REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURT

Civil Suit 68 of 2005

PAN AFRICAN BANK LTD…..………………..……………..…PLAINTIFF

VERSU S

CRESCENT CO NSTRUCTION COMPANY LTD….……..DEFENDANT

KWETU COFFEE ESTATE LTD…………….……………THIRD PARTY

RULING

1. By its Notice of Motion dated 6th June, 2012, the Defendant has applied under Order 8 Rules 3,5(1) and 7, Order 13 Rule 2, Order 20 Rule 2, Order 45 Rule 1, 2 and Order 51 Rule 1 of the Civil Procedure Rules, 2010, Section 1A, 1B, 3A & 80 of the Civil Procedure Act and Article 159 of the Constitution of Kenya, 2010 the Defendant has sought various orders as follows:-

i.) ***Leave to amend its Defence and Counterclaim dated 7th December, 1992;***

ii.) ***Review, setting aside and/or varying the orders of the court made on 5th May, 2008;***

iii.) ***Judgment to be entered on admission for the sum of Kshs, 220,000,000/- together with interest from 16th July, 1999 until payment in full;***

iv.) ***Accounts.***

In the grounds set out in the Application, the Applicant contends that there is new information that came to the Defendant's knowledge subsequent to the filing of the Defence and Counterclaim, that the said amendments would not occasion any prejudice to either the Plaintiff or the Third Party and that there is sufficient reason to review and/or set aside the ruling of Hon. Warsame J delivered on 5th May, 2008, that there is clear admission in a letter dated 26/9/97 by the Plaintiff that it owes the Defendant management and rehabilitation fees, that the Defendant managed the 3rd party on behalf of the Plaintiff until 1999, that the amount in the counter claim only covered until 1991, that the admitted documents show the Defendant's claim as being Kshs.523,538,823/-.

2. The application was supported by the Affidavit of Mohammed Ashraf sworn on 6th June, 2012. In the Affidavit, the Applicant reiterated the matters set out in the Grounds and further contended that the amendments are necessitated by information relevant to fair and just determination of the real issues in controversy, Mr. Nyachoti, learned Counsel for the Defendant submitted that an order for accounts would necessitate shedding light on the issue of management fees and on the admission that fees was

owed to the Applicant, that it would be in the interest of justice that both viva voce and documentary evidence be on record, that on the issue of counterclaim there was variance to the Defence and counterclaim that needed to be reconciled and that the documents before the court were not available during the hearing and the subsequent ruling of Hon. Justice Warsame on 5th May, 2008.

3. The Plaintiff filed its submissions on 12th July, 2012 in opposition to the application. It was submitted that the application for leave to amend the defence and counterclaim was *res judicata* as the same issue had been heard and determined by a court of competent jurisdiction, that the Applicant was not entitled to review and/or setting aside of the ruling dated 5th May, 2008 by Hon. Justice Warsame, that the new evidence that the Applicant sought to bring before the court could have, by reasonable diligence, been produced to court during the hearing of the application for amendment before Hon. Warsame J in 2008. With regard to the issue of judgment on admission, the Respondent relied on the case of **United Insurance Co. Ltd v Waruinge & 2 Others (2003) KLR 629** for the proposition that judgment on admission only ought to be granted in instances where no points of law have been raised, that it is a discretionary power that ought to be used sparingly and in cases where admission is clear and unequivocal. The Plaintiff contended that reviewing the orders of Hon. Justice Warsame of 5th May, 2008, the court would be sitting on appeal on an order of a court of similar jurisdiction.

4. The Third Party filed its Grounds of Opposition dated 26th June, 2012. In objecting to the application, it contended that the Applicant did not state which evidence was not within its knowledge and could not be produced during the hearing of the earlier application, that there was no apparent error or mistake on the face of the record to merit a review, that the application was misconceived and an abuse of the court process, that there was no sufficient reason for review of the order, that the application was brought late in the day and had been overtaken by events and that it was incompetent in law as it did not raise any new issues over those raised by the oral application on 5th May, 2008. In its written submissions dated 17th July, 2012, the Third Party reiterated the grounds set out in its Grounds of Opposition and submitted that in determining whether the application should be struck out for not raising triable issues, the principles in the cases of **D.T Dobie & Company (Kenya) Ltd v Joseph Mbaria Muchina & Another (1980) eKLR** and **Trust Bank v Amolo Company Ltd Civil Appeal No. 215 of 2000 (UR)** should be considered. Further, it was submitted that an order for accounts could not be made until liability has been determined.

