



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT MALINDI**

**CIVIL CASE NO. 5 OF 2014**

**MERRY BEACH LIMITED.....APPLICANT/PLAINTIFF**

**VERSUS**

**BARCLAYS BANK OF KENYA LIMITED..1<sup>ST</sup> RESPONDENT/1<sup>ST</sup> DEFENDANT**

**GIANLUIGI CERNUSCHI.....2<sup>ND</sup> RESPONDENT/2<sup>ND</sup> DEFENDANT**

**RULING**

**[1<sup>ST</sup> DEFENDANT'S CHAMBER SUMMONS DATED 14<sup>TH</sup> MARCH, 2018 AND PLAINTIFF'S NOTICE OF MOTION DATED 23<sup>RD</sup> APRIL, 2018]**

1. This ruling addresses two applications. The first application is the chamber summons dated 14<sup>th</sup> March, 2018 brought by the 1<sup>st</sup> Defendant, Barclays Bank of Kenya Limited (Barclays Bank) under Order 8 rules 3, 5 and 8 of the Civil Procedure Rules, 2010 (CPR) and sections 1A and 3A of the Civil Procedure Act (CPA). Through the application, Barclays Bank seeks orders as follows:

**“1. THAT this Honourable Court be pleased to grant leave to the 1<sup>st</sup> Defendant to amend the Statement of Defence in the manner shown on the annexed copy of the draft amended Statement of Defence and Counterclaim.**

**2. THAT the 1<sup>st</sup> Defendant do file the amended Statement of Defence and Counterclaim within fifteen (15) days from the date of the Order granting the 1<sup>st</sup> Defendant leave to amend the Statement of Defence and Counterclaim.**

**3. THAT the costs of this application be in the cause.”**

The application is supported by the grounds on its face and an affidavit sworn on the date of the application by Barclays Bank's legal counsel one Milkah Maina.

2. The application was opposed by the Plaintiff, Merry Beach Limited (Merry Beach) through a replying affidavit sworn on 23<sup>rd</sup> April, 2018 by its Company Secretary, Walter Kilonzo.

3. At the time of filing its replying affidavit, Merry Beach also filed the notice of motion dated 23<sup>rd</sup> April, 2018 which is brought under Article 159 of the Constitution; sections 1A, 1B and 3A of the CPA; and Order 2 Rule 15(1)(b), (c) and (d) and Order 36 of the CPR. Through the application Merry Beach prays for orders as follows:

**“a. This application be certified as urgent and be heard ex-parte in the first instance.**

**b. This Court be pleased to enter summary judgement for the Plaintiff against the 1<sup>st</sup> Defendant in the sum of Kshs. 27,331,646.00 and Euros 60,000.00 together with interest.**

**c. The 1<sup>st</sup> Defendant's Chamber Summons application dated 14.3.2018 be struck out with costs.**

**d. The costs of this application be paid by the 1<sup>st</sup> Defendant to the Plaintiff.”**

The application is supported by the grounds on its face and an affidavit sworn on the date of the application by the Company Secretary, Walter Kilonzo.

4. Barclays Bank opposed Merry Beach's application through an affidavit sworn on 25<sup>th</sup> May, 2018 by its Senior Legal Counsel, Paul Kinyanjui Ndungi.

5. As directed by the court, the advocates for the parties filed submissions on the two applications. The submissions were highlighted on 23<sup>rd</sup> July, 2018.

6. It is important to state at this early stage that the 2<sup>nd</sup> Defendant, Gianluigi Cernuschi (Gianluigi) did not participate in the two applications.

7. A perusal of the two applications and the submissions made in respect thereto shows that they are intertwined. I will thus address the applications simultaneously.

8. A brief history will do. Through a plaint dated 27<sup>th</sup> February, 2014, Merry Beach sued Barclays Bank and Gianluigi praying that judgement be entered in its favour against Barclays Bank for the sum of Kshs. 20,263,646.00 and Euros 60,000.00. Merry Beach's claim was based on alleged negligence by Barclays Bank and alleged collusion between Barclays Bank and Gianluigi. On 1<sup>st</sup> April, 2014 Barclays Bank entered a memorandum of appearance and followed it by filing a statement of defence on 15<sup>th</sup> April, 2014 denying the Plaintiff's claim. On 21<sup>st</sup> July, 2014 the Plaintiff filed a reply to Barclays Bank's statement of defence.

9. Subsequently, Merry Beach filed a notice of motion on 11<sup>th</sup> August, 2014 asking that Barclays Bank's statement of defence be struck out and seeking an interlocutory judgement against Barclays Bank. After the application was heard, Chitembwe, J delivered a ruling on 11<sup>th</sup> December, 2014.

