



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

HCCC NO. 712 OF 2003

NOVA INDUSTRIES LIMITED & ANOTHER.....PLAINTIFF

VERSUS

ZE YANG YUNG LIMITED.....1ST DEFENDANT

ALEX GATUNDU.....2ND DEFENDANT

KIHARA MUTTU.....3RD DEFENDANT

STANDARD CHARTERED BANK LIMITED..4TH DEFENDANT

RULING

1. The Notice of Motion dated 9th October 2015 is for allowing. It is for Leave to re-amend the Plaint dated 16th May 2003 and is brought pursuant to the Provisions of Order 8 Rule 3(1) and 5((1) of The Civil Procedure Rules.

2. Only the 1st Defendant opposes the Application.

3. The Cause of Action that was originally pleaded is in respect to a Bank and Customer relationship which has gone sour. There was alleged default and Bank set into motion the realization process. This culminated in the sale of the charged property.

4. It is of course true as pointed out by the 1st Defendant that the cause of action sought to be introduced may appear to be a new Cause. But what is crucial is that the cause of action does not arise out of the same facts or substantially the same facts. This is the essence of Order 8 Rule 3(5):-

“(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.”

5. The issues sought to be introduced by the Amendments can be abridged as follows:-

a) It sets out the particulars of the breaches of Law or Contract that are said to have been committed in the Sale and Transfer of the Property.

b) Avers the existence of a Court Order that the Defendants are alleged to have breached in evicting the Plaintiff.

6. As the issues sought to be introduced stem from that Customer/Client relationship between the Plaintiff and the Bank, then the Cause of Action can be said to arise from substantially the same facts as the cause of action already pleaded. The Respondent who opposes the Application chose to do so by way of Grounds of Opposition and may not be able to demonstrate that the amendment sought mutates the entire suit beyond recognition.

7. In addition whilst there is a complaint about the delay in presenting the application for Leave to amend, there is no affidavit evidence to demonstrate the prejudice that the Respondent may suffer if leave is granted.

8. Leave to amend may be freely given and more so when the hearing of a matter has not commenced. Old as this matter is, it is yet to be

heard and I am inclined to grant parties a chance to fully state their respective cases. Substantial justice leans towards determining a matter on the real controversies that emerge from a Dispute.

9. The Notice of Motion dated 9th October 2017 is allowed as prayed. Costs in the cause. The Amended Plaint shall be deemed as duly filed and served when requisite Court Fees is paid and which ought to be done within 14 days hereof. The Defendants have 14 days from Service to file and serve their Responses.

Dated, Signed and Delivered in Court at Nairobi this 12th day of October, 2018.

F. TUIYOTT

JUDGE

In the presence of:

Miss Fundi for Kingara for Plaintiff

N/a for Respondent

Nixon - Court Assistant