



REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

CIVIL SUIT NO 938 OF 2000

MACHARIA..... APPLICANT

VERSUS

GUARDIAN BANK LTD & ANOTHER.....DEFENDANT

RULING

I have before me an application by the first defendant for leave to amend its defence and to join one Manish Shah as third defendant to the counterclaim. The application is made on the grounds that (a) the plaintiff has challenged the validity of the charge and it is therefore necessary to set out the facts whereby the plaintiff was obliged to grant a charge in favour of the first defendant and to request for an order for specific performance in case the charge is for any reason invalid, (b) it is necessary to claim judgment for the amounts due by the plaintiff to the first defendant and to claim against the second defendant and Manish Shah as guarantors of the indebtedness of the plaintiff and for such purpose to set out the guarantees given in respect of the debt of the plaintiff, and (c) it is necessary to set out the facts relating to the guarantee or agreement to guarantee the indebtedness of the second defendant given by the plaintiff so as to obtain judgment against the plaintiff in respect of the indebtedness of the 2nd defendant. The application is supported by an affidavit sworn by Carol N Mathenge on 6.9.02. In opposition to the application there were grounds of opposition filed by advocates of the 2nd defendant and the plaintiff respectively on 24.10.02.

The application was canvassed before me on 27.3.03 by Mr Fraser for the 1st defendant/applicant and Mr Thiga for the plaintiff/respondent. An application for adjournment made on behalf of the 2nd defendant/respondent was refused and accordingly no arguments were heard from that party. Mr Fraser contended that the issue before the Court was the validity of the charge created by the plaintiff in favour of the first defendant.

He explained that what the 1st defendant was trying to achieve by the proposed amendments was to bring before the Court the fact of agreements leading to the execution of the charge so that if the Court were to hold that there was a defect in the execution of the charge, the Court can decide whether the plaintiff was obliged to create a valid security. That way, he submitted, a multiplicity of court proceedings would be avoided. In other words, the amendments were necessary to bring all matters in contention between the parties before the Court and to have them tried in one action. He submitted that no rights of the plaintiff had been prejudiced and indicated that the first defendant was prepared to pay the plaintiff's thrown away costs.

Mr Thiga for the plaintiff submitted that the proposed amendments were unnecessary and would only serve to cloud issues for determination. In that regard, he contended that paragraph 10A of the proposed

amendments sets out other documents executed by the plaintiff and yet those documents had been referred to in paragraphs 6 and 7 of the plaint. He also pointed out that paragraph 10A (c) and (d) did not make sense as they referred to guarantees in writing dated 18.3.87 pursuant to a letter dated 18.3.97.

Those particulars also contradicted paragraph 3 of the proposed amended defence. He also objected to the proposed amendments in paragraphs 20,29 and 30 as unnecessary on the grounds that the matters sought to be introduced thereby are pleaded in the plaint and they are in any case matters of evidence for the trial.

He pointed out that paragraph 47A was confusing as it referred to the plaintiff's obligation to create a new charge in favour to the plaintiff. Paragraph 46B was also attached as confusing in that it referred to a first plaintiff when there was no such party. Paragraph 47D was attacked as unnecessary as it was a repetition of the contents of paragraph 43. And paragraph 47F was criticized on the basis that it contained matters which were irrelevant to the plaintiff in the suit as she was not a party to HCCC No 1927 of 2000 referred to therein. Counsel also attacked the proposed amendments in paragraphs 10A and 47 (c) as matters of argument and submissions rather than statements of facts. He further submitted that the proposed amendments constituted a departure from the 1st defendant's previous pleading in that they contemplated the invalidity of the charge (whereas previously, the 1st defendant had pleaded the charge was valid) and sought an order that the plaintiff should execute a valid charge. He contended that if the amendments were allowed, the plaintiff's position would be irretrievably altered. In that regard he cited *Mulla, Code of Civil Procedure*, 13th Edition Volume 1 at P 728 for the propositions that leave to amend should not be granted if the effect would be to wholly displace the plaintiff's case or convert the pleading into another of a different and inconsistent character. He also cited the case of *Steward v North Metropolitan Trainways Co Ltd* (1886) 16 QBD 178 in support of the proposition that amendments should not be allowed if they would defeat the plaintiff's claim as contemplated in the plaint. The case of *Bell & Another v Lever Brothers Ltd* [1932] AC 161 was cited as supporting the proposition. The application was also attacked on the grounds that it was without merit and was merely intended to delay the expeditious determination of the suit. In that regard, it was pointed out that the defence had been filed on 21.6.00 and the 1st defendant had filed its list of documents on 13.8.02. What new matter had arisen since the suit was apparently ready for trial to warrant leave to amend as proposed, counsel for the 2nd defendant rhetorically asked. Last but not least, it was submitted that the proposed amendments should be rejected for being highlighted in other colours in addition to red.