10. On 18<sup>th</sup> November, 2015 Merry Beach once again filed an application seeking to strike out Barclays Bank's statement of defence and asking that judgement be entered against Barclays Bank. Merry Beach also sought leave to amend its plaint as per an annexed draft. Finally, Merry Beach sought an order directing Barclays Bank to release the original cheques relevant to the transaction giving rise to the suit in order for the same to be subjected to examination by a document examiner.

11. In a ruling delivered on 16<sup>th</sup> March, 2016, Chitembwe, J declined to strike out Barclays Bank's defence. He also declined to issue an order to Barclays Bank to release the original cheques stating that the prayer could be made during pre-trial hearing or at the hearing. Merry Beach was however granted leave to amend its plaint. The prayer for judgement to be entered against Barclays Bank was found unmerited and dismissed.

12. Merry Beach appealed the decision of Chitembwe, J. On 14<sup>th</sup> December, 2017 the Court of Appeal sitting at Malindi allowed the appeal in **Civil Appeal No. 2 of 2017 Merry Beach Limited v Barclays Bank of Kenya Ltd** in the following terms:

**"27. Bearing in mind the foregoing and the principle in *D.T. Dobie & Company (Kenya) Limited vs. Joseph Mbaria Muchina & another [1980] eKLR* the power to strike out pleadings should be used sparingly and cautiously, we issue the following orders: -**

**a) The respondent is hereby directed to file and serve its list and bundle of documents it intends to rely on within 30 days of this judgment.**

**b) The respondent is hereby directed to produce the original cheques whose details are listed at paragraph 14 of the plaint to the appellant's advocate for examination by a handwriting expert within 30 days of this judgment.**

**c) In default of any of the aforementioned orders, the respondent's statement of defence stands struck out with costs."**

13. It is Merry Beach's position that Barclays Bank did not comply with the orders of the Court of Appeal and its statement of defence stood struck out with costs at the expiry of 30 days from 14<sup>th</sup> December, 2017. On the same ground Merry Beach asserts that Barclays Bank's application to amend its statement of defence is without merit since there is no statement of defence to amend in the first place. In Merry Beach's opinion therefore, what remains to be done is to strike out Barclays Bank's application dated 14<sup>th</sup> March, 2018 and proceed to enter judgement against Barclays Bank in its favour.

14. Barclays Bank's position is different. The Bank asserts that it complied with the directives of the Court of Appeal and has given sufficient reasons where it failed to do so. As for its application to amend its statement of defence and file a counterclaim, Barclays Bank contends that its application meets the parameters of the grant of such orders and the application should be allowed as prayed.

15. The orders of the Court of Appeal were succinct. Barclays Bank was directed to take certain steps within 30 days from 14<sup>th</sup> December, 2017 when the judgement was delivered failing which its statement of defence stood struck out with costs to Merry Beach.

16. In response to Merry Beach's application dated 23<sup>rd</sup> April, 2018 Barclays Bank's Senior Legal Counsel, Paul Kinyanjui Ndungi averred that he had complied with the Court of Appeal orders and had sworn an affidavit on 6<sup>th</sup> February, 2018 explaining the extent of the Bank's compliance with the orders. He also averred that he had been informed by the Bank's advocates on record that they had since filed and

served Merry Beach's advocates with the list of documents and witness statements as directed by the Court of Appeal.

17. Paul Kinyanjui Ndungi denied Merry Beach's assertion that the original cheques were intentionally destroyed by the Bank stating that some of the cheques were destroyed by the Record Management Department in accordance with its policy on destruction of documents that are over seven years old. Further, that some cheques and deposit slips for the period 2009/2010 had been destroyed by heavy downpour in June, 2011. The witness also made substantive averments touching on the substance of Merry Beach's claim. It is not necessary to restate those averments in this ruling.

18. According to Barclays Bank, Merry Beach was attempting to argue its case through affidavits and the best way was to ventilate the issues in a full trial.

19. Turning to its application for amendment of its statement of defence, it was averred that the proposed amendments raises vital points. Further, that the Bank's application was filed immediately the certificate of compliance was filed in the Court of Appeal and no prejudice will be suffered by Merry Beach if the Bank is allowed to amend its statement of defence and counterclaim.

20. Merry Beach holds a different view. Its view is that the Court of Appeal directed Barclays Bank to supply all and not some of the documents it had applied for. It is Merry Beach's position that Barclays Bank's claim that two cheques for euros 60,000 were destroyed in August, 2015 in compliance with the Bank's policy on destruction of documents which are over seven years is not tenable. Several reasons are given for the assertion. Again I need not go into the details of the averments as they go into the substance of the suit.

21. It is Merry Beach's position that since the Bank has failed to provide all the cheques as directed by the Court of Appeal, the Bank's statement of defence stood struck out.

