



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT ELDORET**

**CIVIL CASE NO. 76 OF 2018**

**DANIEL MANJARA.....PLAINTIFF**

**VERSUS**

**KENYA COMMERCIAL BANK LTD.....1<sup>ST</sup> DEFENDANT**

**JOYLAND AUCTIONEERS.....2<sup>ND</sup> DEFENDANT**

**NEW LEGEND CO.LTD.....3<sup>RD</sup> DEFENDANT**

**RULING**

1. The plaintiff via a Notice of Motion dated the 31<sup>st</sup> of August 2018 and brought pursuant to Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure Rules seeks primarily to be granted leave to amend his plaint on grounds that the pleadings have closed and that he is desirous of amending the plaint so as to allow court effectively and effectually deal with all issues in controversy. Further, the plaintiff averred that the intended amendment will help meet the ends of justice and no prejudice will be occasioned to the defendants if leave is granted and the plaint amended.

2. The application is supported by the affidavit of the plaintiff dated even date wherein he reiterates the grounds in support of the application highlighted above.

3. The application is opposed by the defendants through their grounds of opposition dated the 9<sup>th</sup> of October, 2018 and the 14<sup>th</sup> of November, 2018.

4. The 1<sup>st</sup> defendant, KCB, through their grounds of opposition dated the 14<sup>th</sup> of November 2018 deponed that the application has been made after undue, unreasonable, inordinate and inexcusable delay and that the application as filed, offends the doctrine and constitutionality of pleadings. Further, the 1<sup>st</sup> defendant averred that the application by the plaintiff on the proposed amendments seek to introduce new cause of action which is prejudicial to the defendants considering that pleadings have closed. Finally, the 1<sup>st</sup> defendant stated that the plaintiff has not given any acceptable reasons for his indolence; has not demonstrated any valid reasons to deserve the orders sought and thus the application is purely an abuse of court process.

5. The 3<sup>rd</sup> defendant on its part averred in their grounds of opposition dated the 9<sup>th</sup> of October 2018 that the proposed amendment has the effect of introducing a brand-new matter altogether and should therefore not be allowed. The 3<sup>rd</sup> defendant asserted that an amendment to pleadings can only be allowed if it seeks to amplify, elaborate, particularize or elucidate on a matter contained in the pleadings. Finally, the 3<sup>rd</sup> defendant affirmed that the application for amendment violates the provisions of Order 2 Rule 6 (1) and (2) of the Civil Procedure Rules whereas the proposed amendments violate the provisions of Order 8 Rule 7(2) of the Civil Procedure Rules ergo the relief sought is incapable of being granted.

6. On the 20<sup>th</sup> of November 2019, the court directed that the application be canvassed by way of written submissions and all parties filed their respective submissions.

**Plaintiff's Submissions**

7. The plaintiff filed his submissions on the 23<sup>rd</sup> of June 2021. In the submissions, the plaintiff submitted that the law on amendment of pleadings requires that an amendment be freely allowed if it does not occasion injustice to the other side, if the amendments are not inconsistent with previous pleadings in that it can alter entirely the nature of the plaint/defence.

8. In that regard, the plaintiff submitted that there is nothing in the intended amendment that will cause injustice to the defendants and further, that there is no inconsistency in the proposed amended plaint vis a vis the plaint on record and relied on the decision in ***St. Patrick Hill School Ltd vs Bank of Africa Kenya Limited [2018] eKLR***. The plaintiff thus prayed that the application be allowed as it is merited.

### **1<sup>st</sup> Defendant's Submissions**

9. The 1<sup>st</sup> defendant in its submissions dated the 11<sup>th</sup> of June 2021 submitted that there are 4 issues for determination namely whether or not the amendment is necessary for determining the real question in controversy; whether the amendment introduces new or inconsistent cause of action; whether the amendment will occasion prejudice or injustice to the other side and finally whether the application for amendment was made in due time.

10. On the first issue, the 1<sup>st</sup> defendant submitted that the amendment is not necessary to determine the real question in controversy but seeks to confuse the court as to the true status of the facts of the case. In this regard, the 1<sup>st</sup> defendant submitted that the 45-days redemption notice dated the 22/3/2011 was not issued on the 22<sup>nd</sup> of March 2010 as alleged by the plaintiff in the intended amendment. The 1<sup>st</sup> defendant thus relied on the cases of ***Central Kenya Limited vs Trust Bank Limited [2000] 2 EA 365 and Beatrice Gikunda vs CFC Life Assurance Limited [2020] eKLR*** and submitted that the plaintiff is attempting to confuse court as to the true and accurate amount of loan arrears as at January 2011 by understating the loan amount due as Kshs 181,067.32 as opposed to Kshs. 198,067.32/=.

