquidate those facilities. That the further amendment is necessary; therefore, for the defendant to claim the amount of those facilities, in this claim, which would avoid multiplicity of suits.

The application was opposed by the plaintiff on the grounds that the defendant filed its defence, amended it, and ought to have included all the matters it relied upon during such amendment, and accordingly the application was not justified and the same was geared to circumvent the plaintiff's notice to produce served on the defendant.

That the order sought by the defendant in its proposed amendment, for specific performance to compel the plaintiff to execute a valid charge, contradicted defendant's earlier averments, where it was deponed that the plaintiff had executed a charge, and the proposed amendment for specific performance should therefore be disallowed.

The plaintiff's final ground of opposition was on the basis that the affidavit in support of the application for amendment, was sworn by someone who was not in the employment of the defendant and who therefore ought to have disclosed his source of information.

The plaintiff's counsel stated that if the amendment was allowed it would cause injustice to the plaintiff because it would cause delay to the conclusion of the case. The general principle which guides the court when faced with application for amendment is well set out in the following two cases. In the case the BRITISH INDIA GENERAL INSURANCE CO; LTD – VERSUS – G.M. PARMAR AND CO. (1966) E.A. 172 it was held:

**“.....the general principle that the courts will freely allow an amendment to pleadings before the hearing if it can be done without injustice to the other side.”**

The case EASTERN BAKERY – VERSUS – CASTELINO [1958] E.A. 461 held as follows:

**“(ii) Amendment 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.**

**(iii) the principles applicable to amendments of plaints are equally applicable to amendments of statements of defence.”**

Having laid down the principles that guide the court in an application for amendment I need to respond to the plaintiff’s grounds of opposition. The plaintiff’s contention that the defendant ought to have pleaded its whole case when it filed a defence or when it first amended its defence is not well taken. Plainly Order 6 of the Civil Procedure Rules allows the court to grant orders for amendment of pleadings freely subject to there being no injustice to the opposite party. The plaintiff failed to show what injustice it would suffer if the amendment is allowed now rather than when the defence was first amended. I do not accept that this present proposed amendment will in any delay the hearing of this suit. This suit was filed in 1999; the plaintiff has failed to demonstrate that it has vigorously prosecuted this suit, since its inception.

The plaintiff’s other ground that the proposed amendment is geared to circumvent the plaintiff’s notice to produce displays the plaintiff’s misunderstanding of the section 69 of the Evidence Act. Section 69 allows a party who has given notice to produce, to the opposite party, the right to rely on secondary evidence.

I do not accept the plaintiff’s contention that the defendant contradicts itself in previous averments with its proposed amendment seeking specific performance. The averments in previous affidavit spoke of the plaintiff’s charge document. The proposed amendment seeks specific performance to order the plaintiff to execute a valid charge. Where is the contradiction there? It seems obvious that the defendant by the proposed amendment accepts what it holds may not be a valid charge.

The plaintiffs suggestion that the deponent of the affidavit in support of the application for amendment ought to have disclosed the source of information was not well taken. The deponent may very well have ascertained the information from documentary evidence and in that case was not required to disclose the source of information.

I believe` it is clear that I find there is no sufficient reason shown why the orders sought by the defendant ought not be granted. I find that the defendant’s application for amendment is bona fide and is merited.

The orders of the court are: -

**(i) That the defendant is hereby granted leave to amend its defence as prayed in prayer (1) of chamber summons dated 11th October 2005.**

**(ii) that the defendant is to file a further amended defence, as stated in order (i) here above, within 7 days from this date hereof.**

**(iii) that the costs of the chamber summons dated 11th October 2005 are awarded to the plaintiff in any event**

Dated and delivered this 25th day of November 2005.

**MARY KASANGO**  
JUDGE