



**REPUBLIC OF KENYA**

**IN THE ENVIRONMENT AND LAND COURT**

**AT KAJIADO**

**ELC NO. 397OF 2017**

**(Formerly Nairobi ELC No. 1458 of 2016)**

**SIDIAN BANK LIMITED.....PLAINTIFF**

**VERSUS**

**ALICE AWALO LITUNYA.....1ST DEFENDANT**

**ZENITH PHARMACEUTICAL LIMITED.....2ND DEFENDANT**

**GREGORY KIVUVA MUIINDE.....3RD DEFENDANT**

**JANET MUNYIVA NZOMO.....4TH DEFENDANT**

**THE LAND REGISTRAR KAJIADO (SUED THROUGH THE**

**ATTORNEY GENERAL) .....5TH DEFENDANT**

**RULING**

The application before this court for determination is a Notice of Motion dated the 5th October, 2018 brought pursuant to Section 1A, 1B, 3A & 63 ( e) of the Civil Procedure Act, Order 7 Rules 11& 17, Order 8 rule 3, Order 50 Rule 6, Order 51 Rule 1 of the Civil Procedure Rules, and all the other enabling provisions of the law. The Plaintiff seeks leave to further amend the Amended Plaintiff as well as file and serve additional documents including Reply to Amended Statement of Defence & Defence to Counterclaim and add two witnesses.

The application is premised on the summarized grounds that it has become necessary for the Bank to further amend the Amended Plaintiff to plead additional alternative claims against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants in respect of funds due to the bank on account of interest and overdraft made by the bank to the 2<sup>nd</sup> Defendant. The proposed amendments are necessary and shall enable the court determine all issues in controversy in the suit with finality thereby dispensing substantive justice to the parties. The further amendments and the additional filings sought to be made shall not in any way prejudice any of the affected defendants since they shall all be able to respond as appropriate.

The application is supported by the affidavit of SARAH CHEPSOI who is the Plaintiff's Legal Manager where she reiterates the claim above and contends that the proposed amendments have become necessary to enable the bank plead an additional claim against the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants for the sum of Kshs. 10, 842, 924.36 on account of interest written off in suspense by the Bank on 30<sup>th</sup> September, 2017 which had been in error not claimed by the Bank. Further, to plead the sum of Kshs. 25, 484, 930.65 due to the bank on account of overdraft facilities made available to the 2<sup>nd</sup> Defendant. She explains that the said additional claims are not new to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants as they are clearly laid out in the loan and current account statements produced in court as well as the Bank's additional court filings which principally comprise of the 2<sup>nd</sup> Defendant's own documents presented to the Bank via its directors, the 3<sup>rd</sup> and 4<sup>th</sup> Defendants' herein.

The application is opposed by the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants that filed a replying affidavit sworn by GREGORY KIVUVA MUIINDE the 3<sup>rd</sup> Defendant herein where he avers that the Plaintiff seeks assistance from the Court to be allowed to litigate in instalments to their extreme prejudice. He avers that the amendments seek to introduce claims against the Defendants, which are statute barred by virtue of the provisions of the Limitation of Actions Act. He insists the Applicant has not satisfied the provisions of Order 10 (1) and (2) of the Civil Procedure Rules. He contend that the proposed amendments arise directly from issues raised by the Defendants in cross examination of the Plaintiff's witnesses. Further, that the amendments seek to deny the Defendants the defence that they have raised in the suit and it will be extremely prejudicial to the Defendants if allowed at this stage of the proceedings. He insists the Plaintiff is guilty of laches as there has been a delay of 16 months in making an additional application to further amend the Plaintiff. Further, no reasons have been furnished in court as to why the

proposed amendments were not included in the initial amendments. He reiterates that the Plaintiff has already called two witnesses with PW2 pending further examination in chief and cross-examination. He states that the Plaintiff filed a Reply to Defence and Counterclaim on the 9<sup>th</sup> October, 2018, which ought to be expunged from record. Further, that the said document is intended to circumvent and defeat the Defendants request for judgment in default. He reaffirms that no proper reason has been advanced as to why the two new witnesses the Plaintiff is seeking to introduce were not in the initial list of its witnesses. Further, no proper reasons have been furnished as to why the documents that have always been in the Plaintiff's custody were not introduced earlier. He further reiterates that the Plaintiff has on several occasions delayed the hearing of the suit.

The 1st and 5<sup>th</sup> Defendants had initially opposed the application but since the claim against them had been withdrawn, I will not consider their respective responses.

The Plaintiff, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants filed their respective submissions that I have considered.

