



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA**

**AT MOMBASA**

**CIVIL SUIT NO. 245 OF 2010**

**ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH**

**t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED**

**DALALI TRADES.....DEFENDANTS**

**AS CONSOLIDATED WITH**

**CIVIL SUIT NO. 165 OF 2010**

**ABDULGADER SHARIFF SALEH & JAMAL SHARIFF SWALEH**

**t/a JINGO TOURS & SAFARIS LTD.....PLAINTIFFS**

**VERSUS**

**SOUTHERN CREDIT BANKING CORPORATION LIMITED**

**JOHNSTONE K MULI t/a**

**KITHEMU AUCTIONEERS .....DEFENDANTS**

**R U L I N G**

1. Before the court for determination is the Notice of Motion by the plaintiff in which the plaintiffs seek an order that leave be granted to them to amend the plaint in terms of the draft amended plaint annexed to the affidavit of SANKOH BUNDI sworn and filed in support of the application. The reasons advanced in the application is that it has become necessary for the plaintiff to get leave to amend so that the court is enabled to completely and effectively adjudicate on all the matters in issue in the suit. In the affidavit in support, it is deponed as follows:-

**“When preparing the plaint herein the then advocate on record inadvertently omitted pertinent fact moreso there are facts which were not available then but are now available which ought to have been included in the claim and the same ought to be amended accordingly to reflect the correct position.”**

2. The application was opposed by the defendants who filed not only grounds of opposition but also a Replying affidavit by one POWLEEN BUSENA, a debt recovery officer of the defendant. The grounds of opposition challenge the application as being an afterthought and a gross abuse of the court process, for lacking merits and having been over taken by events; a design to avoid the matter proceeding to hearing on the merits and that the amendments seek to create new causes of action with grave prejudice to the Defendant Respondent.

3. Additionally the Replying affidavit the deponent asserts act the plaintiff freely and voluntarily entered into a contract with the defendant and ought not be allowed to escape from the liability arising therefrom; that the amendments sought is superfluous as it seeks to plead evidence and not facts. It is then asserted that the application if allowed would have the effect of introducing new causes of action and rewarding the plaintiff in his scheme to delay the fair and just hearing of the matter and that there has been delay in presenting the application hence the overriding objectives of the court are not being observed and respected.

4. In conclusion the deponent asserts that asserts that the ruling by this court dated 7.11.2016 adjudged the plaintiff to owe the defendant and therefore the remedy lies in payment and not an attempt at amendment.

### **Submissions by the parties**

5. The plaintiff/applicant on his side pleaded with the court to allow the application as it seeks to give better particulars of the breeches in the lending contract some of which, it was alleged, occurred after the suit was filed. He also stressed the point that the intended amendment has introduced prayers not in the initial plaint.

6. The defendant/respondent attacked the application for seeking to reiterate the contents of the charge already pleaded asserting that the same introduces a new cause of action, is contrary to the provisions of Order 2 Rule 3(1) and that there has been a delay of over seven(7) years thus contravening the provisions of section 1A & IB of the Act.

### **Analysis and Determination**

7. By statute the law allows the court to allow any amendment and at anytime for the purposes of bring all the matters in controversy before the court so as to afford the court an opportunity to effectually and effectively determine the dispute. It is for that reason a wide and unfettered discretion to be exercised by the court and commend is that the aim of any amendment is to enable fair and just determination of the dispute.

8. Because of that wide discretion, the court have taken the approach that leave to amend should be freely given unless it is demonstrated that the amendment visits prejudice upon the opposite party by; negating on a ground of defence or attack which has accrued; where the amendment contradicts previous pleading, is designed and intended to delay the proceedings by coming to late in the proceedings and therefore present an element of an ambush. Such are clearly not fitting within the purview and purpose of amendment of pleadings to enable the effectual, final and just determination of the matter and the court would be perfectly right to reject same for such would be a pervasion of the purpose of the court. When all that is considered and taken into account however, whenever it can be discerned that the intended amendment is geared towards placing a full and clear case before the court, such ought to be granted because that is the way to do justice.

9. The Court of Appeal in *Stephen Boro Githua vs Formely Finance Building Society & 3 Others [2015] eKLR* had this to say on what to consider in an application for leave to amend.

**“.....we reiterate that where the intended amendments are geared to place full and clear case before the court so that it is effectively and finally determined on its merits, it ought to be allowed for that is the way justice is done”.**

10. I have perused the proposed amended plaint and I have not seen anything in it that contradicts previous pleading, there is no demonstration that it may occasion any prejudice by way of an ambush on the defendant because, even though the suit has stayed long in court, it has never been set down for hearing. In addition everytime a plaintiff amend his plaint the dependant has the door to amend wide open and it has the liberty and indeed legal right to counter by an amended defence every fact freshly pleaded on the amended plaint.

11. Mr. Tsofwa put a lot of weight on the age of the matter as a factor to consider in coming to the submissions that it has been brought after undue delay. My answer to that concern is that no law allows an amendment at anytime including after judgment provided that the ends of justice may be net by such an amendment.

12. The author of Bullen and Leak and Jacob precedents of pleadings 12<sup>th</sup> Edition page 127 writes:-

**“the power to grant or refuse leave no amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particulars case, as to costs or otherwise. The power may be exercised at any stage of the proceedings and accordingly amendment may be allowed before, or at the trial or after trial or even after judgment or on appeal. As a general rule, however, the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party any harm, injury or prejudice him in some way that cannot be compensated by costs or otherwise”.**

13. Applying these well-known and accepted principles, I find no prejudice or harm capable of being visited upon the defendant if leave is granted to amend the plaint, the application is therefore allowed but on terms that:-

- a) The amended plaint be filed and served within 10 days from today and must be accompanied by all witness statements as well as documents to be used at trial.**
- b) The defendant has the right to respond to such amendment within 14 days after service.**
- c) The costs of this application shall be in the cause.**
- d) This matter be mentioned in court on 4/05/2017 for case conference.**

14. It is so ordered.

Dated and delivered at **Mombasa** on **3<sup>rd</sup>** day of **March 2017**.

**HON. P.J.O. OTIENO**

**JUDGE**