



**Prime Bank Limited v Kapu (Kenya) Limited & 7 others (Civil Suit 272 of 2014)
[2024] KEHC 1480 (KLR) (Commercial and Tax) (19 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1480 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT 272 OF 2014
JWW MONG'ARE, J
FEBRUARY 19, 2024**

BETWEEN

PRIME BANK LIMITED PLAINTIFF

AND

KAPU (KENYA) LIMITED 1ST DEFENDANT

SUNDIP JAGDISHROY PATEL 2ND DEFENDANT

PRAFULCHANDRA MANIBHAI PATEL 3RD DEFENDANT

VIPINCHANDRA MANIBHAI PATEL 4TH DEFENDANT

HINA SUNDIP PATEL 5TH DEFENDANT

JAGDISHROY M. PATEL 6TH DEFENDANT

NIKISUHI INVESTMENTS LIMITED 7TH DEFENDANT

KAPU LIMITED 8TH DEFENDANT

RULING

1. Before the Court is the 1st 2nd and 5th Defendant's Notice of Motion application dated 11th March 2020, brought under Order 8 Rule 3 of the *Civil Procedure Rules* seeking leave to further amend their amended defence dated 27th August 2014.
2. The application is premised on the grounds on its face, the supporting affidavit sworn by the 2nd Defendant, Sundip Jagdishroy Patel on 11th March 2020 and written submissions dated 10th May 2020. The grounds are that the Applicants wish to further amend their defence to introduce additional defences and a counterclaim against the Plaintiff in relation to the manner in which it disposed of LR



No. 209/13742 and LR No. 209/13743 over which a legal charge had been created by the Plaintiff; that the proposed amendments relate to the issues already before the Court and would be necessary to enable the Court to make a final and complete determination of the issues between the parties; that the application does not prejudice the Respondent as it shall have a chance to respond to the amended pleadings and that it is fair and just to allow this application.

3. The application is opposed by the Plaintiff who filed a grounds of opposition dated 13th March 2020 and written submissions dated 14th October 2020. The Plaintiff contends that the application is an abuse of Court process, frivolous and vexatious; that the proposed counterclaim would be futile because it would be statute barred and that the proposed amendments shall obfuscate the real issues.
4. The application was canvassed through written submissions with oral highlights. The applicants filed written submissions dated 10th May 2020 while the Respondent filed written submissions dated 14th October 2020.

Analysis and Determination

5. Having carefully considered the application before me, the grounds set out in support and the supporting affidavit, and the grounds of opposition by the Plaintiff, the submissions and authorities filed by the respective parties, I find that the only issue that arise for determination is “whether the applicant has made out a case for grant of leave to further amend its amended defence dated 27th August 2014.”
6. Order 8 Rule 3(1) of the *Civil Procedure Rules* provides that the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.
7. The principles for consideration in an application for leave to amend pleadings were laid out by the Court of Appeal in *George Gikubu Mbutia v Consolidated Bank of Kenya & another* [2015] eKLR, citing the following excerpt from Mulla, *The Code of Civil Procedure*, 18th Ed, Vol.2 at pages 1751-1752:-

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings-

- i. All amendments should be allowed which are necessary for determination of the real controversies in the suit;
- ii. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- iii. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendment;
- iv. Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;
- v. Amendment of a claim or relief barred by time should not be allowed;
- vi. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;



- vii. No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;
 - viii. The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;
 - ix. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”
8. I am alive to the fact that the Court’s power to allow a party to amend pleadings is discretionary and must be exercised judiciously and with reason, on a case-by-case basis. In the English case of *Ketteman v Hansel Properties Limited* (1988) 1 ALL ER 3S, Lord Griffiths, cited with approval by the Court of Appeal in *Joseph Ochieng & 2 others trading as Aquiline Agencies v First National Bank of Chicago* [1995] eKLR, observed that:-
- “Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion.”
9. With the above in mind, I have looked at the draft further amended defence. The Respondent has raised the preliminary issue that the proposed counterclaim would be futile because it would be statute barred.
10. I note that the applicants intend to introduce a claim for negligence and breach of duty of care. The particulars of the alleged claim are disposing LR No. 209/13742 and LR No. 209/13743 at a price less than 75% of their market values, failing to conduct a proper and accurate valuation before disposing them by way of auction and charging the 1st Defendant interest and penalty interest on a non-existent loan after disposing them.
11. As per paragraph 4, the alleged actions or inactions took place in December 2012 or January 2013. The public auction was held on 19th December 2012. The instant application was filed on 11th March 2020, over seven years from the time when the alleged negligent acts took place. Section 4(2) of the *Limitation of Actions Act* provides that:-
- “(2) An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”
12. The Applicants expressed the view that the Court retains the discretion to allow amendments despite a lapse in the limitation period. I respectfully disagree. From the above authorities, it is clear that the Court should not allow amendment of a claim or relief barred by time. As aforementioned, this Court’s discretion must be exercised with reason and judiciously.
13. Faced with a similar issue, this Court (Hon. Mabeya J) in *Nextgen Office Suits Limited v Standard Chartered Bank Limited* (Civil Suit 150 of 2018) [2022] KEHC 10346 (KLR) (Commercial and Tax) (3 June 2022) (Ruling), observed that:-
- “In the present case, if the amendment is allowed at this stage, the Defendant’s right to plead limitation will be prejudiced. Further, the Defendant contended that due to the delay, its employee who would have testified in its defence has since left its employment. Obviously, that is a prejudice that cannot be compensated by an award of costs. It is within the Plaintiff’s



knowledge why it delayed to introduce the fraud claim against the Defendant. The Court cannot act against the law.”

14. Similarly, it is my considered view that if the proposed amendments by the Applicants are allowed at this stage, the Plaintiff will be prejudiced.
15. Accordingly, I find that the application dated 11th March 2020 is without merit and it is hereby dismissed with costs.

Orders accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF FEBRUARY, 2024.

.....

J.W.W. MONG'ARE

JUDGE

In The Presence Of

Kimani holding brief for Elijah Mwangi for the Plaintiff/Respondent.

Omollo for the 1st, 2nd and 5th Defendants.

Azdak for the 2nd Defendant.

Amos - Court Assistant

