



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

Civil Case 623 of 2009

KINGSWAY TYRES LIMITED PLAINTIFF

VERSUS

CORNER GARAGE TRANSPORTERS LIMITED DEFENDANT

RULING

1. The Defendant has made an Application to this court for leave to enjoin Charterhouse Bank Ltd (under statutory management) as a party to this suit. Further, by the same Application, the Defendant requests leave to amend its Defence and has attached a sample of the Amended Defence to its Application. It also prays for the Amended Defence to be taken as filed should leave of this court be granted to it. The Application is by way of Chamber Summons dated twenty-third of April 2012 and is supported by the affidavit of one **Clemence Masinde** bearing even date therewith who details therein that he is the Legal Officer of the Defendant company. One of the grounds upon which the Chamber Summons is based, was that in the opinion of the Defendant, for a proper determination of the dispute between the parties, the said Charterhouse Bank Limited should be enjoined in these proceedings, having issued a bank guarantee in excess of the claim made by the Plaintiff in this suit.

2. In order for the court to understand fully the contents of the affidavit in support of the Application it is perhaps necessary to examine the contents of the Defence more particularly paragraph 4 thereof which reads as follows:

"As far as the allegations contained in paragraph 6 of the plaint are concerned, the Defendant company admits that it issued the Plaintiff company with post-dated cheques in the total sum of Kshs 3,576,722/= payable between 5th October, 2005 and 27th March, 2006. The Defendant Company avers that its bankers Charterhouse Bank honoured the said cheques drawn in favour of the Plaintiff Company. The Defendant Company pleads *tender before suit*."

The deponent to the Affidavit in support of the Application detailed that the Defendant had all along maintained and reiterated that it had taken a bank guarantee with Charterhouse Bank in the amount of Shs. 4 million. He stated that with this guarantee, the Plaintiff was at liberty to discount all cheques issued by the Defendant. Mr. Masinde then went on to say that the Plaintiff had discounted the cheques issued by the Defendant based on the said bank guarantee. However he maintained that before the said Charterhouse Bank could debit the Defendant's account with it, the Bank was put under statutory management. The deponent went on to say that despite several requests made of the Plaintiff by the Defendant, the former had refused to produce the original discounted cheques issued by the Defendant since 2008, so as to enable the latter to replace the same, if at all the cheques were never discounted by the Plaintiff. The understanding was that the Plaintiff was to discount the cheques and if the Bank failed to honour them, then the Plaintiff was at liberty to claim the outstanding amounts from the Bank under the

said guarantee. The deponent went on to say that as far as he was aware, the said guarantee was fully honoured by the Bank hence the Defendant's defence of **tender before suit**. The deponent was of the belief that in order for this court to make a proper just and fair determination of the dispute between the parties it would be necessary to amend the Defence so as to join the said Charterhouse Bank as a party. He concluded by saying that it was on this basis, that the Defendant wished to amend its pleadings as per the sample Amended Defence annexed to his Affidavit.

3. In response to the said Affidavit sworn by Clemence Masinde, the Group Legal and Credit Manager of the Plaintiff company one Mahendra K. Shah swore a Replying Affidavit on 15 May 2012. Having stated that in his opinion the Application was brought by the Defendant company merely to postpone the prosecution and determination of this matter, the deponent noted that in the proposed amended Defence, the Defendant company admitted issuing postdated cheques to the Plaintiff in the total amount of Shs. 3,576,722/- in payment for tyres, tubes and related products purchased from the Plaintiff company on credit. A further interesting point raised by the deponent in paragraph 9 of his said Affidavit was that the Defendant's bankers, Charterhouse Bank Ltd were placed under statutory management on 23 June, 2006 well after the allegations that were made by the Defendant that their cheques dated between 5 October, 2005 and 27 March, 2006 would have been paid. Further as regards the said bank, Mr. Shah maintained that the Plaintiff company herein has no claim as against the Bank but has procured a commitment in writing from the Statutory Manager thereof on the aspect of the payment which forms part of the Plaintiff's bundle of documents in this matter. Further, the Plaintiff has also ensured the attendance of the Bank's Statutory Manager by way of duly served witness summons to attend court, so that he may shed light on any issue which requires to be clarified. Mr. Shah also observed that the Defendant had not made out any claim against Charterhouse Bank Ltd. In his opinion apropos the Defendant's application herein, the proposed amended Defence merely sought the presence of the said Charterhouse Bank to attend court so as to explain and clarify the arrangement with the Defendant and there was no specific claim brought by the Defendant against the Bank.

