



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL SUIT NO. 1 OF 2019

EXON INVESTMENTS LTD.....PLAINTIFF/APPLICANT

VERSUS

ABC BANK LIMITED.....DEFENDANT/RESPONDENT

RULING

1. Through the application dated **11th June, 2020**, the Plaintiff herein seeks for the Leave of the court to **Amend its Plaintiff** dated **17th January, 2019**. That pursuant to granting Leave as prayed, the **Draft Amended Plaintiff** attached to the application be deemed duly filed and served upon payment of requisite court fees.
2. The application is expressed to be brought under **Order 8 Rule 3(1)** and **4** of the **Civil Procedure Rules, 2010**. The application is based on the grounds contained on the face of the application and the **Supporting Affidavit** of **Ateet Jetha** sworn on **11th June, 2020**.
3. It was deponed that the Plaintiff's initial claim against the Defendant was that the Defendant had breached its obligation in various loan facility agreements entered into between the Plaintiff and the Defendant. The loan Facility was to be utilized for the purchase of **five (5) trucks and trailers** listed under **Paragraph 4** of the **Supporting Affidavit**. The vehicles were then offered as security for the loan facility and were jointly registered in the name of the bank and the Plaintiff. However, on or about **16th October, 2018** the Defendants repossessed the said vehicles on ground that the Plaintiff had breached the agreements by failing to repay the installments. This prompted the Plaintiff to challenge the repossession and stop the imminent sale by filing the **Plaint** dated **17th January, 2019** in which it sought a permanent injunction to stop the imminent sale. Despite the pendency of the suit, on **15th January, 2019**, the Defendant purported to sell the subject securities at a grossly undervalued price of **Kshs.26,400,000/=**.
4. It is averred that by that sale, the Defendant breached the fiduciary duty it owes to the Plaintiff and the guarantor of the loan facility by failing to obtain the best reasonable price at the time of sale. Since the subject motor vehicles were sold, it is deponed that the claim for permanent injunction was thus defeated. Therefore the Plaintiff is entitled to claim restitution and damages arising from the sale of the subject motor vehicles.
5. Finally, that the claim for compensation arises out of substantially similar facts and is intertwined with the original claim for injunction and it is crucial that the amendments are allowed to enable the court conclusively determine the issues on controversy. The Plaintiff also asserted the view that, by dint of the **Civil Procedure Rules**, specifically **Rule 8**, a party can be allowed to amend its case anytime before the delivery of a Judgment.
6. In Response to the application, the Defendant/Respondent filed a **Replying Affidavit** sworn by **Louis Omukhulu**, the Defendant's **Legal Officer** on **6th June, 2020** and filed on even date. The Defendant argued that Plaintiff should be denied Leave to **Amend the Plaintiff** and directed to file a fresh suit.
7. The Defendant contends that Plaintiff is misleading the court by continuing to insist that the subject motor vehicles were sold during the pendency of the suit. This is because the subject motor vehicles were sold by way of **Public Auction** on **15th January, 2019** whilst the suit was commenced by way of **Plaint** dated **17th January, 2019** and filed on **18th January, 2019**, way after the subject motor vehicles had been sold.

8. Despite being aware of the facts as stated, the Plaintiff then engaged the court to obtain orders which had already been overtaken by events and thus only engaged the court in an academic exercise.

9. According to the Defendant, by perusal of the **Draft Amended Defence**, the Plaintiff seeks to introduce into the suit additional cause of action through a back door. Further that the contemplated claims of **Kshs.35,710,000/=**, **Kshs.31,291,137.50** and **Kshs.100,000,000/=** as sought in the proposed **Draft Amended Defence** are too drastic in magnitude as to change the character and the essence of the suit.

10. The Defendants reiterate that the Plaintiff could have made the amendments immediately they realized there was change of circumstances, i.e that the vehicles had been sold. Instead, the Plaintiff chose to deliberately waste judicial time in prosecuting for orders already overtaken by events. In the meantime, the proposed amendment has been brought too late in a dishonest manner. In the circumstances therefore, the Plaintiff should be directed to file a fresh suit.

11. Directions were granted to determine the **Notice of Motion** by way of written submissions. The Plaintiff/Applicant filed its submissions on **25th September, 2020** while the Defendant/ Respondent filed its submissions on **13th October, 2020**.

Analysis and Determination

12. I have considered the pleadings, depositions and rival submissions including the various cited law in cases and the Statutes. The issue for determination is whether or not to allow the proposed amendments as sought for by Plaintiff.

13. With regard to the prayer to **Amend the Plaintiff**, it is not disputed that as trite law, amendments to pleadings can be freely allowed at any time before delivery of a Judgment. In the case of **St Patrick's Hill School Ltd...Vs...Bank of Africa Kenya Ltd [2018]eKLR**, the Court of Appeal cited with approval the case of **Ochieng & Others ...Vs...First National Bank of Chicago, Civil Appeal No.147 of 1991 (unreported)** and set out the principles governing the amendment of pleading 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 plaintiff the defendant would be deprived of his right to rely on Limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.

