



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 30 OF 2016

FRONTIER HAULAGE AND CONSTRUCTION COMPANY LIMITED.....PLAINTIFF

VERSUS

LACHEKA LUBRICANTS LIMITED.....1ST DEFENDANT

BANK OF AFRICA LIMITED.....2ND DEFENDANT

RULING

1. Bank of Africa Limited (BOA or the 2nd Defendant or the Applicant) moves the Court for leave to amend its statement of Defence and Counterclaim. If granted then it will require that Taghi Hussein Zadeh, Joseph Owino Ogendo and Clement Andare Omolo be joined as Defendants to the Counterclaim. The second prayer is therefore for that joinder.

2. Frontier Haulage and Construction Company Limited (Frontier of the Plaintiff or the Respondent) was at all material times to this suit a customer of BOA and operated Bank account Number 0103130007 (the designated account) at BOA's Sameer Industrial Park Branch. At the same time Frontier entered into a sale/purchase contract with the Lacheka Lubricants Limited (Lacheka or the 1st Defendant) for supply of base oil.

3. The case presented by Frontier, briefly, is that between August 2012 and October 2012, it supplied Lacheka with base Oil at an agreed price of Kshs.64,706,500.00. As a term of the supply, Lacheka was to pay for the supply by depositing invoiced amounts into the designated account. Frontier's complaint is that, in breach of that arrangement, Lacheka fraudulently entered into an invoice discounting arrangement with BOA and discounted its sum of Kshs.31,423,900.00. That this resulted in unlawful interest, penalties and charges of Kshs.17,004,446.64.

4. A further grievance is that, without instruction and therefore unlawful, BOA debited Frontiers account with a sum of Kshs.158,040.00 in alleged Citi Bank Charges.

5. As against Lacheka, Frontier claims a sum of Kshs.13,042,600.00 allegedly being unpaid amounts for goods received.

6. In addition to a claim for General damages for breach of duty of care and skill as against the BOA, Frontier claims the aforesaid sums from the Defendants, where the claims fall.

7. In answering to the claim, BOA filed a statement of defence on 14th March 2016 but also mounted a Counterclaim. I outline the contents of the Counterclaim. It avers that sometimes in 2012 it granted an invoice discounting facility to Frontier in relation to invoices that were payable by Lacheka. That the facility was not satisfactorily operated and interest penalties and other charges accrued. That as at 11th September 2015 the amount outstanding on account of the facility was Kshs.23,328,662.51 which BOA seeks from Frontier in the Counterclaim.

8. BOA explains why it seeks to amend. That in addition to the Cheque Discounting facility, BOA granted a contract finance facility and an asset finance facility to Frontier, all including the Cheque Discounting facility amounted to Kshs.58,000.00 and was subsequently amended to Kshs.55,000,000.00. BOA alleges default in the facilities and seeks to include its entire claim in the counterclaim. Further, that the three intended Defendants were guarantors to the obligations of Frontier under the facilities.

9. Lacheka is not opposed to the application while Frontier resists the application and raises 7 grounds in a statement of opposition dated 21st

February 2021. That the application violates the mandatory provisions of the Civil Procedure Rules and is incurably defective; that the proposed defence violates Order 8 Rule 3; that the case is certified ready for hearing; that the sought amendments raise new causes of action and reliefs; that the amendments are prejudicial to the Plaintiff and that there has been delay in bringing the application.

10. The law on amendment of pleadings is found in Order 8 of the Civil Procedure Rules. Where pleadings have closed, like here, leave of court is required before any amendments can be made. Two rules are relevant in guiding this Court consider the application before Court. Order 8 Rule 3 reads:-

“Amendment of pleading with leave.

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, 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.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.”

11. While Order 8 Rule 5 reads:-

“General power to amend.

5. (1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.

(2) This rule shall not have effect in relation to a judgment or order.”

12. Explicit from Rule 3(1) is that amendment of pleadings can be allowed at any stage of the proceedings but amendments sought very late in the proceedings may be declined if the prejudice to the Respondent is one which is not compensable in costs.

13. In the matter before this Court, Frontier complains of delay. That may be true because the application was brought not only after case management conference had been held but also after the suit had been set down for hearing. That said, as the hearing had not commenced at the date the application was argued, this reason may be overlooked.

14. Yet the Respondent alerts Court that to allow further delay would prejudice it because the controversial facilities continue to attract interest. This argument is however inconsistent with Frontier’s own case. In its response to the Counterclaim it denies owing any sums to BOA and there would be no reason for such fear because a non-existing debt cannot attract interest.

15. Any delay in bringing of the application is therefore excused.

16. To allow or disallow the application turns on whether the amendment sought helps this Court determine the real issues in controversy between the parties in an effectual and complete manner.

17. Presented by the already filed pleadings is whether the Cheque discounting facility was breached and if so by who. A corollary question is then who between Frontier and BOA owes the other on that facility. Raised now by BOA is that in addition to that facility it also granted Frontier a Contract Finance facility and an Asset Finance facility on which sums are owed. Even if this are said to be a new or new causes of action, it would seem that they arose from the same facts or substantially the same facts as that of the Cheque Discounting facility as they are all within the Customer – Bank relationship between the two. It would be imprudent use of judicial time if the Bank was required to file separate suits to press different claims for facilities which were granted under one contract (letter of offer dated 25th October 2010 and accepted on 1st November 2020.)

18. As to the concern that to allow the application for leave to amend would allow joinder of persons who do not have a bearing of the outcome of the suit between Frontier on the one hand and BOA and Lacheke on the other, there seems to be a ready answer. The controversy

between BOA and Frontier as now constructed is who, between the two, has breached the Cheque Discounting facility and who therefore is in debt on account of that breach. The three persons sought to be joined were not just guarantors to the obligation of Frontier that may arise under the Cheque Discounting facility but also to the other two facilities. They are guarantors to the facilities and cannot be strangers to the dispute for if Frontier is found liable then they too may be found liable under the contracts of guarantee.

19. As would be clear this Court is for allowing the application of 9th February 2021. It is hereby allowed as prayed. Costs to the Defendants as against the Plaintiff.

DATED, SIGNED AND DELIVERED IN COURT AT NAIROBI THIS 11TH DAY OF MAY 2021

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17TH April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE

PRESENT