4. As regards the post-dated cheques which the Plaintiff has attached to correspondence in respect of the Charterhouse Bank guarantee, Mr. Shah maintained that the Plaintiff had the original of those cheques in its possession and which have not yet been paid. He felt that the Defendant's allegation that the said post-dated cheques had been paid could easily be proved by the Defendant submitting true copies of its bank statements of account to court. In his opinion, the allegation that the Defendant kept on making that it had paid the Plaintiff the sums due by the issued post-dated cheques under the Bank guarantee was just to confuse the court and prolong these proceedings. In order to emphasise his point, the deponent attached to his Replying Affidavit a copy of a letter dated 12 July 2011 from Charterhouse Bank Limited (under statutory management) to Messrs Mbaluka & Co., Advocates on record for the Plaintiff. That letter detailed twenty cheques in various amounts totalling Shs. 2,699,756/-. Further, the bank said in the last paragraph of its said letter:

"As for the guarantee for Shs. 4,000,000.00 issued in favour of Kingsway Tyres Ltd by the Bank on behalf of Corner Garage Ltd, we would like to advise that the same has not been enforced."

Mr Shah went on to say that he had received information that the Defendant was in the process of selling off its vehicles and other assets and consequently this application was an attempt by the Defendant to prolong this matter before court so that at the end of the day, the Defendant would have no assets to dispose of upon which the Plaintiff could execute to recover its monies.

5. In a short Affidavit sworn on 19 June, 2012, Mr. Pandya, in his capacity as Managing Director of the first Defendant company, stated that there had been no deliberate attempt on the part of the first Defendant to delay the determination of this suit. He then went on to say that the issue in dispute as between the parties is not whether or not the Defendant issued post-dated cheques in favour of the Plaintiff, but, rather, whether or not the said cheques were actually discounted on the strength of the bank guarantee dated 1st December 2005 which covered the entire claim sum due to the Plaintiff from the first Defendant. The deponent reiterated the contents of his Affidavit in support of the Application in maintaining that the proposed second Defendant, Charterhouse Bank, had discounted some of the cheques drawn by the Defendant Company in favour of the Plaintiff on the strength of the said guarantee. He

maintained that because of:

"this symbiotic interwoven relationship between the Plaintiff and Charterhouse Bank and also since the said relationship is a central aspect of the dispute between the parties herein, it is imperative that the said Charterhouse Bank be enjoined as a party to this suit. Whether or not the Defendant has a counter-claim against Charterhouse Bank is, with due respect, immaterial".

Finally, the deponent to the Supplementary Affidavit maintained that there was no truth whatsoever in the allegations that the Defendant company was divesting itself of its assets. It was still conducting its main core business and was in the process of embarking upon a serious expansion thereof.

6. In its submissions the Defendant relied upon the statements made in the 2 Affidavits sworn by the said Mr. Pandya. It maintained that the reason for seeking the Order for joining Charterhouse Bank as a party to this suit had been clearly spelt out in the said Affidavits. It maintained that there was a nexus between the Charterhouse Bank and the Plaintiff herein. This fact, coupled with the said guarantee issued by Charterhouse Bank dated 1st December 2005 which covered the entire claim subject matter of this suit, makes Charterhouse Bank a central player in the dispute between the parties. The Defendant went on to say that this court has a wide discretion to allow applications for amendment of this nature. I was referred to several authorities as per the Defendant's list of authorities dated 13 July, 2012. I will review such later in this Ruling.