5. I have carefully considered the application, affidavits on record, the written submissions and the oral highlights by counsels and the authorities referred to. I shall first deal with the issue of accounts and judgment on admission. Order 20 of the Civil Procedure Rules provides for the applications for accounts and Rule 4 thereof provides:-

"**On hearing of the application, the court may, unless satisfied that there is some preliminary question to be tried, order that an account be taken and may also order that any amount certified on taking the account to be due to either party be paid to him within a time specified in the order**."

6. This suit was commenced in 1992 as HCCC No. 5884 of 1992. The Plaintiff has already closed its case. The preliminary issue to be determined therefore in this instance is the suit itself. The suit has not been concluded and in my view therefore under the Rules, no order can be made for accounts. The suit has to be determined in order to ascertain the liability of the parties.

7. With regard to the issue of judgment on admission, the Applicant has contended that the Plaintiff had admitted to owing Kshs. 220,000,000/- and produced exhibits to that effect marked "MA1"and "MA2" of a meeting held between the Deposit Protection Fund, M/s Crescent Construction Company Ltd and Mr. Frank Kwinga. In the said Exhibit "MA2" and in particular Note 4, thereof the Applicant contended that it was to be paid Kshs. 220,000,000/-. In making a judgment on admission, the court has to be satisfied that there is a clear and plain admission of fact, and not mere allegations of the same. The power to enter judgment is discretionary and must be exercised sparingly and in unequivocal circumstances. Njagi, J in his ruling in **United Insurance Co. Ltd v Waruinge & 2 Others (2003) KLR 629** at pg 635 and in making an observation in the ruling of **Cassam v Sachania (1982) KLR 191** held *inter alia*;

"…judgment on admission of facts is a discretionary power…judgment on admission cannot be granted where points of law have been raised, and <u>where one has to resort to interpretation of documents to reach a decision</u>."

In the case of **<u>Cassam v Sachania</u>** (supra) the Court of Appeal held that the power to make judgment on admission is discretionary and had to be made in instances where there was a plain admission of fact. The court held:-

"…the judge's discretion to grant judgment on admission of fact under the order is to be exercised only in plain cases where <u>the admission of fact are so clear and unequivocal that they amount to an admission of liability</u> entitling the plaintiff to judgment."

8. It is clear from the submissions made by counsels, both orally and written and in the affidavits filed, there clearly are issues in dispute to be resolved. Judgment on admission has to be made only in clear and unambiguous admission of facts. In the event that there are any points of law raised and to resort to an interpretation of documents to resolve issues, then judgment should not be entered. From the documents submitted by the Applicant in "MA1", "MA2" and particularly Note 4, there is a contention on what amounts had been admitted and the authenticity of the notes. The Plaintiff submitted at Paragraph 23 of its submissions that the ***'…notes did not constitute minutes of the meeting since they are not authenticated and there are no signatures on the alleged minutes.'*** This in itself amounts to an issue of law as regards the provisions of the Evidence Act. For that reason, judgment on admission cannot be entered as against the Plaintiff and I reject the same.

9. In considering an application for amendment, the principles are well set out in the case of **<u>Eastern Bakery v Castellino</u> (1958) EA 461** where at page 462 it was held;

"The court will not refuse to allow an amendment simply because it introduces a new case…<u>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 amendment</u> e.g. by depriving him of a defence of limitation accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side."

In the Court of Appeal case of **<u>Joseph Ochieng & 2 Others v First National Bank of Chicago</u> C.A No, 149 of 1991**, Shah J.A (as he was then) held;

"…the power of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; <u>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</u>; that exact nature of proposed amendment sought ought to be formulated and be 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; <u>that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed</u>; 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 would leave the claim equally unsupportable will not be allowed; <u>that if the proposed amendments introduce 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 more conveniently be made the subject of a fresh action</u>; 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 expiry of current period of Limitation; that the court has special powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action of the same arises out of the same facts as a cause of action in respect of which relief has already been claimed in the action by the 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 VI Rule 3 sets out all such

principles which have been gone into on many previous occasions."