11. On the second issue, the 1<sup>st</sup> defendant did not make any explanation.

12. On the third issue, the 1<sup>st</sup> defendant stated that the amendment will occasion prejudice to it and relied on Order 2 rule 13 of the Civil Procedure Rules. It thus submitted that the plaintiff sought amendment three years after the pleadings had closed and that the plaintiff has failed to give reasons to court that would justify why the proposed amendments could not be incorporated in the original plaint at the time of filing. The 1<sup>st</sup> defendant also relied on the case of ***Elijah Taragon vs George Kiptanui Cheboi [2020] eKLR*** submitting that the plaintiff's application is meant to delay the payment of his debt and in the process cripple and or even drive the bank out of business. It was further submitted that the 1<sup>st</sup> defendant has a legitimate expectation to have a fair trial and the plaintiff's total case should have been disclosed to the 1<sup>st</sup> defendant fully and not in installments which has the effect of unjustifiably dragging the 1<sup>st</sup> defendant through litigation thereby causing delays in the prosecution of the case. The 1<sup>st</sup> defendant finally submitted that the delay will occasion prejudice to the 1<sup>st</sup> defendant as it will be unable to recover the debt which continues to accrue interest to date and further, that if the suit is not substantially determined as soon as possible, the debt owed to the 1<sup>st</sup> defendant will grow to such proportions that the plaintiff will be unable to pay resulting in significant loss to the 1<sup>st</sup> defendant.

13. On the last issue, the 1<sup>st</sup> defendant submitted that the plaintiff made his application out of time and without providing any sufficient reason as to delay in filing his application. In this regard, the 1<sup>st</sup> defendant observed that the plaintiff filed his original plaint dated the 23/3/2015 to which the 1<sup>st</sup> defendant filed their defence and waited until the 31<sup>st</sup> of August 2018 to file the application to amend plaint, almost 3 years later. Accordingly, the 1<sup>st</sup> defendant stated that this delay is meant to frustrate the matter and relied on the cases of ***Central Kenya Limited case [supra] and Ocean Foods Limited vs Osotspa Company Limited & 2 Others [2020] eKLR*** and submitted that the plaintiff is underserving of the orders sought due to inordinate delay.

### **3<sup>rd</sup> Defendant Submissions**

14. The 3<sup>rd</sup> defendant via its submissions dated the 4<sup>th</sup> of June 2021 submitted that the net effect of the proposed amendment is to introduce brand new matters into the pleadings, change the direction of the pleadings, change the cause of action and or introduce a cause of action where non existed, provide elegance to the pleadings where none is needed or necessary, allow some amendments to sail through undetected and defeat the defence already filed by the 3<sup>rd</sup> defendants.

15. It was submitted further that the proposed amendments are inconsistent with the previous pleadings and offends the provisions of Order 2 Rule 6 (1) and (2) of the Civil Procedure Rules to the extent that the plaintiff seeks to change the contents of the original plaint which the plaintiff averred that they were true and correct. The 3<sup>rd</sup> defendant also submitted that parties are bound by their pleadings and submitted that the plaintiff blocked his chances of ever amending his pleadings.

16. The 3<sup>rd</sup> defendant also submitted that the proposed amended plaint offends Order 8 Rule 7(2) of the Civil Procedure Rules to the extent that the added words in the amended plaint have not been underlined in red ink and the same should thus fail. The 3<sup>rd</sup> defendant thus relied on the case of ***Mulaya vs COMESA & another [2003] 1 EA 173 and Patel vs Amin [1988] KLR 639*** and submitted that a plaint cannot be amended so as to introduce a new cause of action which was not in existence at the time of the suit and urged court to find no merit in the plaintiff's application and consequently dismiss it.

### **Analysis & Determination**

17. Having carefully considered the application, the affidavits tendered by both parties in support and in rebuttal of issues and the submissions by all the parties, I do find that the only issue for determination is whether the Plaintiff/Applicant's Notice of Motion for amendment has merit.

18. The Amendment of pleadings is a discretionary power donated by the Civil Procedure Rules under ***Order 8***. In particular ***Order 8 Rule 3(1) provides: -***

**“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”**

19. On the other hand, **Order 8 rule 5 (1) provides: -**

**“For the purpose of determining the real question in controversy between the parties, or correcting any defect or error in any proceedings, the court may either on 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.”**

20. The above provisions do not seem to place time restrictions upon which an amendment to a pleading should be made. In fact, Order 8 Rule 3 (1) uses the phrase ‘at any time of the proceedings’ while Order 8 rule 5 provides no indication of whatever time other than the fact that the rule does not apply in relation to judgement and or order.