7. In its turn, the Plaintiff in its submissions in relation to the Application to join the said Charterhouse Bank as a party to the suit, maintained that the one and only ground on which the said Application was based was that the said Bank had issued a Guarantee that covered the amount claimed by the Plaintiff. This submission was based on the following grounds:

- “a. The Application is bad in law and incurably defective for which the Plaintiff is raising a preliminary objection.**
- b. Without prejudice to the foregoing, the said application is vexatious, frivolous, an abuse of the court process and only meant to further delay the conclusion of this matter.**
- c. The alleged bank guarantee does not raise primary obligation to pay and in any event, it was not honoured more particularly due to the placement into statutory management of Charter House Bank Ltd.**
- d. The Defendant admits having issued the post dated cheques in settlement of the debt herein, which is an admission in itself.**
- e. The cheques were never banked on account of Charter House Bank having been placed under statutory management on 23rd June 2006.**
- f. The Plaintiff has all along invited the Defendant's counsel to inspect the original cheques at the offices of the advocates for the Plaintiff.**
- g. Neither the Plaintiff nor the Defendant has a claim against Charter House Bank Ltd.**
- h. The Statutory Manager, Charter House Bank is one of the Plaintiff's witnesses, who will come and confirm that the cheques were not banked and were not paid, which will give the Defendant the opportunity to get any clarification it may need from it; and**
- i. The application defeats the spirit of the Overriding Objective (Oxygen Principle) under the newly enacted sections 1A and 1B of the Civil Procedure Act”.**

8. Moreover, the Plaintiff's submissions continued to state that it raised a preliminary objection to the Application (which was never formally put to court as such) to the extent that a corporate body under

statutory management such as Charterhouse Bank, could not be made a party to this suit. It maintained that once a banking institution has been placed under statutory management, it loses its legal personality and can no longer sue or be sued in its own name. Only the Statutory Manager can sue and/or be sued in any proceedings. In that regard, the Defendant ought to have applied for leave of this court to enjoin the Statutory Manager as a party to this suit. On that ground alone, the Plaintiff maintained, the Application ought to entirely fail. Further, the Plaintiff maintained that if at all the Defendant had a claim against the Charterhouse Bank, it should have applied to have the said Bank enjoined as a third party to this suit by taking out third-party proceedings, which it had not done.

9. As far as the law is concerned, the Plaintiff's submissions leaned heavily on the decision of **Kuloba J.** in **Kassam vs Bank of Baroda (Kenya) Ltd (2002) 1 KLR 294**. The Plaintiff quoted extensively from the first 4 findings of the learned Judge in that case as follows:

“1. The general rule is that amendments should be allowed if the court is satisfied that:

- a) the part applying is not acting mala fide;**
 - b) the amendment will not cause some injury to the other side which cannot be compensated by costs;**
 - c) the amendment is not a device to abuse the court process;**
 - d) the amendment is necessary for the purpose of determining the real questions in controversy between the parties and avoid multiplicity of suits.**
 - e) And that the amendment will not alter the character of the suit.**
- 2. Amendments sought after the statutory free period cannot be claimed as of right, but it is within the discretion of the court.**
- 3. Late amendments may be done, but the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate.**
- 4. In exercise of the court’s discretion the following factors must be considered:**
- a) whether the amendment sought embodies a legally valid claim of defence;**
 - b) the reasons why the subject matter of the amendment was not included in the original pleading or offered sooner;**
 - c) delay or disruption of judicial administration;**
 - d) and the extent to which the amendment departs from the original claim or tends to complicate the issues”.**

In relation to the finding no. 3 above, the Plaintiff submitted that the Pleadings herein had closed on 14 May 2010. This Application had been brought one year and eleven months later and on this ground alone, the Plaintiff submitted that such a delay was inordinate and could not be entertained by this court. The Plaintiff referred this court to the Ruling of **Bosire J.** (as he then was) in **Mowa Publishers Ltd & another vs Attorney General & another (1991) KLR 46** who observed that:

".....a litigant who brings an application for leave as late a stage as the defendants did, has a duty to the Court to show that the Court should exercise its discretion in its favour notwithstanding the delay."