In reply, Mr Fraser apologized for apparent mistakes in his pleading. He pointed out that paragraphs 10A (c) and (d) of the proposed amendments should have read 16.3.97 and not 18.3.87 and paragraph 47A should have indicated that the charge was in favour of the 1st defendant. In similar vein, the reference in paragraph 47B to the first plaintiff should have been to the first defendant. He prayed that if the amendments proposed were allowed, it should be subject to corrections on the document to be filed.

As regards the point that the proposed amendment contained in paragraph 10A was unnecessary because paragraph 7 of the plaint had stated what the agreement between the parties was, counsel argued that paragraph 10A set out what documents were actually executed. He argued that there was a difference between what parties had agreed to do and what they had actually done and on that basis the amendments were necessary. On paragraph 47F and prayer (c) in the reliefs sought, he contended that the amount stated therein was a quantification of the debt which the plaintiff agreed to guarantee or give security for in paragraph 7 of the plaint. As regards the complaint that paragraphs 10A and 47C were pleadings of evidence, counsel argued that there were pleadings of the fact of the agreements executed and demands made. The pleadings of the demands made was a necessary part of a cause of action against a guarantor and for the realization of security. Paragraph 47A was also to be seen as a pleading in the alternative – a practice allowed by order 6 rule 6(2). Lastly, Mr Fraser contended that the proposed amendments did not defeat any right which the plaintiff had. If they are allowed, the plaintiff would be in no worse state than if they had been included in the original statement of defence. And amendments cannot be refused on the ground that they would defeat the plaintiff's case.

I have read the plaint, the 1st defendant's statement of defence and I have considered the application and the rival submissions. The law is well settled that amendments sought before trial should be freely granted if they are necessary to put the facts in dispute between the parties before the Court for a proper

adjudication of the matter and if there would be no injustice to the adverse party. In the latter regard, it is also well established that there can be no injustice if the prejudice to the adverse party can be compensated by an order for costs. In the matter at hand, I accept the submissions by counsel for the 1st defendant that all the amendments sought are necessary to bring before the Court all the relevant facts in contention between the parties. I reject the submissions by counsel for the plaintiff to the contrary including the submission that they cloud the issues for trial. In the latter regard, I accept the 1st defendant's submissions that paragraphs 10A (c) and (d), 47A and 47B contained clerical or typographical errors which can be corrected in the amended defence if the amendments are otherwise, allowed. I further accept the 1st defendant's submissions that paragraphs 10A and 47C are really pleadings of fact and

not evidence by which those facts are to be proved. And the pleading in paragraph 47A is really a pleading in the alternative. It is not a pleading which is inconsistent with the previous statement of defence and it does not displace the plaintiff's case. And I agree with Mr Fraser that an amendment to a pleading cannot be refused on the basis that it would have the effect of defeating an adversary's claim. I also accept his submission that if the amendments sought are allowed, the plaintiff will be in no worse position than she would have been if the matters sought to be introduced thereby had been incorporated in the original statement of defence. All in all I don't see that the plaintiff would be prejudiced by the amendments beyond cure by an order of costs in her favour.

Accordingly, there is no injustice to her if the amendments are allowed. Last but not least, I am persuaded that the amendment proposed in paragraph 47F and in prayer (c) of the reliefs is only a quantification of the debt which the plaintiff agreed to guarantee or secure as per paragraph 7 of the plaint.

Having taken the above view of the matter, I allow the application as prayed on the following terms and conditions

(i) appropriate corrections of the formal typographical or clerical errors in paragraphs 10A (c) and (d), 47A and 47B be made on the pleading to be filed and that the computer highlights of the proposed amendments be eliminated; (ii) the amended

defence be filed and served on all affected parties within 7 days of today;

(iii) the second defendant and Manish Shah are granted liberty to file and serve a reply to amended defence or defence to the counterclaim, or other pleading, as appropriate, within 14 days of being served with the amended defence and counterclaim; and (iv) the 1st defendant do pay the plaintiff's costs of this application and any thrown away costs as a result of the amendments allowed.

Orders accordingly.

Dated and delivered at Nairobi this 2nd day of May, 2003

A.G. RINGERA

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JUDGE