



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL CASE NO 469 OF 2008**

NATIONAL BANK OF KENYA.....PLAINTIFF

Versus

CLASSIC FURNITURE MART LIMITED.....1<sup>ST</sup> DEFENDANT

DAMJI DAYALAL GOHIL.....2<sup>ND</sup> DEFENDANT

MANJULA DAMJI GOHIL.....3<sup>RD</sup> DEFENDANT

**RULING**

**Amendment of Defence**

[1] The Defendants have applied for leave to amend their statement of Defence dated 10<sup>th</sup> November 2008 in the manner shown in the annexed a draft Amended Defence. The Applicants cited constitutional as well as statutory foundations of amendment of pleadings in adjudication of cases; the Constitution of Kenya, 2010 particularly Article 159 (2) which prohibits undue reliance on technicalities and insists on determination of cases on merit, i.e. determine the real substance of the case; the overriding objective in sections 1A, 1B and 3A of the Civil Procedure Act which requires the court to act fairly and justly in a request for amendment of pleadings; and Order 2 rule 5, Order 8 Rules 3 and 5, Order 1 Rules 9 and 10 of the Civil Procedure Rules 2010 on the importance of amendment of pleadings in adjudication of cases. They also cited judicial authorities on amendment of pleadings and more specifically the case of **Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998** (Gicheru JA).

[2] According to the Applicants, the amendment of the statement of Defence has been necessitated by two major occurrences, to wit; 1) the withdrawal of the suit against the 1<sup>st</sup> Defendant; and 2) the sale of the 1<sup>st</sup> Defendant's assets. These two events have entirely changed the course and nature of the suit. The proposed amendments are proposing to introduce another party, a company and which is the owner of some of the properties which the Plaintiff fraudulently sold off as if they were the 1<sup>st</sup> Defendants. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants say that they are directors of the 1<sup>st</sup> Defendant as well as the proposed 3<sup>rd</sup> Defendant Company. Again, they stated that all the 1<sup>st</sup> Defendant's assets were fraudulently sold by the Receiver Managers appointed by the Plaintiff. In addition, the Defendants aver that they were just guarantors of the 1<sup>st</sup> Defendant which was the principal debtor. That is not all: this suit is for recovery of Kshs. 59,220,994 from the company and its directors and has been filed after selling all the assets of the 1<sup>st</sup> Defendant. Therefore, when the Defendants put all these things together, they come to one conclusion: that, the withdrawal of the suit against the 1<sup>st</sup> Defendant, and the vehement opposition to the proposed amendment

especially the one which seeks to enjoin the 3<sup>rd</sup> Defendant, are but the Plaintiff's stealth ways of concealing their fraudulent acts in selling and the truth worth of properties of the proposed Defendant and those of the 1<sup>st</sup> Defendant. The amendments are only aimed at bringing the Defendants' entire case to court, thereby enabling the Court to determine the entire case effectually and completely. The amendments will reinforce their counter-claim against the Company, and allegations of arbitrariness, fraudulent, irresponsible and malicious disposal of the assets. On that basis, refusal of these amendments will only prejudice the Defendants in view of the changed circumstance.

[3] They did not stop there as they argued that the claim by the 3<sup>rd</sup> Defendant is not res judicata as case No. was not decided on merit but on a technicality, i.e. it was dismissed for want of prosecution. They cited the case of **John Njathi Mwangi v Njathi Njoroge & 2 others Civil Appeal 292 of 2002** which supports that view. They are convinced there is substance in the amendments and as amendment of pleadings is a matter of right, the application for amendment herein should be allowed.

### **The Respondent opposed the application**

[4] The Respondent opposed the application for amendment of the defence on several fronts. It raised a preliminary issue; that since the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants filed a joint Statement of Defence, amendment thereof requires an affidavit sworn on behalf of the two defendants. The Supporting Affidavit sworn by the 2<sup>nd</sup> Defendant does not claim to have been made on behalf of the 3<sup>rd</sup> Defendant or with his knowledge and consent. Equally, the 2<sup>nd</sup> Defendant has not demonstrated, in the affidavit that he is a director of the proposed Defendant and that omission renders the application invalid. The 3<sup>rd</sup> Defendant has not even applied for any amendment.