In that case, the applicant had not explained the reasons for delay in making the application to amend

their pleadings and thus could not expect the court's indulgence. Similarly, my learned brother **Mabeya J.** in **Fidelity Commercial Bank Ltd vs Azim Jiwa Rajani (2002) eKLR** followed the Ruling of **Shah J.** (as he then was) in **Joseph Ochieng & others vs First National Bank of Chicago, CA No. 149 of 1991** when the learned judge had stated that applications for amendments ought to be applied for timeously and ought to have been made in good faith. Further, **Kuloba J.** had detailed in the **Kassam Case** (supra) that the applicant has a duty to show why his application was made late and further that the delay was not deliberate.

10. It was the Plaintiff's mainline submission that when the Defendant filed its Defence on 16 March, 2010, the Bank Guarantee was already known to it and it is the only justification why the Defendant wants Charterhouse Bank to be enjoined as a party to this suit. The Defendant had shown no reason why it failed to make the Bank a party to these proceedings earlier and thus, the Plaintiff submitted, the application ought to fail in its entirety. The Plaintiff further submitted that the amendments sought by the application do not avail a claim and/or defence known to law. Further, the Plaintiff in its pleadings had detailed no claim against Charterhouse Bank which is why it wondered as to the necessity of the amendment. The Plaintiff also submitted that the said cheques issued by the Defendant were never banked and the Plaintiff intended to call a witness from the Bank to come to court to confirm the position. In the **Mowa Publishers** case (supra), the Judge also found that in an application to amend a pleading, it has a duty to ensure that the pleadings identify the real matters in controversy in order for substantial justice to be done. The Plaintiff observed that the amendments sought by the Defendant do not raise any claim by the Defendant against Charterhouse Bank Ltd. So that in effect, the said Bank would be unnecessarily dragged into court where and when there is no any pleading that displays any claim levied against it. Again in the **Fidelity Commercial Bank** case (supra) it was found that such application ought to be made in good faith. In the Plaintiff's opinion the Defendant's application was not made in good faith because the Defendant has not established any case against the said Bank. In the Plaintiff's view the present application had only been brought so as to prolong this matter further and cause more delay. The Plaintiff continued with its submissions by stating:

"Even presuming the Bank Guarantee was honoured, as alleged by the Defendant, which is denied any way, it is the Bank that could have had a case against the Defendant. It is common knowledge that once a guarantor pays up a debt, the guarantor has a right to pursue the principal debtor for recovery of the money paid under the guarantee. This is not the case here. The Bank Guarantee was not valid as the cheques were not banked thus there can be no claim as between the Defendant and Charterhouse Bank. The only logical conclusion is that the application is a delay tactic and thus it ought to be dismissed with costs."

11. Towards the end of its submissions, the Plaintiff invited the court to consider the following:

"a. The issuance of the Bank Guarantee created a guarantee contract between the Plaintiff and Charter House Bank Limited (Now under statutory management) in which the Bank would pay any debt due from the Defendant in case of default by the Defendant.

b. Contracts of guarantee have the legal effect that in the event that the guarantor pays up the amount or any part thereof, the guarantor has the right to pursue the principal debtor to recover the amount paid.

c. Contracts of guarantee only create a secondary obligation to pay, though the person owed may elect whether to pursue the principal debtor or the guarantor.

d. The bank was guaranteeing that in the event that the Defendant defaulted in payment of its financial obligations, it would pay the amount due on account of being the guarantor.

e. By dint of number (b) and (d) above, the bank would accrue the right to pursue the Defendant for any sum paid under the guarantee.

f. In light of the above, it is the bank that would have had a right to pursue the Defendant had it

honoured any part of the amount under the guarantee.

g. In the premises, one wonders why the Defendant wants the Bank to be a party to this suit, as a 2nd Defendant yet the Bank did not honour any part of the guarantee. In any event, had the guarantee been honoured, it would be the bank, through the statutory manager, who would be suing to recover the amount paid under the guarantee and not the other way round.

The Defendant admits having issued the post dated cheques in settlement of the debt herein, which is an admission that the sum is due, the cheques were never banked on account of Charter House Bank having been placed under statutory management on 23rd June 2006; and the Plaintiff has all along invited the Defendant's counsel to inspect the original cheques at the offices of the advocates for the Plaintiff".