22. On its prayer that summary judgement be entered against Barclays Bank in its favour, Merry Beach asserts that in view of the fact that the Bank only provided cheques for Kshs. 992,000, the Bank no longer has a defence for the larger part of the claim as it cannot reconstruct the cheques that were allegedly destroyed in accordance with the Bank's policy or by floods.

23. Mr. Ole Kina who held brief for Mr. Kinyua for Merry Beach strongly submitted that it was not for this court to determine whether the orders of the Court of Appeal had been complied with. He firmly stated that such a duty belonged to the Court of Appeal.

24. A look at the pleadings and submissions will instantly disclose that there is no dispute that Barclays Bank complied with Order (a) of the Court of Appeal's orders. There is also no dispute that the Bank did not provide all the cheques to Merry Beach's advocate as directed by the Court of Appeal. Additionally, it is agreed that Barclays Bank filed an affidavit of compliance in the Court of Appeal explaining why it could not supply all the cheques to Merry Beach's counsel.

25. Should Barclays Bank be deemed to have defied the orders of the Court of Appeal? I do not think so. The Bank has stated why it could not avail some cheques to Merry Beach's counsel. Whether the reasons given for non-compliance are plausible is another issue altogether. A party cannot be compelled to supply documents which it says it no longer has. Failure to avail documents is not a ground for denying a party an opportunity to be heard. There are consequences attendant to a party's failure to provide documentary evidence as directed by the court. However, those consequences can only be visited upon the party after the hearing. That is the time it will become clear whether a party destroyed or hid documents or whether the documents were genuinely damaged or lost. By supplying the documents it claims to have, the Bank has fulfilled its obligation in compliance with the Court of Appeal order.

26. Since Barclays Bank complied with the Court of Appeal order within the time frame set for it, it follows that it has a valid statement of defence on record. Consequently, I find that there is no good reason for entering summary judgement against the Bank. The outcome is that Merry Beach's application dated 23<sup>rd</sup> April, 2018 fails in its entirety.

27. The question that remains is whether Barclays Bank should be allowed to file an amended statement of defence and counterclaim.

28. Various authorities will show that amendment of pleadings should be allowed if the amendment will assist the court to determine the real question in controversy. Such an amendment should not introduce new or inconsistent cause of action. The amendment should not occasion prejudice or injustice to the opposing party. It is also a principle of law that it cannot be said that prejudice can be occasioned where costs can provide adequate compensation. See **Isaac Awuodo v Surgipharm Limited & another [2011] eKLR**; **Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR**; **Dolphin Transporters Limited v Bank of India Limited [2012] eKLR**; and **Lalji t/a Vakkep Building Contractors v Carousel Limited [1989] eKLR**.

29. The Court of Appeal in **Elijah Kipngeno Arap Bii** (supra) restated the law applicable to amendment of pleadings as stated in **Bullen and Leake & Jacob's Precedents of Pleadings – 12<sup>th</sup> Edition** and captured in the Court of Appeal decision in **Joseph Ochieng & 2 others v First National Bank of Chicago, Civil Appeal No. 149 of 1991** thus:

**“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); 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; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that 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 Limitation Acts.”**

30. Applying the law to the instant application, it becomes apparent that Barclays Bank's application is merited. A perusal of the draft amended statement of defence and counterclaim reveals that the Bank is not introducing new issues but only desires to have all matters related to Merry Beach's claim brought to a closure through ventilation in these proceedings. No prejudice will be suffered by Merry Beach if the amendment is allowed.

31. In the circumstances I allow Barclays Bank's application dated 14<sup>th</sup> March, 2018 in the following terms:

- a) Barclays Bank is hereby granted leave to file and serve its amended defence and counterclaim within 14 days from the date of this ruling.
- b) Merry Beach be at liberty to file and serve its reply to the amended defence and counterclaim within 14 days of service.
- c) Gianluigi be at liberty to file a defence to the counterclaim within 14 days of service.

32. As for costs I find that Merry Beach is entitled to costs in respect of Barclays Bank's application dated 14<sup>th</sup> March, 2018. On the other hand I find that Merry Beach's application dated 23<sup>rd</sup> April, 2018 was without merit and Barclays Bank should have costs for the same. In view of what I have stated above, the ideal order on costs in regard to the two applications is to ask each party to meet its own costs in respect of each of the applications.

33. For clarity, my determination of the two applications is as follows:

- i) Merry Beach's application dated 23<sup>rd</sup> April, 2018 is dismissed;
- ii) Barclays Bank's application dated 14<sup>th</sup> March, 2018 is allowed in the terms hereinabove stated; and
- iii) Each party shall bear own costs in respect of the two applications.

**Dated, signed and delivered at Malindi this 18<sup>th</sup> day of October, 2018.**

**W. KORIR,**

**JUDGE OF THE HIGH COURT**