[5] The Respondent submitted on more substantive grounds canvassed in the Replying affidavit sworn on 5<sup>th</sup> August 2014 by Samuel Wanjohi Mundia. The major argument is that pleadings have closed and so any amendment which seeks to introduce a new party (**Classic Food Mart Limited**) to this suit must be with leave of the Court. There is no leave sought in the application. Moreover, the Respondent submitted, the intended party, **Classic Food Mart Limited** was not a party against whom any right to relief in respect of the transactions between the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants can arise. The intended party was also not involved in the transactions between the Plaintiff and Defendants and there is no common question of law or fact that can arise between the said intended party, the Plaintiff and the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The casual manner in which the 2<sup>nd</sup> Defendant intends to introduce the alleged intended party into these proceedings does not meet the standards set out in Order 1 Rule 3 and Order 1 Rule 14 of the Civil Procedure Rules. The facts pleaded by the 2<sup>nd</sup> Defendant do not support the addition of the intended party in the suit whatsoever. Thus, if the amendment is allowed, it will cause an injustice to the Plaintiff as a new party would have been introduced through the back door with the possible consequence of costs being ordered against the Plaintiff.

[6] The Respondent pressed on and stated that Classic Food Mart Limited is unknown both to the Plaintiff and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants, and, therefore, a stranger in this suit. The Verifying affidavit attached to the Draft Amended Statement of Defence and Counterclaim can only be sworn by a person named as a director of the alleged intended party, Classic Food Mart Limited. In this instance it has been sworn by the 2<sup>nd</sup> Defendant who has not demonstrated what position he holds in the intended Defendant Company. The 2<sup>nd</sup> Defendant herein is purporting to hold brief for Classic Food Mart Limited without its authority and so he lacks the Locus Standi to sue the Plaintiff.

[7] The second ground urged by the Respondent is that, the amendment which seeks to plead a counter-claim offends **Order 7 Rule 7 of the Civil Procedure Rules** and so the Defendants cannot rely on the proposed counterclaim. And lastly, the Respondent argued that the alleged counterclaim, ought to have been brought by the 1<sup>st</sup> Defendant in **Milimani HCCC No 281 of 2004** in which the 1<sup>st</sup> Defendant sued the Plaintiff herein and the two appointed Receiver Managers. The suit was dismissed for want of prosecution on 20<sup>th</sup> November 2007 and as such, the new attempt by the 1<sup>st</sup> Defendant to sneak in a

counterclaim is an abuse of the Honourable Court's process and ought not to be entertained.

[8] The Respondent does not deny that the 1<sup>st</sup> Defendant is the principal debtor and the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants are Guarantors for the repayment of the facilities advanced to the 1<sup>st</sup> Defendant. The 2<sup>nd</sup> and 3<sup>rd</sup> Defendants executed a joint and individual continuing deeds of guarantee and indemnity for Kshs. 76,000,000/-. The Guarantors gave their properties as security in the guarantees. The claims against the 1<sup>st</sup> and 2<sup>nd</sup> Defendants is for the sum of Kshs. 59,220,994/- being the amount due and outstanding against each Defendant under the Deeds of Guarantee executed by them jointly and severally, and it is a separate cause of action from the one against the 1<sup>st</sup> Defendant. Therefore, the withdrawal of the suit against the 1<sup>st</sup> Defendant by a Notice dated 5<sup>th</sup> May 2014 and filed in Court on the 8<sup>th</sup> May 2014, decimates the case against the 1<sup>st</sup> Defendant only. The withdrawal of the suit against the 1<sup>st</sup> Defendant is not also a strategy or tact on the part of the Plaintiff to conceal the truth as alleged. The fact that the 1<sup>st</sup> defendant closed down informed the decision to withdraw case against it and pursue the 2<sup>nd</sup> and 3<sup>rd</sup> Defendants. The withdrawal does not create any new issues that were unknown to the defendants or a new cause of action to support the proposed amendments.