Finally, the Plaintiff requested the court to consider the spirit of the Oxygen Principle under sections 1A and 1B of the Civil Procedure Act by referring the court to the overriding objective in the case of **John Maina Mburu vs George Gitau Munene & 3 others** (2012) eKLR as per my learned brother **Odunga J.**:

"..... the overriding Objective overshadows all technicalities, precedents, rules and actions which are in conflict with and whatever is in conflict with it must give way. The new dawn has broken forth and we are challenged to reshape the legal landscape to satisfy the needs of our time. The court must warn the litigants and counsel that the courts are now on the driving seat of justice in that the courts have a new call to use the overriding objective to remove all the cobwebs hitherto experienced in the civil process and to weed out as far as is practicable the scourge of the civil process starting with unacceptable levels of delay and cost in order to achieve resolution of disputes in a just, fair and expeditious manner. If the often talked backlog of cases is littered with similar matters, the challenge to the courts is to use the new "broom" of overriding objective to bring cases to finality, by declining to hear unnecessary interlocutory applications and instead to adjudicate on the principal issues in a full hearing if possible."

The Plaintiff submitted that the Defendant's present application, in light of the above, was nothing but a cobweb aimed at delaying this matter further. The Plaintiff called it a cobweb because firstly, no remedy is sought by the Defendant against Charterhouse Bank and secondly, the application had been made very late in the proceedings.

12. In contrast, the authorities cited to court by the Defendant all concentrated on the premise that the power of amendment was a discretionary one and that one of the factors to be taken into account was that it should be in the interests of justice. This was the finding in **Kalpna vs Debi Dayal** (1977) A.I.R. 198. Again in **Faulkner vs Agricultural Development Corporation** (1977) KLR 49 the court found that it could allow any party to amend its pleadings **"at any stage of the proceedings"** which includes at the trial. An amendment may be made, even though it adds a new cause of action, if it arises out of the same or substantially the same facts. This provision was also confirmed in A. I. R. being the Rules of the Indian Supreme Court, **Order 20 Rules 5 and 8** which in its footnote further detailed:

"As a general rule, however late the amendment is sought to be made, it should be allowed if it will not do the opponent party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise."

Further on in the footnotes, the learned authors noted the case of **Hipgrave vs Case** (1885) 28 Ch. D 356 at **P. 361** in which it was stated:

".....But the Court will not readily allow at the trial an amendment, the necessity for which was abundantly apparent months ago, and then not asked for."

Again in the footnotes in the case of **Smith vs Baron**, **The Times**, February 1, 1991 C.A. It was held that:

"the court has the power to allow the amendment or re-amendment of pleadings after the conclusion of the evidence and even after the closing speeches of counsel, where there is no injustice or prejudice that would be occasioned to either party and where it is necessary to formulate the real issues between the parties which did not appear from the original pleadings."

The Plaintiff's submissions also referred me to the Jupiter General Insurance Co. Ltd. vs Rajabali Hasham and Sons case (1960) E. A. 592. Again this was a case where an application to amend a pleading was made at the trial of the suit and the Court of Appeal noted that there was no challenge to the power of the court to allow the amendment to be made and the explanation of inadvertence put forward in the affidavit in support of the application to amend, was fully accepted by counsel for the respondent firm. This is not the case here and I do not think that this authority is relevant to the current application. However, I received some assistance from the Supreme Court case in India of Shah vs Grover AIR 1969 at page 1267. The court had this to say as follows:

"Rules of procedure are intended to be a handmaid to the administration of justice. A party cannot be refused just relief merely because of some mistake, negligence, inadvertence or even infraction of the rules of procedure. The Court always gives leave to amend the pleading of a party, unless it is satisfied that the party applying was acting *mala fide*, or that by his blunder, he had caused injury to his opponent which may not be compensated for by an order of costs. However negligent or careless may have been the first omission, and, however late the proposed amendment, the amendment may be allowed if it can be made without injustice to the other side."

13. The Defendant also put before court the case of Pemcloth Enterprises Ltd vs Patel (1976) KLR 78 where the Court of Appeal sitting in Nairobi held:

"that even if an amended plaint substituted a new cause of action it was proper that the amendment should be allowed under (the old) Order VIA, rule 3 (5), of the Civil Procedure Rules and the wider discretion as to costs under rule 2 (2) was not affected by the introduction of a new cause of action pleaded as of right and based on the same facts as the original cause of action."

