



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

**MILIMANI COMMERCIAL COURTS**

**CIVIL SUIT NO 257 OF 2009**

NATONAL BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

KENNETH PATRICK MALCOLM DAWSON.....1<sup>ST</sup> DEFENDANT

THE LORD DELAMERE.....2<sup>ND</sup> DEFENDANT

**RULING**

**INTRODUCTION**

1. The 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 7<sup>th</sup> February 2014 was brought under the aegis of Order 8 Rules 3 and 5(1) of the Civil Procedure Rules and Sections 3A and 100 of the Civil Procedure Act. It sought the following prayers;
1. **THAT this honourable court be pleased to grant leave to the 2<sup>nd</sup> Defendant/Applicant to amend his Statement of Defence in terms of the draft amended defence annexed herewith.**
2. **THAT the draft amended defence annexed herewith be deemed as duly filed and served.**
3. **THAT the costs of this application be provided for.**

**2<sup>ND</sup> DEFENDANT'S CASE**

2. The application was premised on the grounds that the amendment would be necessary for the determination of the real questions or issues in controversy between the parties, that the application was made in good faith and with the intention of resolving the issues in dispute fairly, expeditiously and justly and that the amendment sought would not cause injury and/or prejudice to the Plaintiff.
3. The said application was also supported by the Affidavit of Pravin Bowry that was sworn and filed on 7<sup>th</sup> February 2014 in which he reiterated the grounds on the face of the application. It was its case that the factual and legal issues now sought to be amended had not been captured in the earlier statement of defence. The draft amended defence was marked "PB-1".
4. To support its argument, the 2<sup>nd</sup> Defendant relied on the cases of **Eastern Bakery v Castelino [1958] EA 461** and **Central Kenya Limited v Trust Bank Limited [2000] 2 EA 365.**
5. On the issue of *locus standi*, the 2<sup>nd</sup> Defendant made reference to the case of **Kanyotta Holdings Ltd vs Kenya Pipeline Company Ltd (2005) eKLR** in which Emukule J determined that an advocate could depone on issues of fact provided that the same were not contentious issues. He

reiterated *inter alia*;

**“I cannot see what is contentious in the matters deponed by Andrew Wandabwa, learned counsel for the Defendant. I therefore reject the first ground of opposition in the application.”**

### **PLAINTIFF’S CASE**

6. On 3<sup>rd</sup> March 2014, the Plaintiff’s advocate, Damaris Wanjiru Gitonga swore the Replying Affidavit. The same was filed on 4<sup>th</sup> Mach 2014. It was contended that the 2<sup>nd</sup> Defendant’s advocate had no *locus standi* to swear to contentious matters of fact.
7. The Plaintiff also averred that the application herein having been made in bad faith, it was a belated attempt at further delaying the case, confusing and embarrassing its case thus causing it prejudice. It was categorical that the issues proposed to be amended had no reasonable basis to warrant the application being allowed.
8. In its submissions dated and filed on 25<sup>th</sup> July 2014 and 29<sup>th</sup> July 2014, the Plaintiff submitted that the issues which the 2<sup>nd</sup> Defendant’s advocate had deponed to were issues that were highly contentious as they were matters of fact that were not in the express knowledge of the advocate.
9. It referred to the cases of **Albany Taylor & Another v Christopher Taylor & Another (2008) eKLR** and **Moses Wachira v Neils Bruel & 2 Others (2013) eKLR** for the proposition that an advocate cannot depone to highly contentious matters which affect the rights of the parties.

### **LEGAL ANALYSIS**

10. The court deems it necessary to consider the Plaintiff’s contention as to whether the 2<sup>nd</sup> Defendant’s advocate on record had the *locus standi* to depone on these issues as he did in the aforesaid Supporting Affidavit.
11. At paragraph 10 of the said Supporting Affidavit, the 2<sup>nd</sup> Defendant’s advocate deposed that the facts were personally known to him as he was well versed with the issues in contention and was therefore competent to swear the affidavit. The List of Documents filed on 4<sup>th</sup> October 2012 formed the basis from which the deposed issues emanated which necessitated the amendments in the draft amended defence.
12. The court has considered the case law and the submissions by the parties on this issue and has come to the conclusion that there was nothing contentious in the said advocates’ averments and he was therefore quite in order when he swore the said Supporting Affidavit on behalf of the 2<sup>nd</sup> Defendant.
13. The purpose of amending pleadings as provided under Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure rules is to allow parties to include all issues of contention between them to enable the court determine the real issues which are in controversy or contention.
14. Paragraphs 4, 4A, 4B, 4C, 4D, 5, 5A, 6A, 9A, 10, 11A, 11B, 11C and 12A of the Draft Amended Defence deal with issues ranging from the validity of the guarantees to the accounts forming the Plaintiff’s claim and the material variation of the terms of lending. Indeed, the issues raised in the proposed Amended Statement of Defence annexed and marked as “PB-1” were pertinent issues that can only be adequately ventilated in a full trial.
15. The Plaintiff has not demonstrated what prejudice it stands to suffer should the proposed amendments be allowed. It has not shown how the issues raised in the draft amended defence fail to disclose any real issues in controversy between the parties, or that it would inevitably result into undue delay in the conclusion of the matter.
16. The court agrees with the 2<sup>nd</sup> Defendant that a mere delay in bringing an application to amend pleadings is not sufficient ground for it to be disallowed. In fact amendments, no matter how late, should be freely allowed before judgment provided they do not cause any injustice to the opposing party and if costs would be adequate compensation to the other party- **See Eastern Bakery v Castelino**(Supra) and **Central Kenya Ltd v Trust Bank Ltd** (Supra).
17. Although the court had wide and unfettered discretion, this power has to be exercised judiciously. Accordingly, having considered the parties’ pleadings, written submissions and case law in

support of their respective cases and after applying the principles of exercising its discretion to the facts of this case, the court was satisfied that the 2<sup>nd</sup> Defendant had made out a good case why this court should exercise its discretion in its favour so as to arrive at a just determination of this matter based on material facts.

18. However, this is a very old matter in which case the 2<sup>nd</sup> Defendant ought to have effected amendments to its Statement of Defence in the early stages as opposed to applying to amend the said Statement of Defence thus taking the Plaintiff backwards. It cannot therefore be allowed to go scot free and must pay costs to the Plaintiff to compensate it for the inconvenience that it has suffered or will suffer as this matter goes back to the closing of pleading stage.

### **DISPOSITION**

19. The upshot of this court's ruling is that the 2<sup>nd</sup> Defendant's Notice of Motion application dated and filed on 7<sup>th</sup> February 2014 is hereby allowed in terms of prayer Nos (1) and (2).

20. The 2<sup>nd</sup> Defendant shall file and serve its Amended defence within fourteen (14) days from the date of the ruling.

21. The Plaintiff shall file and serve its Reply to Amended Defence within fourteen (14) days from the date of service.

22. The 2<sup>nd</sup> Defendant is hereby directed to pay to the Plaintiff thrown away costs in the sum of Kshs. 50,000/= within fourteen (14) days from the date of this ruling, failing which the Plaintiff will be at liberty to seek such further appropriate orders as it would deem fit.

23. Costs shall in be in the cause.

24. It is so ordered.

**DATED and DELIVERED at NAIROBI this 15<sup>th</sup> day of October 2014**

**J. KAMAU**

**JUDGE**