[9] In any event, the amendments come too late in the day, i.e. six (6) years after the event. No reasons have been given why the counter-claim was not pleaded in the earlier pleadings. The Defendants seem to be using the counterclaim like a hidden card. The Respondent says that the issues they are raising are not technicalities as alleged but substantive matters of law which cannot be glossed over. **Article 159 2(a)** of the Constitution, 2010, provides that *Justice shall be done to all*. In the case of **Misc Civil Application No 405 Republic vs. The Land Disputes Tribunal Mukuruweini** Hon. Odunga J. held in part that:-

*In my view Article 159 of the Constitution is meant to ensure that justice is done to the parties in cases where the Court is properly seized of the matter without locking out the parties for failure to comply with matters of procedure. Where however the matter is not properly before the Court in that a party has failed to bring himself within the circumstances which clothe the Court with powers to grant him the remedies sought it would be stretching the provisions of Article 159 of the Constitution too far if the Court were to ignore all statutory provisions in order to accommodate a party who without any justifiable reason failed to adhere to the provisions of the law.*

## THE DETERMINATION

### Amendment of defence

[10] The law on amendment of pleadings is now settled and cannot be called upon to justify itself. There is ample judicial authority on it but I am content to echo the words of Gicheru JA. in the **Central Kenya Limited vs. Trust Bank Limited and 5 Others, Civil Appeal NO. 222 OF 1998:-**

*“...that a party is allowed to make such amendments as maybe 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”.*

[11] I have considered all the rival submissions and perused the proposed amendments. One hotly contested issue is whether the Defendants can seek to enjoin a company without proper authorization. **Classic Food Mart Limited** is a limited liability company- a legal person separate from those who compose it. And under the law on corporation, a company must, through a resolution, authorize any legal proceedings which the company intends to file in court. Another person cannot file suit on behalf of the company unless he is coming under a derivative suit. See the Rule in **Foss vs. Harbottle**. The Defendants herein are in effect seeking to plead a counter-claim on behalf of **Classic Food Mart Limited**. Needless to state that a counter-claim has the same effect as a cross-suit, and it is a suit for all purposes and intents. Therefore, the 2<sup>nd</sup> Defendant, even if he is a director of **Classic Food Mart Limited** cannot file suit on

behalf of the said company. **Classic Food Mart Limited** should be the one to apply to be enjoined as a party in the suit. I agree with the submissions by the Respondent that the verifying affidavit as well as the supporting affidavit on the counter-claim by **Classic Food Mart Limited** should be sworn by the appropriate officer authorized by the Company in that behalf. On that basis, any amendments whose effect is to lay a counter-claim which, only **Classic Food Mart Limited** can lodge is untenable in law and is disallowed. Even if **Classic Food Mart Limited** was to file a suit against the Plaintiff, it would be to recover its property, and such would be separate suits where no any common question of law or fact would arise. Therefore, there would be no multiplicity of suit which the proposed amendment herein wishes to avert.

[12] I, however, wish to state that the approach used by the Defendants in seeking to join **Classic Food Mart Limited** is most undesirable and that is why it has attracted copious submissions from the Respondent. Had **Classic Food Mart Limited** applied to be joined in the suit, perhaps less or no argument would have ensued on the competence of the application, and I am sure we would only be dealing with the usual thresholds for joinder of parties under Order 1 of the Civil Procedure Rules. Given what I have stated above, although ultimately, where joinder is allowed in appropriate cases, except in cases of joinder of third parties, pleadings are ordinarily amended in such manner as may be necessary unless the court otherwise, I understand why the Respondent was arguing that the Applicant has not applied for leave to join **Classic Food Mart Limited**. Accordingly, it is not necessary for me to dwell on the yardstick provided under Order 1 of the CPR for joinder of parties.