The last authority put before court by the Defendant was that of Simonian vs Johar & others (1962) EA 336 as per Crawshaw JA in which the learned Judge reviewed a number of English cases more particularly that of Tildesley v Harper 10 Ch. D.396 at P.397 where Bramwell LJ stated:

"My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting *mala fide*, or that, by his blunder, he had done some injury to his opponent which could not be compensated for by costs or otherwise". "However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs."

Further in that finding by Crawshaw JA he stated:

"an amendment ought to be allowed if thereby 'the real substantial question can be raised between the parties', and multiplicity of legal proceedings avoided."

And later in his ruling the learned judge had this to say:

"It will be sufficient, for purposes of the present case, to say 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:"

In the above case, there was no suggestion of *mala fides* whereas in this case, the Plaintiff has made a distinct point in that regard. Certainly, it appears that the main principle is that an amendment should not be allowed if it causes injustice to the other side. Further, it is quite clear from the authorities that there is no general principle that in the absence of *mala fides*, no new cause of action may be founded on facts

which were known to the plaintiff at the time that he filed the suit.

14. In its submissions, the Plaintiff made the point, by way of preliminary objection, that the Defendant ought to have applied to obtain leave of the court to enjoin the Statutory Manager of the Charterhouse Bank as a party to this suit. As I understand it, the first prayer of the Application by way of Chamber Summons dated 23 April 2012 was just that, an application to this court to grant the Defendant herein leave to enjoin the Charterhouse Bank as a party in this suit. The second point raised by the Plaintiff by way of informal preliminary objection, was that the Defendant should have applied to have the said Bank be enjoined as a third party to this suit by taking out third party proceedings. The Application before court is brought under the provisions of **Order 1 rule 3** as well as **Order 8 rules 3 and 5** of the *Civil Procedure Rules, 2010*. For the purposes of this Ruling, I believe it would be worthwhile to set out what these three rules detail as follows:

(a) **Order 1 rule 3** states:

"All persons may be enjoined as defendants against whom any right to relief in respect of or by arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally or in the alternative, where, if separate suits were brought against such persons, any common question of law or fact would arise."

(b) **Order 8 rule 3** states:

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 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 his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under sub rule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under sub rule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment.

(c) **Order 8 rule 5(1)** states:

"(1) For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just."

15. I do not believe that in reading **Order 8 rule 3**, that the Defendant can enjoin Charterhouse Bank as a party to this suit, thereunder, without taking out third party proceedings. **Order 8 rule 3 (3)** only covers an amendment made to correct the name of a party is not the addition of the new party to this suit.

Further, **Order 8 rule 3 (4)** does not assist the Defendant either, as that only covers an amendment to alter the capacity in which a party sues. As regards **Order 8 rule 5**, according to the marginal note, that involves a general power to amend in terms of any document to be amended. Although a pleading can be said to be a document, I do not consider that this rule allows for an amendment to a pleading which has the effect of joining a third party. That leaves the court with **Order 1 rule 3**. The rule is expressed open-ended enough so as to be interpreted that all persons may be joined as defendants against whom any right to relief exists in respect of or arising out of the same act or transaction or series of acts or transactions. The rule does not say when such persons can be joined whether in the initial pleadings as parties to a suit or later. However, I think that the pertinent provision in this rule is in regard to the expression:

"the same act or transaction or series of acts or transactions is alleged to exist."

I have perused the proposed Amended Defence attached as an exhibit to the Affidavit of **Clemence Masinde** in support of the Application. The Plaintiff maintained that, as drawn, the proposed Amended Defence does not avail a claim and/or defence known to law to either of the parties. Further, the Plaintiff maintained that the amendment sought by the Defendant did not raise any claim by it against Charterhouse Bank nor did it raise any claim against it by the Plaintiff. I tend to agree with the Plaintiff. To my mind, the only significant amendment as proposed by the Defendant is the statement in paragraph 10 of the proposed Amended Defence, which blandly states that the Defendant is not liable to the Plaintiff for the claim sum or any sum at all and goes on to say that if there is any liability then the same should attach against Charterhouse Bank. I also noted that the Plaintiff, in its Complaint, made no mention of Charterhouse Bank. However, the Plaintiff did refer to the said Bank as regards the said guarantee in paragraphs 6, 7 and 8 of its Reply to Defence dated 26 April, 2010. In fact, the Plaintiff averred that the said Bank was placed under statutory management before it could honour its alleged bank guarantee in favour of the Defendant.