14. Further, the Court of Appeal in the case of **Central Kenya Ltd...Vs...Trust Bank Ltd [2000]EALR 365**, held that: -

“The guiding principle in applications to amend pleadings is that the same will be liberally and freely permitted, unless prejudice and injustice will be occasioned to the opposite party. There will normally be no justice if the other party can be compensated by an appropriate award of costs for any expense, delay or bother occasioned to him. The main this is that it be in the interests of justice that the amendments sought be permitted in order that the real question in controversy between the parties be determined.”

15. Based on the cited authorities, it follows that **Leave to Amend** must always be granted unless the party applying was acting *mala fide* and where it is not necessary for determining the real question in controversy between the parties.

16. I am also of the opinion that an application to amend must be made *bona fide* (in good faith). Where the amendment is necessary to enable justice to be done between the parties, it will be allowed on terms even at a late stage. However, the amendment will be refused if it will in any way unfairly prejudice the other party, or is irrelevant or useless, or would merely raise a technical point.

17. In the present case, the Plaintiff stated the **grounds** in support of its application for Leave to **Amend the Plaintiff** as being that the claim for permanent injunction was defeated and the Plaintiff can only claim for restitution and damages arising from the sale of the subject motor vehicles.

18. Also, the Plaintiff asserted that there was need to have the court effectively determine the real issues in controversy.

19. On its part, the Defendant was of the view that the application has been brought too late in the day with the Plaintiff concealing material facts from the court i.e that the subject motor vehicles were sold prior to the commencement of the suit. As such the Plaintiff is unfaithful and not deserving the exercise of this court's discretion. And finally that the Plaintiff is attempting to bring a new action through the back door.

20. I have considered the reasons advanced by the plaintiff for seeking Leave to Amend the Plaintiff alongside the reasons advanced by the Defendant for opposing the same.

21. On the aspect of delay, the court has illustrated in this Ruling above that where amendment is necessary, it will be allowed even at a late stage. The delay complained of in this case is that the Plaintiff was aware that the subject motor vehicles had been sold even before commencement of the suit but never bothered to amend the Plaint as suggested.

22. I will address the issue in tandem with the Defendant's concern that the amendment if allowed would introduce a new claim. In so doing I will borrow from the decision in the case of Eastern Bakery...Vs... Castelino [1958]EA 462 (CAU), where it was held at page 462 that:-

“The court will not refuse to allow an amendment simply because it introduces a new case..... The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ”.

23. Further to the above, the Court of Appeal also stated in the case of Central Kenya Limited...Vs...Trust Bank Limited (2000)2 EA 365, that:-

“..... a party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.” (Emphasis mine)

24. From the above case law it goes without saying that the Court has wide discretion to allow any party to amend its pleadings 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 under **Order 8 Rule 3** of the **Civil Procedure Rules**. Though there might have been a delay in filing the instant application as suggested by the Defendant, it is not indicated what particular prejudice the Defendant/Respondent is likely to suffer if the application for amendment is allowed.

25. In the case of Central Kenya Limited –v- Trust Bank Limited (supra) it was stated that mere delay is not a ground for declining leave to amend, but that such delay must be one likely to prejudice the other party beyond monetary compensation.

26. In this particular case, I am of the view that there is no prejudice which cannot be compensated by an award of costs to the Defendant. Likewise, I am of the opinion that if the application for amendment is allowed, the Defendant will have the opportunity to respond to the amendment if it wishes so. This ground for opposing the application for amendment must therefore fail.

27. Similarly the Defendant has not shown how the amendment will change the action to a substantially new one or that the Defendant will be deprived off a defence accrued as at the time of filing the suit.

28. Having regard to the proceedings so far conducted in this matter, and taking into account the fact that the Case Management Conference has not been done, I find that the proposed amendment of the plaint will not prejudice the defendant's case as it will still have the chance to amend its pleadings should it deem it necessary.

29. For the above reasons and having regard to the above cited authorities on amendment of pleadings, I find that the upshot of the foregoing is that the Plaintiff's **Notice of Motion** dated **11th June, 2020** is allowed as prayed on the following terms: -

a) The Plaintiff is granted leave to amend its plaint.

b) That the Amended Plaint be filed and served within fourteen (14) days from the date of this Ruling.

c) The Defendant is granted corresponding Leave to amend file and serve an Amended Defence within 14 days from the date of service with the Amended Plaint if need be.

d) The costs of the application shall abide the outcome of the main suit.

It is so ordered.

DATED, SIGNED and DELIVERED at MOMBASA on this 6th day of November, 2020.

D. O. CHEPKWONY

JUDGE

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 **15th March 2020**, this Ruling has been delivered to the parties online with their consent. They have waived compliance with **Order 21 Rule 1** of the Civil Procedure Rules which requires that all Judgments and Rulings be pronounced in open Court.

D. O. CHEPKWONY

JUDGE