



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 1585 OF 2000

GIRO COMMERCIAL BANK LIMITEDPLAINTIFF

VERSUS

NAKUMATT HOLDINGS

**LIMITED1ST
DEFENDANT**

**SUPERFOSS LIMITED.....2ND
DEFENDANT**

**PANKAJ MOHANLAL LAKHANI3RD
DEFENDANT**

**DILIP MOHANLAL LAKHANI4TH
DEFENDANT**

RULING

There are two applications that were argued before me, both dated the same date and both seeking similar prayers.

One application is made by the first defendant and the other is by the 2nd, 3rd and 4th defendants.

These applications are dated 6th August 2004 and are brought under Order 6 A of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.

The Defendants seek leave to amend their respective defences as annexed to their application.

Both applications have similar grounds, namely: -

- (a) That due to time constraint, gravity and urgency of the matter, defendants defence left out particulars material to this matter filed.
- (b) That it would be in the interest of justice and for purposes of determining all the real issues in that the defendants are allowed to amend their defences.
- (c) That time allowed for amending the statement of defence without leave expired.

(d) That the defendants will not be able to reasonably and usefully defend this suit and would suffer irreparable loss if the proposed amendments are not effected.

(e) That the Plaintiff and the defendants will not suffer prejudice if this application is granted.

The 1st Defendant's counsel submitted that the 1st defendant had left out important issues, which it now seeks to include by the amendment. She argued that the 1st defendant had not delayed in bringing the present application particularly when one considers that Order 6 provides that an amendment can be made at any stage in the proceedings.

The counsel for the 2nd, 3rd and 4th defendants reiterated and supported the argument by counsel for the 1st defendant.

He further submitted that the suit was still at an early stage since it had not been set down for hearing. He concluded by saying that the Plaintiff will not be prejudiced by the amendment.

The plaintiff in opposition said that the amendment is being sought 4 years after the suit was filed and it was evidence that the defendant were intend on preventing the hearing of this suit.

The Plaintiff counsel argued that the Plaintiff will be prejudiced if the present amendment is allowed and said that such amendments delay the hearing of the suit and thus cause hardship to the plaintiff. Counsel requested the court to look at those amendments to determine whether they breathed life in the defence.

In regard to the application by the 2nd, 3rd and 4th defendants the plaintiff argued that the same was incompetent for the affidavit in support was sworn by a person who stated that he was the 3rd defendant but the name of the deponent did not match the name of the 3rd defendant. Indeed looking at the name of the 3rd defendant the first two names are similar to the names of the deponent but the last name differs. The 3rd defendant's third name is **LAKHANI**; the deponent's third name is **LANKANI**.

This difference to my mind does not go to the substance of the application and I am certain that it did not cause any prejudice to the plaintiff. Any way there is a further supporting affidavit by 4th defendant. The plaintiff's counsel further drew the court's attention to the proposed amended defence annexed to the application of 2nd, 3rd and 4th defendants. Beneath the heading of that proposed amended defence are the words: -

“The 2nd, 3rd and 4th Defendants shall oppose the application dated 6th of July 2004 on the following grounds”.

Thereafter follows the various paragraphs of the defence.

The counsel for 2nd, 3rd and 4th defendant said that that portion quoted above was included by mistake in Amended defence. He argued that he would be seeking for leave to amend the defence by excluding the quoted portion.

The Plaintiff relied on the case of **HCCC (Milimani) No. 739 of 2003**, which Justice Ringera (as he then was) refused an amendment on the basis that the factual basis of the ground of leave to amend was not made out.

Plaintiffs other authority was **CENTRAL KENYA LTD – v - TRUST BANK LTD. (2000) 2 EA** page 365. The holding of the Court of Appeal in part stated: -

“ 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”.

The 1st defendant relied on Mulla “*The code of Civil Procedure*”. Considering counsel’s submissions and the authorities relied on, I am of the view that the defendant’s applications are deserving considering the liberal right, that is afforded by Order 6 A, to amend pleadings.

I am conscientious of the Plaintiff’s objection and particularly to the paragraph in the proposed amended defence of 2nd, 3rd and 4th defendant. The counsel of those defendants was heard to request the court to disregard that portion which was by error typed therein.

As I said before the right to amend is liberal and is also allowed to be so sought by oral application, see Order 6 A rule 8.

Accordingly the court will allow the application made by 2nd, 3rd and 4th defendants, counsel seeking that the court does disregard the extra portion beneath the heading of the amended defence.

The courts orders are as follows: -

(1) The 1st defendant is hereby granted leave to amend its defence as per the draft annexed to its application dated 6th August 2004. The said amended defence shall be filed and served within 7 days from this date hereof.

(2) The 2nd, 3rd and 4th defendant are hereby granted leave to amend their defence as per the draft annexed to their application dated 6th August 2004, save that they will exclude in those amendments, the paragraph appearing beneath the heading and before paragraph

1. The said amended defence shall be filed and served within 7 days from today’s date hereof.

(3) That the costs of the application by the 1st defendant dated 6th August 2004 and by the 2nd, 3rd and 4th defendant dated 6th August 2004 shall be the plaintiffs in any event.

Dated and delivered this 13th day of October 2004.

MARY KASANGO

AG JUDGE