



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Case 164 of 2005

FRANCOIS MAKORANI DDAIDDO PLAINTIFF/APPLICANT

V E R S U S

BANK OF INDIA DEFENDANT/RESPONDENT

RULING

- 1) The Plaintiff's application dated 21st July 2011 for leave to amend his plaint is before this Court for determination. That application is expressed to be brought under the provisions of Order 8 Rule 1 and Order 51 Rule 1 of The Civil Procedure Rules. It faces strong opposition by the Defendant.
- 2) The application is premised on the grounds on the face of the application and the affidavit of the Plaintiff sworn on 22nd July 2011. Annexed to that affidavit is a copy of the proposed amendment. Basically, the Plaintiff says he has discovered new material facts which are fundamental to his case and which were not within his knowledge at the time of filing of the suit. The introduction of these facts by way of amendment will not prejudice the Defendant, so the Court is told.
- 3) The Defendant opposes the application through a replying affidavit sworn by one **ALLAN MWACHALA** sworn on 1st September 2011. In it the Defendants emphasis that at the time of filing suit the Plaintiff was fully aware of the state of affairs between him and the Defendant bank. That affidavit gives details on how the Plaintiff was dismissed, his terminal benefits fully paid and how, it is said, the Plaintiff still owed the Defendant monies on account of a housing loan. The Defendant Bank is of the view that the application is *mala fides* and part of the Plaintiffs strategy to delay the disposal of the suit.
- 4) Parties elected to argue the applications by way of written submissions. A highlight of those arguments should be sufficient.
- 5) The centerpiece of the Plaintiffs case is that amendments to pleadings ought to be freely allowed if they do not prejudice the opposing side and provided any damages which may arise as a result can be cured by way of costs. Counsel for the Plaintiff cited the decisions in **Omar -Vs- EA Cargo Handling Services Ltd [1985]EA 837** and **Nrb Civil 32 of 2005 National Cereals & Produce Board -Vs- Dubai Bank Kenya Ltd (2005)eKLR** to support this position.
- 6) Counsel for the Defendant did not think much of the application and took the view that "***the Applicant is not being frank and candid with the Court and in fact is deviously attempting to mislead the Court.***" Some energy was spent analyzing the facts surrounding the case to demonstrate that the application was based on falsehood. The Defence did agree that amendments to pleading could be allowed but only when the same was just. The Plaintiff, I was told, having seen the Defence is seeking to

amend the plaint so as to defeat the Defence raised. This Court was asked to consider the force of the following passage on the Court of Appeal decision in **Civil Appeal No. 2 of 2002 – James Ochieng Oduol t/a Ochieng Oduol & Co. Advocates –Vs- Richard Kuloba-**

“However, in a case as this one where a Plaintiff is reacting to a defence raised, the Court should be slow in allowing amendments to the Plaint which prima facie have the effect of defeating that defence.”

7) In addition the Court was asked to take into account that the Plaintiffs employment was terminated in 1999 which was about 13 years before the date the amendment is sought. I am asked to find that this delay would severely prejudice the Defence.

8) This application can be determined by the Court considering the nature of amendments sought, the reasons given for seeking the amendments and the effect allowing it may have on the Defence.

9) On 17th August 2005, the Plaintiffs presented a claim whose backbone, as I see it, would be paragraphs 4, 5, 6 & 7 of the plaint reproduced below-

“4. The Defendant offered the Plaintiff earlier retirement with all benefits recovering the age of retirement and from the said benefits any money the Plaintiff owed the Defendant to be deducted.

5. The Plaintiff has not been paid his benefits totaling Kshs. 2,097,270/- and has not all been officially notified his total benefit in written and/or has not been dismissed officially from his employer.

6. The Defendant has served the Plaintiff with Notification of sale and made advertisement of the property of Plot No. MN/1921/II of sale which advertisement was made in Standard of 29th July 2005.

7. The Defendant also has set the reserve price at Kshs. 940,000/- which is low according to the present market value.

The Plaintiffs grievance, it would seem, is two fold. One, that the Defendant has not given him a true and full credit of his retirement benefits and secondly the reserve price set for the charged property is low.

10) The highlights of the Defendants Statement of Defence are-

- The Plaintiffs employment was terminated.
- Then after giving credit for his dues, the Plaintiff owed the Defendant Kshs. 866,140/15 with interest.
- Due to default of payment the Defendant has sought to exercise its statutory power of sale and has given a fair value to the charged property.