10. From the foregoing, it is clear that an application for amendment should be made timeously. Although the provisions of Order 8 are to the effect that an amendment can be allowed at any stage of the proceedings, the amendment sought should not be prejudicial to the other party and it should not change the action into one of a substantially different character which could more conveniently be made subject of a fresh action. The Defendant has contended that the proposed amendments seek to clarify and crystallize the amount claimed in the counterclaim. At paragraph 6 of the Supporting Affidavit sworn on 6th June, 2012, it has been deponed to:-

"6. THAT further to the foregoing and in a meeting held on 16th July, 1999 between the Central Bank of Kenya, the Defendant, the Third Party and the Plaintiff, the Plaintiff further admitted and acknowledged its indebtedness to the Defendant upon which it was agreed that the Defendant would write down its claim against the Plaintiff in respect of management fees to Kshs.220,000,000/- and that upon sale of the Plaintiff's farm, the proceeds therefrom would be shared between the Defendant and the Deposit Protection Fund in the ration of 52% and 48% respectively. Annexed hereto and marked "MA2" is a true copy of the said minutes of 16th July, 1999."

11. Before the court can address itself to this issue of amendment, it is important to consider the issue for review since they are interrelated. The Applicant has in prayer 2 of the Notice of Motion, prayed in the alternative for the review and setting aside of the ruling and Order of Justice Warsame delivered on 5th May, 2008.

The Defendant's contention is that the evidence adduced could not have, by reasonable diligence, been brought before the court and was only available to its after the orders had been made on 5th May, 2008. Learned counsel Mr. Nyachoti submitting on behalf of the Defendant urged that 'a substantial part' of the evidence of DW1 was not on record when the judge made his ruling on 5th May, 2008. Order 45 Rule 3 of the of the Civil Procedure Rules provides that:-

"***Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of such allegation."***

In **Kithoi v Kioko (1982) KLR 177**, page 181, the Court of Appeal held that;

"The Civil Procedure Rules Order XLIV, demands inter alia, that an application for review must be based in the discovery of new and important evidence which was not within the applicant's knowledge or could not be produced by him at the time when the decree was passed or the order made or on account of some mistake on the face of the record or for any other sufficient reason. The application for review must strictly prove the grounds for review, except for review on the ground of mistake or error apparent on the record, failing which the application will not be granted."

12. Although the Applicants did not precisely state under which limb of Order 45 Rule 1 of the Civil procedure Rules they were making the Application, the reading of the Affidavits and submissions show that the application was made on the basis of discovery of new evidence and any other sufficient reason. The question that arises therefore is whether the evidence tendered by Applicant was within its knowledge before the order was made on 5th May, 2008? Warsame, J in making his ruling stated inter alia;

"…the issue between the parties must be reflected in the pleadings of the parties and I do not think that the alleged special damages can be introduced at this stage…I think the position taken by the defendant is not a true reflection of the issues which have crystallised before it."

13. In its Application, the Applicant contends that the variance in evidence adduced by DW1 and the Defence and Counterclaim filed is sufficient cause to allow for a remedy of review by the court. In the

counterclaim, the amount of Kshs. 523,538,823/- is claimed by the Defendant as the amount due and owing to it. My view is however, that does not constitute new evidence that could not be, by reasonable diligence, been brought before the court before it made its ruling of 5th May, 2008. These were facts that were well within the Defendant's knowledge and of which the court could have deliberated upon before the ruling of 5th May, 2008. The claim is not based on any new evidence and allowing the same would be re-opening the matter to litigation, hence defeating the courts duty of effectively, efficiently, expeditiously and proportionately determining matters as is envisaged under Section 1A and 1B of the Civil Procedure Act. As paragraph 6 of the Supporting Affidavit would show, the matters sought to be introduced existed and were known to the Defendant in 1999, six years before the ruling of Hon. Warsame J. The applicant in my view has failed to prove the grounds for review and for this reason, I find the prayer for review to be without merit and is hereby declined.

14. The offshoot of this would be that the application for leave to amend would obviously fail. As stated in the case of **Eastern Bakery –vs- Castellino (supra)** an amendment would not be allowed if it prejudices the other party. The amendments sought to be introduced are substantial. The documents relied on has been inexistence since 1999. The Plaintiff has already rested its witnesses and closed its case. DW1 has already been cross examined and was at the stage of re-examination when the application was made. How is the Plaintiff expected to contend with the new claim? I think, if allowed, the amendment will prejudice the Plaintiff.

15. In the premises, I find the application by the Applicant dated 6th June, 2012 to be without merit and the same is dismissed. Costs in any event are awarded to the Plaintiff.

Orders accordingly.

DATED and DELIVERED in NAIROBI this 5th day of October, 2012

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A. MABEYA
JUDGE