



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
Civil Suit 98 of 2011**

DOLPHIN TRANSPORTERS LIMITED..... PLAINTIFF

VERSUS

BANK OF INDIA LIMITED.....DEFENDANT

RULING

1. The defendant's application dated 23rd May, 2012 seeks the following orders, **THAT:-**
2. **The defendant be granted leave to amend the Defence in the manner shown in red in the draft Defence annexed hereto.**
3. **The costs of this application be in the cause."**
2. The application was brought under **Section 1A & 1B and Section 95** of the **Civil Procedure Act, Order 1 rule 10** and **Order 8 Rule 3** of the **Civil Procedure Rules**.
3. The application was supported by an affidavit sworn by **Raj Kishore Mohanty**, the defendant's Assistant General Manager.
4. On 15th March, 2011, the plaintiff filed a suit against the defendant for breach of contract wherein it alleged that it had suffered loss as a result of the defendant's negligence and negligent misrepresentation.
5. The plaintiff alleges that as a banker the defendant owed it a duty of care to act diligently, prudently and good faith in operating the plaintiff's account and not to illegally debit it.
6. The plaintiff now claims, as a result, general damages for negligence and negligent misrepresentation as well as a declaration that the **Kshs.2,190,899.05** debited into the Plaintiff's overdraft account on the 28/5/2009 is unlawful and unconscionable and in the result should be set aside. Further, an order directing the Defendant, to render true and full accounts to the Plaintiff.
7. The defendant on the other hand seeks an order to amend its defence in order to include a counterclaim against the defendant on grounds that according to the statement of the plaintiff's account with the defendant, as at 21st May, 2012, the sum due from the plaintiff to the defendant was **Kshs.3,853,473.71**

which sum continues to accrue interest at 25% per annum from 22nd May, 2012 until payment in full.

8. Further, that in consideration for granting and continuing to grant credit facilities to the plaintiff, the plaintiff's directors have over the course of time executed a number of personal Guarantees and Indemnities in favour of the defendant, the most recent being the Guarantee executed on 21st March, 2006 by Mr. Binai Jayantilal Shah, Mr. Baadal Chandrakant Shah, Mr. Pravin Kanji Veraria and Mr. Kanji Karsan Vekaria in which they jointly and severally guaranteed the due payment of, *inter alia*, all liabilities and advances granted to the plaintiff up the maximum sum of Kshs.5,094,000/= together with interest thereon.

9. The defendant further states that it is necessary to amend the Defence dated 29th April, 2011 in order to add Mr. Binai Jayantilal Shah, Mr. Baadal Chandrakant Shah, Mr. Pravin Kanji Veraria and Mr. Kanji Karsan Vekaria as defendants in the proposed counterclaim.

10. The proposed amendments are necessary to enable the court effectually and completely adjudicate upon and settle all questions involved in the suit; prevent a multiplicity of suits; save judicial time and enable the court determine the real question in controversy between the parties, it was submitted.

11. I have considered the submissions by all the parties as well as the pleadings record.

12. The defendant seeks to join four parties as defendants and has relied on **Order 1 rule 10 (2)** of the **Civil Procedure Rules** provides that;

“(2). The court at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”

13. This Court in **SAMURA ENGINEERING LIMITED vs. KENYA TEA DEVELOPMENT AUTHORITY & ANOTHER**, H.C.C.C. NO.694 of 2009, made reference to principles upon which amendments to pleadings ought to be as set out as stated in the Court of Appeal decision in **EASTERN BAKERY v. CASTELINO [1958] E.A. 461**. The principles were summarized as hereunder:

- 1. Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.**
- 2. There is no injustice caused to the other side if it can be compensated with costs.**
- 3. The court will not refuse an amendment simply because it introduces a new case.**
- 4. There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject matter of the suit.**
- 5. The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.**
- 6. The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.**
- 7. A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles.**

14. Further, in the case of **JOSEPH OCHIENG & 2 OTHERS –VS- FIRST NATIONAL BANK OF CHICAGO C.A. No. 149 of 1991** , Shah J.A (as he then was) held:-

“The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side.....”

15. With regard to limitations, the court of Appeal in **JOSEPH OCHIENG & 2 OTHERS –VS- FIRST NATIONAL BANK OF CHICAGO (Supra)** stated that the defendant would be deprived of his right to rely on Limitations Acts but subject however to powers of the court to still allow such an amendment notwithstanding the expiry of current period of limitation. The plaintiff herein submitted that the agreement between the two parties was made in 2005 and that the cause of action was over six years and that the counterclaim was time barred. Be that as it may, this court has powers notwithstanding the limitation period as the plaintiff alleges to allow the amendments.

16. From the foregoing, the principles for allowing amendments are well established. This court in **SAMURA ENGINEERING LIMITED vs. KENYA TEA DEVELOPMENT AUTHORITY & ANOTHER** (Supra) stated that the court is alive to the fact that the purpose of an amendment is to identify all the real questions and controversies between parties and determine them at once.

The defence and counterclaim in my opinion arise from the same cause of action and as such, by allowing the amendments, would be in effect allowing this court adjudicate all matters in dispute at one go instead of parties bringing matters before court in installments.

17. Accordingly, I allow the application on the following terms:-

(i) The defendant is hereby granted leave to amend its defence and file its counterclaim and serve the same within 14 days from the date herein.

(ii) The plaintiff be at liberty to file and serve its reply to the amended defence and counterclaim within 14 days of service.

(iii) Costs of this application shall be in the cause.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 1ST DAY OF OCTOBER, 2012.

**D. MUSINGA
JUDGE**

In the presence of:

Irene – Court Clerk

Miss Odari for Mrs. Munene for Plaintiff

Miss Kashindi for Defendant