### **Analysis and Determination**

Upon consideration of the materials presented in respect of the Notice of Motion dated 5<sup>th</sup> October, 2018 the following are the issues for determination:

- Whether the Plaintiff should be granted leave to reamend its Amended Plaintiff.
- Whether the Plaintiff should be granted leave to file and serve additional documents, Reply to Defence and Counterclaim as well as two witness statements.

As to whether the Plaintiff should be granted leave to re-amend its Amended Plaintiff.

The Plaintiff is seeking to re-amend its Plaintiff after the matter had proceeded for hearing. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have vehemently opposed the Plaintiff's application and insist the prayers are prejudicial to them. The 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant further insist the proposed amendment are statute barred.

Section 100 of the Civil Procedure Act makes provisions on the General Power to Amend, and gives the Court the discretion on whether to allow an amendment or not.

Order 8 Rule 3 (1) and (2) of the Civil Procedure Rules provide that: **'(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 subrule (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 subrule if it thinks just so to do.'**

Further Order 8 Rule 5 of the Civil Procedure Rules provides as follows: **'(1) For purposes 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.'**

**In the case of Elijah Kipngeno Arap Bii v Kenya Commercial Bank Limited [2013] eKLR, the Court of Appeal in dealing with issues of amendment held a follows: 'The law on amendment of pleading in terms of section 100 of the Civil Procedure Act and Order VIA rule 3 of the repealed Civil Procedure Rules under which the application was brought was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading - 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**

**"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; that the proposed amendment must not be immaterial or useless or merely technical; 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; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaintiff the defendant would be deprived of his right to rely on Limitation Acts."**

In relying on the Legal provisions as well as the authorities I have cited above, insofar as pretrial directions had been done and the suit set down for hearing, but from the materials presented in respect of the instant application, it is my considered view that the documents the Plaintiff intends to rely on, relate to the dispute herein as there are statement of accounts which it had already furnished in court. Further, I find that the reamendment sought by the Plaintiff is necessary for the determination of the real question in controversy taking into account that the claim against the 1st and 5<sup>th</sup> Defendant have since collapsed and it will determine the finality of the suit herein. I do not see any prejudice the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants will suffer if the amendment sought is allowed. In any event, they will also be granted leave to further amend their Defence and Counterclaim if need be. It is against the foregoing that I will proceed to allow the reamendment sought and grant leave to the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendant to filed their Defences and Counterclaim if need be, within 14 day from the date hereof.

As to whether the Plaintiff should be granted leave to file additional documents, Reply to Defence and Counterclaim as well as two witness statements. I note that two of the Plaintiff's witnesses had testified.

In the case of **Haco Industries Ltd & Another V Doshi Iron Mongers Limited & Another (2018) eKLR**, Justice PJ Otieno held that: '**How about the Reply to defence and defence to counter claim filed on 5/4/2017 Should it be strike out for having been filed out of time. I have held that failure to comply with procedural requirement should not by itself be the reason for a court to drive out a party from the seat of justice. For a counter claim unlike a plaint, there is no procedure for requesting for judgment to in default of a defence. Where the plaintiff fails to file a defence to counterclaim, the remedy is for the defendant to fix the matter for formal proof and not request for judgment. As there is no procedure for requesting for judgment and none having been requested and entered, I do find that nothing stood on the way of the plaintiff from filling his defence when it did. If a counter claim is a cross action then a defence can be filed at anytime, provided the counterclaimant counsel takes no step to towards formal proof. This however is an area that may encourage indolence and the Rules committee need to look at that lacuna and maybe provide what consequences would follow in the event that the plaintiff fails to file a defence to a counter claim within the period of 15 days.**'

I note the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants had not sought for interlocutory judgment to be entered in respect of the counterclaim. Further, that the Plaintiff seeks leave of court to allow the Reply to Defence and Counterclaim to form part of the record as well as to introduce two more witnesses and file further documents. I note the Plaintiff was yet to close its case and since the 1<sup>st</sup> and 5<sup>th</sup> Defendants had been removed from the suit and the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants opposition merely relating more to procedural technicalities, I opine that in the interest of justice and in being persuaded by the abovementioned case, I will grant the Plaintiff leave to file the two more witness statements and allow the Reply to Defence and Counterclaim to form part of the Record. I will further grant the plaintiff leave of 7 days to serve the reply to defense and counter claim. I will grant the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants leave to file further witness statements as well as further reply to Reply to Defense and counter claim if need be, within 21 days, from the date hereof.

As for the costs of the application, since the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> Defendants have been inconvenienced, I will grant them costs assessed at Kshs. 15,000/=.

**Dated and delivered at Kajiado this 19<sup>th</sup> Day of March, 2019**

**CHRISTINE OCHIENG**

**JUDGE**