

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND TAX DIVISION
CIVIL SUIT NO. 28 OF 2012

NYANZA SPINNING AND WEAVING LTD.....PLAINTIFF/RESPONDENT

MILLS

VERSUS

CREDIT BANK LIMITED.....1ST

DEFENDANT/APPLICANT

VIPUL SHAH.....2ND

DEFENDANT/RESPONDENT

KAMAL SHAH.....3RD

DEFENDANT/RESPONDENT

RULING

1. Before this Court for determination is the Notice of Motion dated 31st January 2025 filed by the 1st Defendant, brought under Sections 1A, 1B and 3A of the Civil Procedure Act, and Order 8 Rule 3(1) and Order 51 Rule 1 of the Civil Procedure Rules, 2010. The Applicant seeks leave to amend its Amended Statement of Defence and Counterclaim dated 19th July 2017.
2. The application is supported by the affidavit of Emmanuel Wetangula, who avers that the 1st Defendant has come into possession of new material facts which were inadvertently not pleaded at the time of preparing the earlier pleadings.

He states that the new information was discovered during pre-trial preparations, and concerns the Plaintiff's alleged failure to mitigate damages by neglecting to take reasonable steps to take possession of, secure, and preserve its premises following the cessation of the joint receivers and managers from acting. The Applicant contends that these issues go to the core of the cause of action, that the proposed amendments raise *prima facie* arguable defence, and that granting leave is necessary in the interests of justice.

3. The application is opposed through the affidavit of *Mitesh Fulchand Shah*, a director of the Plaintiff. He avers that the matter has been in court for several years and that the Plaintiff concluded the hearing of its case on 19th May 2022. It is contended that the present application has been brought too late in the day and is intended to stall the hearing and delay the conclusion of the matter. The Plaintiff further argues that the 1st Defendant now seeks to introduce evidence of an expert witness, specifically, a land economist/valuer, despite having earlier indicated that it would not be calling such a witness. According to the Plaintiff, the proposed amendments seek to introduce a new line of evidence and raise matters of law and fact on which the 1st Defendant had already cross-examined the Plaintiff's witnesses. It is therefore argued that leave under Order 8 Rule 3 is not intended to aid a party who has been indolent.

4. I have considered the application, the affidavits on record, and the applicable law. The issue for determination is whether the 1st Defendant has satisfied the legal threshold for the grant of leave to amend its amended statement of defence and counterclaim.
5. **Order 8 Rule 3** of the Rules, stipulates as follows:

“(1) Subject to Order 1, rules 9 and 18, 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.”

6. The general principle governing amendments is that they should be freely allowed at any stage before the hearing if such amendments can be made without causing injustice to the other party. No injustice is deemed to occur where any inconvenience can be compensated by an award of costs.
7. In the case of **Central Kenya Ltd v Trust Bank Ltd & 5 Others [2000] eKLR**, the Court of Appeal pronounced the following principles;

“...the overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the

opposite party beyond compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite party would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

8. In **Joseph Ochieng & 2 others Aquiline Agencies v First National Bank of Chicago (1995) eKLR** the Court of Appeal had this to say about amendment:

“Whether an amendment should be granted is a matter for the discretion of the trial judge and he should be guided in the exercise of the discretion by his assessment of where justice lies. Many and diverse factors will bear on the exercise of this discretion. I do not think it is possible to enumerate them all or wise to attempt to do so. But justice cannot be measured in terms of money and in my view a judge is entitled to weigh in balance the strain the litigation imposes on the litigants, particularly if they are personal litigants rather than business corporations, the anxieties occasioned by facing new issues one way or the other.”

9. The discretion, however, is not unbounded. Courts have repeatedly cautioned that amendments should not be used to introduce matters that were always within a party’s knowledge, nor to introduce a new defence or evidence

without adequate justification. Amendments should also not be allowed where they result in prejudice that cannot be compensated by costs or where they appear designed merely to delay proceedings.

10. In the present matter, the Applicant seeks leave to amend its Amended Defence and Counterclaim on the alleged ground of discovery of new evidence. The Plaintiff opposes the application, contending that its case is already closed and that allowing the amendment would occasion prejudice.

11. It is undisputed that the Plaintiff closed its case on 19th May 2022, nearly three years before the filing of this application. The Applicant has not demonstrated why the purported “new material facts” could not, with reasonable diligence, have been discovered and pleaded earlier, particularly since the issues raised relate to mitigation of damages, an issue squarely within the purview of the defence from the outset.

12. Moreover, the proposed introduction of an expert witness at this advanced stage, after the close of the Plaintiff’s case, would substantially alter the character of the defence and impose new evidentiary burdens. I agree with the Plaintiff that the amendments sought would amount to a fresh defence rather than a clarification of existing pleadings.

13. Permitting such amendments now would undeniably prejudice the Plaintiff, who concluded its case based on the pleadings as they stood. Re-opening the evidentiary process would also prolong litigation that has already been pending for a considerable period.
14. While the law favours determination of disputes on their merits, justice must be even-handed. The Applicant has failed to offer a satisfactory explanation for the delay or to demonstrate that the amendments are indispensable for the fair adjudication of this suit, rather than an attempt to fill evidentiary gaps exposed during trial.
15. In the circumstances, I am not persuaded that this is an appropriate case in which to exercise the Court's discretion in favour of the Applicant.
16. The Notice of Motion dated 31st January 2025 is hereby dismissed.
17. Costs shall follow the event and are awarded to the Plaintiff.

Orders accordingly.

RULING delivered virtually, dated and signed at **NAIROBI**

This **11th** day of **December** 2025.

P.M. MULWA
JUDGE

In the presence of:

Mr. Odero h/b for Mr. Wasuna for Plaintiff

Mr. Wakhisi h/b for Mr. G. Oraro & Mr. E. Wetangula for 1st

Defendant

Mr. Ned Chemwoiwo h/b for Mr. Singh for 2nd & 3rd Defendants

Court Assistant: *Carlos*