



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 450 OF 2013**

**BELL PACIFIC INTERNATIONAL LIMITED.....PLAINTIFF**

**VERSUS**

**ECO BANK KENYA LIMITED.....DEFENDANT**

**RULING**

1. The Defendant's Notice of Motion dated and filed on 2<sup>nd</sup> May 2014 was brought pursuant to the provisions of Order 8 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A and 1B of the Civil Procedure Act and all other enabling provisions of the law. It sought the following orders:-
  - a. **This Honourable Court be pleased to grant leave to the Defendant to amend its defence and lodge a counter-claim as per the annexed amended defence and counter claim.**
  - b. **The costs of this application be provided for.**
2. The application was predicated upon the grounds that it was imperative for court to allow for the amendment of the defence dated and filed on 29<sup>th</sup> November 2013 so as to aptly capture the circumstances leading to the Plaintiff's debt, which the Plaintiff attempted to pre-empt by filing the instant suit. The Defendant averred that the intended amendments would aid the court in determining all matters relating to the Plaintiff's suit, and thereby ensuring effective use of judicial time and resources. It contended that the Plaintiff would not suffer any prejudice because it would have the opportunity to respond to its Amended Defence and Counter-claim.
3. The application was further supported by the affidavit of Jack Kimathi sworn and filed on 2<sup>nd</sup> May 2014 which reiterated by grounds on the face of the application.
4. In opposing the application, the Plaintiff filed its Grounds of Opposition dated and filed on 16<sup>th</sup> May 2014. It contended that the application was in breach of the order of the court issued on 21<sup>st</sup> March 2014 in that no leave had been sought to extend the time limited by the aforementioned order, that the draft amended defence and counter claim did not disclose a cause of action and was an abuse of the process of the court. It was its averment that the Draft Defence and Counterclaim were unsupported by documents forming their basis and that the attached statements of account were incomplete and only intended to orchestrate a fraud.

5. On 21<sup>st</sup> March 2014, the court granted leave to the Defendant to file and serve upon the Plaintiff its formal application for leave to amend the defence to include a counterclaim. The leave was granted on the premise that the application was to be made within fourteen (14) days from the day of the said orders which was to be by 4<sup>th</sup> April 2014. However, the Defendant filed the application on 2<sup>nd</sup> May 2014.
6. The Plaintiff contended that the application was filed out of time, with the Defendant having failed to seek the leave of the court to extend the time for the filing and service of the application. In its submissions dated and filed on 17<sup>th</sup> June 2014, the Plaintiff reiterated that it was the duty of the Defendant to lay a basis for its claim to show how its claim was made up.
7. In the submissions dated and filed on 16<sup>th</sup> June 2014, the Defendant admitted that there had indeed been a delay in filing of its application which it attributed to an administrative error. It submitted that even after the leave had expired, it still retained the right to file an application for leave to amend the Defence as it was available to any party at any stage of proceedings. It relied on the case **of AAT Holding Limited v Diamond Shields International Limited (2014) eKLR.**
8. It should be stated from the outset that the application presented before the court will not delve into issues as to whether the Defendant has set out its cause of action or a basis for its claim. Those are issues better placed to be ventilated at trial. What the court will however concern itself with at this particular juncture is as to whether the Defendant should be granted leave to file its amended defence and counterclaim as it had sought.
9. Order 8 Rule 3 (1) of the Civil Procedure Rules 2010 under which the application was brought provides that:-

**“Subject to Order 1 Rules 9 and 10, Order 24 Rue 3, 4, 5 and 6 and the following provisions of this rule, 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 its pleadings.”**

10. For a court to allow an application for amendment of pleadings, the said application should have been made in good faith, provided that the respondent, in this instance the Plaintiff, would be adequately compensated by way of costs.
11. Shah, J A (as he then was) **in David Jonathan Grantham & Another v National Social Security Fund** referred to in **Civil Appeal No 149 of 1991 Joseph Ochieng & 2 Others t/a Aquiline Agencies v National Bank of Chicago** on applications for amendment stated as follows:-

**“Amendments should be timeously applied for... that as a general rule however late the amendment is sought to be made is should be allowed if made in good faith provided costs can compensate the other side.”**

12. This court, following the aforementioned provisions of the Civil Procedure Rules, has the discretion to allow a party to amend its pleadings. However, the discretion of the court should be used cautiously, and only in circumstances that would not prejudice either of the parties to the suit. The court should only deny a party leave to amend its pleadings as a last resort with good or sufficient cause, failure to which would be a subversion of justice.
13. Even though the application by the Defendant was made out of time as directed by the court, the Plaintiff has not shown any prejudice that it stood to suffer should the application herein be allowed. The court, being cognisant of the fact that Articles 50(1) and 159(2) (d) of the Constitution of Kenya entitle to party of fair hearing, which shall be conducted in a without undue regard to technicalities, has a duty to allow parties to ventilate their issues before the court, as denying them the opportunity to do so would be a travesty and miscarriage of justice.
14. The Plaintiff having failed to show what prejudice or harm it would be occasioned if the application was allowed; the court is inclined to exercise its discretion grant the Defendant’s application.
15. As the Defendant filed its application after the expiry of the leave granted by the court on 21<sup>st</sup>

March 2014 and it made the application without seeking the leave of the court to extend the time for filing the same, it shall be subjected to thrown away costs.

**DISPOSITION**

16. Having considered by the Plaintiff's Grounds of Opposition dated 16<sup>th</sup> May 2014 and the submissions dated 16<sup>th</sup> June 2014 and 17<sup>th</sup> June 2014 filed by the Defendant and Plaintiff respectively, the court finds that the Defendants Notice of Motion application dated and filed on 2<sup>nd</sup> May 2014 was merited and the hereby allowed in terms of prayer (a).
17. The Defendant shall file and serve its Defence and Counter-claim within fourteen (14) days from the date of this ruling.
18. The Plaintiff is hereby granted leave to file and serve its Reply to Defence and Defence to Counter-claim within Fourteen (14) days from the date of service of the Defendant's Defence and Counter-claim.
19. All subsequent pleadings to be filed and served within the time lines provided for in the Civil Procedure Rules, 2010.
20. The Defendant shall thrown away costs of Kshs. 5,000/- to the Plaintiff within fourteen (14) days from the date of this ruling.
21. It is so ordered.

**DATED and DELIVERED at NAIROBI this 16<sup>th</sup> day of October 2014**

**J. KAMAU**

**JUDGE**