11) Reading the Defence against the Plaintiffs claim the following are in contention-

(i) Did the Defendant terminate the Plaintiffs services or did he leave on retirement?

(ii) Was the Plaintiffs dues properly worked and credit given?

(iii) Does the Plaintiff owe any sums to the Defendant?

(iv) Was the value given to the charged property fair and just?

12) The substantive part of the intended amendments are-

“6. The Defendant was also to pay to the Plaintiff some money out of the Defendant’s Provident Fund

which has not been paid to date. The same was due from the Kenya National Assurance Co. Ltd and has been received by the Defendant.

7. The Plaintiff has not been paid his benefits totaling Kshs. 2,097,270/- and has not at all been officially notified of his total benefits in writing and/or has not been dismissed officially by his employer. He also hasn't been issued with any letter or document indicating his official and lawful exit from employment to date.

10. Despite demand being made the Defendant merely alleges to have applied the Plaintiff's benefits to the Plaintiff's loan account without giving the Plaintiff a statement of account showing how the money has been computed and applied.

12. The Plaintiff states that his terminal benefits if properly computed is more than sufficient to settle his indebtedness with the Defendant.

13. The Plaintiff further states that the interest claimed by the Defendant is inordinately high, excessive, illegal and unconscionable.

These issues, on a cursory look, relate substantially to the very issues which were alive for determination at close of pleadings. There is, of course, more clarity as to the Plaintiffs cause. But this is not to be unexpected as the initial pleadings were drawn by the Plaintiff in person.

13) A new issue now introduced is the provident fund that was due from Kenya National Assurance Co. Ltd and is said to have been received by the Defendant. The Plaintiffs claim, right from the outset, was that he was not paid his full terminal benefits. Whether or not the "Kenya National Assurance" money would be part of the benefits is a matter that can be resolved on evidence. I am, however, unable to say that it is a claim that is inconsistent or outside the Plaintiffs current claim in which he seeks an account of his full terminal benefits.

14) Another issue is that the interest claimed by the Defendant is excessive, illegal and unconscionable. The manner in which the Defendant worked out the interest on the Plaintiffs loan does not appear to have been challenged upto this point. Does its introduction jeopardize the Defence? It is the view of the Court that part of the Defence is that Plaintiffs debt has been properly worked out. Paragraph 3(iii) of the Defence is to the following effect-

"Despite demands the Plaintiff failed to pay any interest and the amount payable under the said Charges for over several years aggregating to Kshs. 2,134,124/10 as at 30th June, 2002 with further interest thereafter thereby entitling the Defendant to exercise its statutory power of sale under Section 69A(b) and/or 69A(c) of the Indian Transfer of Property Amendment Act 9 of 1959 as applied in Kenya."

The rate of interest and how it was applied was always a natural plank of the Defence. The specific challenge on interest now mounted by the Plaintiff does not, in my view, prejudice the Defence.

15) But I must consider the question whether the amendments sought are time barred. As earlier said, the amendments seem to be an elaboration and clarification of the Plaintiffs claim. There is no new cause of action. If limitation is now an issue then it would also be in respect to the plaint as it now stands. But no plea of limitation was raised in the defence. The proposed amendments do not place the Defendant in any worse situation.

16) As would now be clear, this Court does not see any prejudice that the Defendant can suffer by allowing the amendment. The Defence sees the Plaintiffs claim as wholly unmeritorious. The Defence can attack that claim through an application for striking out or wait to destroy it at full hearing. The answer to the Defendants' anxiety is not in disallowing the application for leave to amend. If, as I think, the amended plaint reveals the controversy more clearly then it should be allowed. Parties to a dispute must be given an opportunity to put their best case forward.

17) That said, I would observe that issue of the KNA provident fund must have been in the knowledge of the Plaintiff even at the time of drawing the Plaintiff. He is not candid when he says that he has just discovered it as a new material. This Court will nevertheless overlook that lack of conduct for the greater good of justice. But the Plaintiff must not get away completely. He shall meet the costs of this application. The application of 21st July 2011 is hereby allowed but with costs to the Defendant. The Plaintiff shall file and serve his amended plaint within fourteen days with a right to the Defendant to respond within 14 days of service.

Dated and delivered at Mombasa this 10th day of October, 2012.

F. TUIYOTT
JUDGE

Dated and delivered in open court in the presence of:-

Shimabil for the Plaintiff

Mulwa for Kasmani for the Defendant

Court clerk - Moriasi

F. TUIYOTT
JUDGE