16. In all the circumstances, it seems quite clear to me that the Defendant's proposed Amended Defence merely lays the blame for the non-payment of the sums owed to the Plaintiff at the door of the Charterhouse Bank. Basically, it is implying that the Plaintiff was aware of the guarantee arrangement and consequently it should have sought satisfaction for the outstanding amount owed to it from the said Bank. To my mind, that is as maybe as far as the Defendant is concerned. However, nowhere in the Affidavit in support of the Application nor in the Supplementary Affidavit both sworn by the Managing Director of the Defendant company, Mr. Pandya, is there any reason given by the Defendant why it has taken such a length of time to bring in the proposed amendment to the Defence. Further I take cognizance of the guidance of **Kuloba J.** when he detailed in his ruling in the **Kassam** case that:

"Late amendments may be made about the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate."

More important, for the reason that the finding is binding upon me rather than merely persuasive, is a quotation contained in the **Fidelity Commercial Bank Ltd** case as per **Shah JA** in the case of **Joseph Ochieng & 2 Ors vs First National Bank of Chicago C.A. No. 149 of 1991** where it 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; and that exact nature of proposed amendment sought ought to be formulated and the submitted to the other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of the proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduced a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which

could have more conveniently be made the subject a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaint, the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiring of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by a party applying for leave to seek the amendment.

These are of course the principles upon which the Courts act in allowing or disallowing any proposed amendments and our Order VIA Rule 3 sets out all such principles which have been gone into on many previous occasions."

17. Of course the learned Judge in the **Ochieng** case (supra) was referring to the old Civil Procedure Rules which have been replaced by the new in 2010. As detailed above, the Application has been brought under **Order 8** – Amendment of Pleadings. The new **Order 8** contains almost the same wording as the old **Order VIA**. The 2 aspects of **Shah JA**'s finding as above which have particularly caught my eye are firstly, that amendments should be timeously applied for and secondly, that the proposed amendment must not be immaterial or useless or merely technical. To my mind, the Defendant herein has made no attempt to either justify its lateness in bringing the amendment or showing that the delay is not deliberate. The Plaintiff quite obviously wishes to get on and prosecute this 2009 case as soon as possible in seeking payment of the Plaint claimed amount of Shs. 5,084,945.45/-. By introducing this proposed amendment and seeking to enjoin Charterhouse Bank, the Defendant is obviously bent on delaying the further progress of this suit for whatever reason. Further, I don't view the Defendant's proposed amendment as particularly material to this suit. As the Plaintiff has stated in its submissions, the Defendant has not detailed in its proposed amendment to the Defence, just what it hopes to achieve by bringing Charterhouse Bank into the proceedings. The proposed amended Defence states that in the event that liability is found against the Defendant in this suit, then such should attach against the proposed 2nd Defendant – Charterhouse Bank. There is no claim made by the Plaintiff herein in its Plaint as against Charterhouse Bank. Its claim, which it has to prove, is solely against the Defendant. If it obtained judgement against the Defendant, then it will seek to enforce the same by way of execution proceedings. Such proceedings will be against the Defendant, Charterhouse Bank is not involved. To my mind, the proposed amendment by the addition of paragraph 10 to the Defence smacks of a new cause of action by the Defendant against Charterhouse Bank. I cannot see its place in these proceedings. In my opinion, if the Plaintiff herein is successful against the Defendant, then the latter may seek to choose to file a fresh suit as against Charterhouse Bank for indemnity under the said guarantee.

18. Theupshot of the above is that I disallow the Defendant's Chamber Summons dated 23 April 2012 with costs to the Plaintiff.

DATED and DELIVERED at Nairobi this 3rd day of October, 2012.

**J. B. HAVELOCK
JUDGE**