



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & TAX DIVISION- MILIMANI

CIVIL CASE NO. 452 OF 2014

SIL CO-OPERATIVE SAVINGS & CREDIT SOCIETY LTD.....PLAINTIFF/RESPONDENT

VERSUS

COOPERATIVE BANK OF KENYA LTD.....DEFENDANT/APPLICANT

RULING

BACKGROUND OF THE APPLICATION

The Applicant approached the court by a notice of motion dated 11th June 2018 for the orders; that the defendant be granted leave to amend its defence dated 25th November 2014. The application was based on the grounds that;

- a. The proposed amendments are necessitated by the discovery of outstanding amounts owed to the Defendants among other facts are vital to the defendant's case;**
- b. The intended amendments shall assist the court to determine the real matter in question.**

The Application was also supported by the affidavit of Lawrence Karanja who stated that the Plaintiff instituted a suit via a plaint dated 25th September 2014 seeking a refund of **Ksh 10,301,581.65**. Thereafter, the Defendants duly entered appearance and filed its Defence on 1st November 2014. Prior to filing the plaint, the Plaintiff had closed its account with the Defendants and after review of that account Lawrence noted that the Plaintiff had outstanding debts against the Defendants as follows;

- 1. The Plaintiff had taken a working capital loan kshs 4,500,000 and defaulted in making payments. As of 21st November 2017, the Plaintiff owed the Defendants a sum of kshs. 5,578,348.33;**
- 2. The Plaintiff had taken an Education Savings Scheme Loan of kshs.1,000,000 where it defaulted in payment hence owes the Defendant a sum of kshs 1,167,178.72 as of 21st November 2017;**
- 3. The Plaintiff also took an additional Working capital loan of kshs 9,865,710.20 where it defaulted in payment hence owes the Defendant a sum of kshs9,696,769.06 as of 21st November 2017;**
- 4. The Plaintiff had also taken a Sacco Personal Loan for its membership whereby individual members would access loans from the Defendant through the Plaintiff, the outstanding amount being kshs.2,766,436.00 as of 22nd November 2017.**

The Defendants submitted that it was therefore necessary that the Defence be amended to include the above sums.

PLAINTIFF'S CASE

The Plaintiff responded to the above application by a replying affidavit sworn by **Allan Magero** dated 16th July 2018. He stated that after the trial conference it made several attempts to fix a hearing date but the efforts were frustrated. The Plaintiff stated further that at one point, the file hence on 25th February 2017, the Plaintiff made an application to reconstruct a skeleton file. After the application was allowed, the parties were directed to seek a mention date at the registry and at no point did the Defendants make an application to amend their pleadings.

The Plaintiff stated that, despite his efforts to fix dates in the registry, the case was never captured in the causers and hence termed this as underhand tactics to avoid this matter being heard. He also stated that the Defendant's application was brought 5 years after the suit had been

filed and there was no plausible explanation or annexure to support the alleged information to warrant the above application.

DETERMINATION

The court has only one issue to determine which is; **whether the Defendant should be granted leave to amend its defence.**

Order 8 Rule 3 of the Civil Procedure Rules 2010 generally 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.

The Plaintiff relied on the case of *John Mulwa Kang'aatu vs Pan African Insurance Co. Ltd [2015] eKLR*, where the Court held;

“ordinarily, amendments of pleadings should be allowed freely if such amendment is necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided that there has been no undue delay, no new or inconsistent cause of action is introduced, no vested interest or accrued legal right is affected and the amendment does not occasion prejudice or injustice to the other side which cannot be compensated in costs. Whereas there is no fixed number of the times when a party may seek to amend its pleadings, the court should, however, be wary of parties who use the right to amend to temporize or delay a case to the extent that the exercise of the right becomes a source of injustice. Courts of law are minded tonote that the long proven adage that “justice delayed is justice denied” has now gained constitutional expression as a principle of justice in article 159 of the Constitution.”

It is therefore the courts view that since the application to amend the defence has been made before hearing of the suit, in the interest of justice, the Defendant’s case should be heard on its merits. The amendments that the Defendant seeks to include are vital in determining the suit and granting leave would mitigate the prejudice that maybe caused and may lead to a multiplicity of suits.

DISPOSITION

- 1) It is hereby ordered that the Defendant is granted leave to amend its defense within 14 days from today.
- 2) The Plaintiff is granted corresponding leave to file (amended) Further Reply to Amended Defense within 14 days from date of service of the Amended Defense.
- 3) Each party to bear own costs
- 4) Once pleadings close parties to obtain date for hearing of the main suit after case management.

DELIVERED SIGNED & DATED IN OPEN COURT ON 22ND JULY 2019.

M.W.MUIGAI

JUDGE

IN THE PRESENCE OF:

Ms Muhonja Holding Brief Kenneth Wilson For Plaintiff/applicant

N/a For Defendant

COURT ASSISTANT – ISIAIAH OTIENO