



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND TAX DIVISION**  
**CORAM: F. MUGAMBI, J**  
**CIVIL SUIT NO. 83 OF 2019**

**BETWEEN**

**DEVELOPMENT BANK OF KENYA LIMITED .....**  
**PLAINTIFF**

**AND**

**AMBROSE DICKSON OTIENO RACHIER**  
**OTIENO AMOLLO**  
**J. OKOME ARWA**  
**FRANCIS OLALO**  
**STEPHEN LIGUNYA *all trading as***  
**RACHIER & AMOLLO ADVOCATES**  
**MARENYO LIMITED .....**  
**DEFENDANTS**

**RULING/DIRECTIONS**  
**ON THE APPLICATION BY THE 1<sup>ST</sup>**  
**DEFENDANT FOR LEAVE TO FILE A FRESH**  
**WITNESS STATEMENT**

**Introduction and Background**

1. Pursuant to an amended plaint dated 31<sup>st</sup> May 2019, the plaintiff, (herein the Bank), instituted this

suit against the defendants seeking recovery of Kshs. 179,867,449.71, together with compound interest accruing from 31<sup>st</sup> May 2019 until full settlement, and costs of the suit.

- 2.** The matter was heard on 14<sup>th</sup> November 2024, during which Ms. Olga Sechero (PW1) testified on behalf of the Bank and was duly cross-examined. When the matter resumed for further hearing on 17<sup>th</sup> July 2025, learned counsel Mr. Kiplagat, appearing alongside Mr. Oyando for the plaintiff, informed the Court that he had been served with an amended statement of defence, a counterclaim, and an additional witness statement filed by the 2<sup>nd</sup> to 5<sup>th</sup> defendants.
- 3.** He submitted that these documents had been filed without prior leave of the Court and urged that they be expunged from the record. Mr. Kiplagat further contended that the amendments substantially altered the original cause of action and introduced an increased quantum in the counterclaim, thereby prejudicing the plaintiff's case.

4. In response, Mr. Juma, appearing for the 1<sup>st</sup> and 6<sup>th</sup> defendants, clarified that he had no objection to the amended pleadings being admitted to the record. He emphasized that in light of the defendants now being represented by separate counsel and the emergence of potentially conflicting interests, the continued reliance on a joint statement of defence was untenable. Dr. Arwa confirmed Mr. Juma's submissions that he (Dr Arwa) was initially acting for all the defendants but that the 1<sup>st</sup> defendant had since retained Mr. Juma to act for him independently.

### **Analysis and Determination**

5. The statutory provisions governing the amendment of pleadings are set out under **Order 8 of the Civil Procedure Rules, 2010**. Specifically, **Rule 3 and Rule 5** provide the procedural framework for such amendments and vest the Court with discretion to allow amendments at any stage of the proceedings, on such terms as may be just. The objective is to ensure that the real questions in controversy are determined and to avoid multiplicity of suits.

6. This discretion is not absolute. The Court of Appeal in the case of **Central Kenya Ltd V Trust Bank Ltd & 5 Others, [2000] eKLR** held as follows:

***“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”***

7. Similarly, in **Ochieng and 2 Others V First National Bank of Chicago, (1995) eKLR**, the Court of Appeal laid down the following principles:

***“i. The power of the court to allow amendments is intended to determine the true substantive merits of the case;***

- ii. The amendments should be timeously applied for;**
- iii. Power to amend can be exercised by the court at any stage of the proceedings; 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**
- iv. 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 limitations Act subject however to powers of the court to still allow an amendment notwithstanding the expiry of current period of limitation.”**

**8.** Having carefully considered the submissions of learned counsel, Mr. Kiplagat for the plaintiff, Dr. Arwa for the 2<sup>nd</sup> to 5<sup>th</sup> defendants, and Mr. Juma for the 1<sup>st</sup> and 6<sup>th</sup> defendants, I am mindful of the

competing procedural and substantive interests at play.

- 9.** On the issue of delay, I observe that this suit was instituted in 2019 and has since undergone extensive pre-trial proceedings. The trial itself only commenced in 2024, nearly five years later. During this period, the defendants have actively participated in the litigation process and, by all reasonable inference, have been fully cognizant of the issues in dispute. Notably, both Mr. Juma and Dr. Arwa acknowledged that the divergence of interests among the defendants had been raised earlier in the proceedings.
- 10.** Despite this, no effort was made to file separate statements of defence or seek leave to amend the pleadings in a timely manner. This omission is material. It reflects a lack of diligence on the part of the 2<sup>nd</sup> to 5<sup>th</sup> defendants, who now seek to introduce substantial amendments at an advanced stage of the trial. In the absence of a satisfactory explanation for this delay, I must weigh the interests of justice against the risk of prejudice to the plaintiff.