21. For this reason, it is considered trite law that amendments to pleadings can be freely allowed at any time before the delivery of a judgment. In this regard, **Mulla in The Code of Civil Procedure, 17<sup>th</sup> Edition Volume 2, at pages 333, 334 and 335** observes that as a general rule, leave to amend will be granted so as to enable the real question in issue between the parties to be raised on the pleadings where the amendment will occasion no injury to the opposite party, except such as can be sufficiently compensated for by costs or other terms to be imposed by the order.

22. Consequently, in **Beatrice Gikunda vs CFC Life Assurance Limited [2020] eKLR** the court observed that leave to amend must always be granted unless the party applying is acting mala fide and where it is not necessary for determining the real question in controversy between the parties. Thus, an application to amend a pleading, must be made bona fide and in good faith without the intention of frustrating the suit or delaying justice.

23. The main principle therefore that the court considers is that an amendment should not be allowed if it causes injustice to the other side. In **Abdul Karim Khan vs Mohamed Roshan (1965) EA.289 (C.A)**, the court laid down the principle that the courts will not permit an amendment that is inconsistent with original pleading and entirely alters the nature of the defence or plaint.

24. In **Ochieng and Others vs First National Bank of Chicago Civil Appeal Number 147 of 1991**, the court of Appeal clearly set out the principles under which Courts may grant leave to amend the pleadings. Accordingly, the principles are as follows:

**“a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;**

**b) the amendments should be timeously applied for;**

**c) power to amend can be exercised by the court at any stage of the proceedings;**

**d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;**

**e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act, subject however to powers of the court to still allow amendment notwithstanding the expiry of current period of limitation.”**

25. In **St. Patrick’s Hill School Limited v Bank of Africa Kenya Limited [2018] eKLR**, the court observed that the above-mentioned parameters are not exhaustive as far as the grant of leave to amend plaints is concerned and that the court therefore has wide discretion in granting leave to amend.

26. In the instant application, the plaintiff seeks to amend the plaint to primarily change the date of 45-day notice from the 22<sup>nd</sup> of March 2011 to the 22<sup>nd</sup> of March 2010. Further, the plaintiff seeks to change the arrears from Kshs.198, 067.32 to Kshs. 181,067.32. and add the words ‘mode of’ repayment and ‘the buyer communicated through his letter dated 14/4/2011’ in paragraph 21. Finally, the plaintiff seeks to amend the plaint to replace the words ‘transferred back’ with the words ‘restored to him’ under paragraph 24 and deleting prayer c in the plaint and adding the words ‘**LR IRONG/ITEN/588** under prayer ‘d’.

27. Taken altogether, I do not see how the above amendments will in any way prejudice the defendants and or result in any injustice that cannot be compensated for by way of costs. Majority of the proposed amendments are more of corrections than introduction of new facts. Moreover, whereas there has been no explanation given for the delay in filing of the application for leave to amend the plaint, I am guided by the decision in **Central Kenya Limited v Trust Bank Limited (supra)** where the court stated that mere delay is not a ground for declining leave to amend, unless such delay is one likely to prejudice the other party beyond monetary compensation.

28. In this particular case, I am of the view that there is no prejudice that will be occasioned to the defendants or one that cannot be compensated by an award for costs to the defendants.

29. Furthermore, if the application for amendment is allowed, the defendants will have the opportunity to respond to the amendments if they so wish.

30. In the foregoing, I find that the plaintiff has demonstrated a good case for an amendment of pleadings and that no prejudice will be suffered by the defendants if the application is allowed.

31. Accordingly, the application dated the 31st of August 2018 is allowed on the following terms: -

- a. That the amended plaint be filed and served within fourteen (14) days from the date of this ruling,*
- b. That the defendants are granted leave to file amended defence within fourteen (14) days of service if need be and,*
- c. The applicant to meet the costs of this application.*

.....

**S.M GITHINJI**

**JUDGE**

**DATED, SIGNED and DELIVERED at ELDORET this 12<sup>th</sup> day of October, 2021.**

In the presence of:-

Mr. Momanyi for the plaintiff.

Mr Karuga holding brief for Mrs. Chesoo for the 1<sup>st</sup> & 2<sup>nd</sup> defendant.

C. F. Otieno for the 3<sup>rd</sup> defendant.

Ms Gladys - Court assistant