



**Dhariwal & another v I&M Bank Limited & another (Civil Suit E148 of 2019)
[2024] KEHC 1670 (KLR) (Commercial and Tax) (23 February 2024) (Ruling)**

Neutral citation: [2024] KEHC 1670 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
CIVIL SUIT E148 OF 2019
FG MUGAMBI, J
FEBRUARY 23, 2024**

BETWEEN

MOHAN SINGH DHARIWAL 1ST PLAINTIFF

KULWANT KAUL DHARIWAL 2ND PLAINTIFF

AND

I&M BANK LIMITED 1ST DEFENDANT

BHAVING GUDKA HARILAL SHAH 2ND DEFENDANT

RULING

1. The ruling herein relates to an objection raised by Mr. Kisinga for the plaintiff objecting to the 1st defendant's further amended statement of defence and a supplementary list of documents filed pursuant to the leave of this court granted on 3rd October 2024.
2. Very briefly the dispute between the parties relates to a loan advanced to the 2nd defendant by the 1st defendants, which was secured by the plaintiff's property. The point of contention relates primarily to the value of the security discharged by the sale of the security and the amount still due (if any).
3. The plaintiffs filed this suit by the plaint dated 26th June, 2019 and amended it on 11th October 2019 pursuant to leave granted on 4th October, 2019 and again further amended it on 7th March 2023 pursuant to leave of the court.
4. In response, the 1st defendant filed its statement of defence dated 28th November, 2019 and amended on 18th May 2023 in which it averred that the plaintiffs breached the contract and were in arrears before it lawfully exercised the statutory power of sale. The amendment rectified the arrears due from Kshs. 12,387,035.22/= to Kshs. 22,168,630.77.



5. The hearing of the suit commenced on 3rd October 2023 with the 1st plaintiff taking the stand, he testified and was cross-examined by the defence counsels. It is at this point that Mr. Karani Kamati Counsel for the 1st defendant sought leave to amend the discrepancy of amounts in the documents filed by the 1st defendant. The discrepancy was in terms of the amounts claimed in arrears from the plaintiffs. He also sought leave to put in a further amended statement of defence and counterclaim, a supplementary bundle of documents as well as written submissions.
6. Mr. Kisinga and Mr. Mbeche for the plaintiff and the 2nd defendant respectively were not opposed to the application for leave to amend the documents save to the effect that only figures would be amended. In fact, Mr Kisinga proposed that the amendments could be made orally. This Court proceeded to grant the said leave to amend the statement of defense, witness statement and supplementary list of documents based on the consent of the parties. Pursuant to this leave, the 1st defendant served upon the parties the further amended statement of defence, and a supplementary list of documents.
7. When the matter came up for hearing of the 2nd plaintiff's case on 4th October 2023, Mr. Kisinga opposed the production of further documents and urged the court to expunge them from the record as they introduced new facts and sought to expunge from the record documents already adduced in court.
8. Since the 2nd plaintiff was testifying the court opted to proceed with the hearing of the plaintiff's case so as not to waste the time allocated for hearing, and reserve the ruling for later.

Analysis

9. I have perused the Court record against the 1st defendant's Further Amended Statement of Defence & Counterclaim dated 3rd October 2024. At paragraph 23 of the said pleading, the figure owing has been amended from Kshs.22,168,630.77 to read Kshs.13,559,143.22 as at 11th May 2023. The same amendment is made within the prayers at paragraph (b). There is no other amendment visible. This amendment was within the leave granted by the Court.
10. I have equally looked at the 1st defendant's amended supplementary list and bundle of documents dated 3rd October 2024. The said amended list and bundle of documents introduces the borrower's statement of account for the Account No. 0040041XXXXX11, thereby seeking to replace the statement for account number 00400XXXXXX01200. This completely alters the evidence on record and was not within the leave that the Court had granted.
11. The introduction of the new evidence is evidenced by the further supplementary witness statement sworn by Andrew Muchina on 3rd October 2023. Paragraph 2 and 3 state as follows:

“I therefore wish to rely on the Borrower's Statement of Accounts for Loan Account Nos. 0040041XXXXX11 and 00400XXXXXX01201. In the circumstances, I urge that the Statement of Account for Loan Account No. 00400XXXXXX01200 as produced vide my Supplementary Witness Statement be expunged from the Court's record.

I therefore wish to recall my Supplementary Witness Statement dated 18 May 2023 and rely on the present Further Supplementary Witness Statement as well as my Witness Statement dated 7 December 2022.”
12. The intention of the amendment as captured by the Court and expressed by Counsel was for purposes of amending what was depicted to be an error and not making substantial additions to documents and expunging others. If the defendant was honest about this, he would have specifically informed the Court about his intentions. In my view, the introduction of a new account altogether alters the nature



of the claim. It is way too late to make such amends at this point in time. Parties had sufficient time before the matter was confirmed ready for hearing. The Court's leeway is not to be abused.

Determination

13. For these reasons the amendment to the pleadings and the further evidence and witness statement dated October 3, 2024 are hereby expunged from the record.

DATED, SIGNED AND DELIVERED IN NAIROBI

THIS 23RD DAY OF FEBRUARY 2024.

F. MUGAMBI

JUDGE