**11.** The absence of good faith is further underscored by the conduct of the 2<sup>nd</sup> to 5<sup>th</sup> defendants, who proceeded to file the amended statement of defence, counterclaim, and additional witness statement on 17<sup>th</sup> April 2025 without first seeking leave of this Court. This procedural irregularity is particularly glaring given that the parties were before the Court in November 2024. At the very least, the defendants could have indicated their intention to file further documents or sought directions from the Court then. Their failure to do so reflects a disregard for procedural propriety and also undermines the orderly administration of justice.

**12.** I am mindful of the well-established jurisprudence that amendments to pleadings should generally be allowed, provided they do not occasion injustice to the opposing party. This principle is firmly supported by precedent, including **Eastern Bakery V Castelino, [1958] EA 461** and **Central (K) Limited V Trust Bank of Kenya Ltd, (2002) 2EA 365** which affirm the position that amendments are permissible where they serve to

clarify the real issues in controversy and can be compensated by costs.

- 13.** However, the timing of the present amendments is critical. The hearing has already commenced, and the Bank's witness has already testified. Were it not for this procedural posture, I would have been inclined to allow the amendments in the interests of substantive justice, recognizing that any prejudice to the plaintiff could be mitigated through an award of costs. In the present circumstances, however, the late filing without leave and the absence of a credible explanation for the delay weigh heavily against the exercise of discretion in favor of the 2<sup>nd</sup> to 5<sup>th</sup> defendants.
- 14.** Of greater concern is the core issue raised by the plaintiff, namely, the prejudice that would result from allowing the impugned amendments. In an adversarial system such as ours, the imperative for parties to fully disclose their cases from the outset lies at the heart of procedural propriety and fair trial principles. Once the plaintiff's witness has testified, there exists a tangible risk that the 2<sup>nd</sup> to 5<sup>th</sup> defendants, having gained insight into the

plaintiff's evidentiary strategy, may now seek to tailor their amended pleadings to fill gaps exposed during the testimony of PW1.

**15.** Such tactical amendments, made *post facto*, undermine the integrity of the trial process and compromise the level playing field that procedural rules are designed to preserve. Prejudice of this nature cannot be adequately compensated by an award of costs, as it goes to the root of fairness and the right to a fair hearing. It distorts the adversarial balance and risks converting the trial into a reactive exercise rather than a genuine contest of pre-defined claims and defences.

**16.** Similar concerns were aptly articulated in **Abdul Wahid Al Abubakar V Osman Abubakar T/A Osman Woodworks & 2 Others, [2015] eKLR** where the Court (Angote, J) cautioned:

***“Indeed, the law allows a party to amend his pleadings at any stage of the proceedings. However, where a matter has been partly heard, the court ought to be slow in allowing an***

***amendment to a pleading considering that such an amendment is likely to be prejudicial, especially where the opposite party has already tendered evidence.”***

**17.** I fully endorse this position. Having carefully reviewed the proposed amendments to the statement of defence and counterclaim, as well as the further witness statement I am satisfied that they go far beyond what the defendants initially described as a minor correction. The amendments seek to introduce substantial changes to both the defence and the counterclaim, altering the scope, nature, and quantum of the issues in dispute. Such sweeping revisions, made after the plaintiff has already tendered evidence, are not only procedurally irregular but also risk prejudicing the plaintiff in a manner that cannot be cured by costs.

## **Disposition**

- i. Accordingly, I decline to allow the amendments at this point of the proceedings.***
- ii. The amended statement of defence, counterclaim, and further witness statement filed by the 2<sup>nd</sup> to 5<sup>th</sup> defendants on 17<sup>th</sup> April 2025 are hereby struck out from the record for having been filed without leave of the Court and at a stage that would occasion prejudice to the plaintiff.***
- iii. The matter shall proceed on the basis of the pleadings currently on record.***

**DATED, SIGNED AND DELIVERED AT NAIROBI  
THIS 27<sup>TH</sup> DAY OF OCTOBER 2025.**

**F. MUGAMBI  
JUDGE**