[13] There is yet another legal point of great significance which has emerged here. The Defendants seem to argue that the reason why they should be allowed to amend their defence is because of the changed circumstances arising from the withdrawal of the suit against the 1<sup>st</sup> Defendant which was the principal debtor whose indebtedness the Defendants guaranteed. These submissions by the Applicant oppose the ever-unambiguous position of the law on guarantee. My reflection on the law shows that a guarantee is a separate contract from the agreement for loan with the principal debtor, and the liability of a Guarantor is also separate from that of the principal debtor. On this, see *Halsbury's Laws of England*, 4<sup>th</sup> Ed that:

**Para 101**

*“A guarantee, being merely an accessory contract, does not, even when under seal, cause a merger with that of the principal debtor’s simple contract debt to which it relates.....”*

**Para 103**

*“...although sometimes bound by the same instrument as his surety, the principal debtor is not a party to the surety’s contract to be answerable to the contract; there is not necessarily any privity between the surety and the principal debtor; they do not constitute one person in law, and are not as such jointly liable to the creditor, with whom alone the surety contracts.”*

In view of the above, the argument that the withdrawal of the case against the 1<sup>st</sup> Defendant- the principal debtor- changes the nature and character of the case, thus, necessitating the proposed amendment of the Defence is a comedy of extravagant humour. The arguments are not profitable in this application for amendment or joinder. In such a case as this, the Bank has a right to file and maintain a suit against the Guarantors alone without offending any law.

[14] In the circumstances, the amendments to introduce a company as a party and claim a relief on its behalf yet the company has not applied for such relief should fail, and I hereby decline the amendments in that respect. Similarly, all those amendments which relate to the property of the proposed party (**Classic Food Mart Limited**) are also refused. However, there are those amendments which relate to the parties herein and their properties which I think simply augment the Defence. They are also not prejudicial to the Respondent and will enable the court to determine the real issue in controversy. I allow those. The Applicant shall, therefore, within 14 days, present to Court and the other side a draft amended defence which is drawn in accordance with this ruling. The draft will not be deemed as filed until the court is satisfied it complies with this ruling. I am guided by the case of **Eastern Bakery vs. Castelino [1958]**

EA 461 that:-

*“amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs; Tildeslay vs Harper (1) (1878), 10 Ch D 393, Clarapede The court will not refuse to allow an amendment simply because it introduces a new case: Budding vs Murdoch (3) (1875), 1 Ch D 42. but there is no power to enable one distinct cause of action to be substituted for another, nor to change by means of an amendment, the subject matter of the suit: Mashwe Mya vs Maung Po Hnaung (4) (1921), 48 I A 214; 48 Cal 832. The court will refuse leave to amend where the amendment would charge the action into one of substantially different character: Raleigh vs Gasehan (5) [1898] 1 ch 73, 81 or where the amendment would prejudice the rights of the opposite party existing at date of the proposed amendment e.g by depriving him of a defence of limitation accrued since the issue of the court: Weldon vs Neal (6) (1887), 19 QBD 394; Hilton vs Suttan Steam Laundry (7) [1946] KB 65. The main principle is that an amendment should not be allowed if it causes injustice to the other side”.*

### Res judicata

[15] I should say something on the argument on res judicata without really determining the issue whether the counter-claim herein is res judicata. The reason is; my decision on the substance of the application before me, and more so the question on joinder of **Classic Food Mart Limited**, renders the issue of res judicata of the counter-claim on behalf the said company, moot. Except, however, one must fathom whether a determination of the suit in question was a determination in the sense of res judicata. Note the suit between **Classic Food Mart Limited vs. National Bank of Kenya, John Muteru Kabiru & Clement Mwadulo Mwangoe** was dismissed for want of prosecution.

Dated, signed and delivered in court at NAIROBI this 2<sup>nd</sup> day of February 2015.

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F. GIKONYO

JUDGE