Jaribu Credit Traders Limited v Fidelity Bank Limited & another (Commercial Case 647 of 2015) [2024] KEHC 3412 (KLR) (Commercial and Tax) (15 March 2024) (Ruling)

Neutral citation: [2024] KEHC 3412 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)

COMMERCIAL AND TAX

COMMERCIAL CASE 647 OF 2015

NW SIFUNA, J

MARCH 15, 2024

BETWEEN

JARIBU CREDIT TRADERS LIMITED ..... PLAINTIFF

AND

FIDELITY BANK LIMITED ..... 1ST DEFENDANT

SBM BANK LIMITED ..... 2ND DEFENDANT

RULING

1. The Plaintiff filed a Notice of Motion Application dated 17th February 2023, seeking to set aside a consent recorded on 8th December 2017 and this Court's consequent order that adopted that consent. Before the same could be set down for hearing, the Plaintiff purported to amend it. That amendment, and which has been canvassed by way of written submissions, is the one that this Ruling relates to.

2. Both parties filed their written submissions on the issue, and the same are on record. Even though the submissions are on both this issue and the Application itself, this Court at its session of 16th October 2023 directed it needed to first render a substantive determination on whether an Application can be amended, and whether such amendment is contemplated under the provisions of Order 8 of the *Civil Procedure Rules*. Upon being invited by the court, the parties filed their respective submissions on the issue.

3. The primary issue for determination now, is whether an Application is amendable just like any other pleading or other litigation document. This to me is a pertinent a glaringly uncertainty and often controversial grey area of law, that needs to be settled.

Analysis and Determination

4. Senior Counsel Dr Kamau Kuria for the Plaintiff has as usual filed very elaborate and extensive submissions, proffering that an Application can be amended or is amendable under the law, and has cited certain legal provisions as well as decided cases. These include *Fredrick Mwangi Nyaga v. Garam Investment Bank* [2013] (Havelock, J), *Samwel Barkoyett Kangogo- & 3 Others v. Daniel Ndungu* [2009] eKLR (Omondi J as she then was), *Diamond Trust Bank of Kenya Limited v. Invesco Assurance Limited & Anor* [2021] eKLR (Chepkwony, J). *In Re Estate of NMM (Deceased)* [2121] eKLR (Onyiego J).

5. He in arguing that an Application can be amended. cited Order 8 Rule 5 of the *Civil Procedure Rules* as well as Section 100 of the *Civil Procedure Act* Cap 21 Laws of Kenya. These provisions, he submitted, provide for the general power to amend. For the benefit of this analysis, I hereby quote these provisions verbatim.

6. Order 8 Rule 5 of the *Civil Procedure Rules* provides as follows:

(1) ....

> " For the purpose 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.

(2) ...

> " This rule shall not have effect in relation to a judgment or order."

7. Section 100 of the *Civil Procedure Act* for its part, provides as follows:

> " The court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.

8. The Application has in its grounds stated that Under Order 8 Rule 5 of *Civil Procedures Rules*, this Court has the power to permit an amendment to be made on a pleading for the purpose of determining the real question in controversy between the parties. It further stated that the Plaintiff has subsequent upon undertaking to pay the Defendant, stumbled upon some documents that show that he did not owe the Defendant at all, and that to the contrary, its is the Defendant who owes it.

9. Hence that the real question in controversy as at now is as to who owes the other, money. That this is the reason why it filed an Application to set aside the consent earlier recorded in this Court. In urging amendment, stated that it is from that document that it realized it actually did not owe the Defendant. To me these facts are in respect of the initial setting aside Application and not the amended Application the subject of this ruling. Those grounds are therefore unhelpful and irrelevant for this amendment of an Application.

Can an Application Be Amended?

10. It is clear in my mind that Order 8 is on amendment of principal pleadings and not amendment of Applications. That is why it even makes reference to the "close of pleadings". It is my view therefore

that this Order, sometimes in combination with Section 3A of the *Civil Procedure Act* Cap 21 Laws of Kenya, only applies to an institutive primary pleading such as a Plaint, or a subsequent other primary pleading such as a Defence or Reply to Defence. An interlocutory Application although sometimes generalized as a pleading, is not a primary pleading.

11. The Plaintiff just like many other parties that have been seeking or supporting amendment of Applications have relied on Order 8 Rule 5 (1). Which states that the Court may for purposes of determining the real controversy between parties, or of correcting any defect or error in any proceedings, either of its own motion or on the application of any party order any document to be amended. The Plaintiff has in its submissions extensively relied on "the real controversy" test.

12. I take the position that an Application is not a document contemplated by this provision, or in terms of that provision. Those that support amendment of Applications, on the one hand argue that an Application is a pleading hence under Order 8 Rule 1 amendable. They then quickly with the same breath start arguing that it is a document in terms of Order 8 Rule 5 (1). This is not only ironical and paradoxical, but also contradictory.

13. In my view, there must be a legal and rational basis to base the argument that an Application is amendable. It cannot be merely predicated on the generalized premises that all pleadings are amendable. The court decisions that the Plaintiff has cited in support of its amendment of its Application, and which took a position different from mine, are High Court decisions, hence not binding on me. From them as I have explained hereinafter, I humbly dissent. In urging its request for amendment of the said Application, the Plaintiff like many others, and as I have already stated also sought to rely on Section 3A of the *Civil Procedure Act*.

14. This section is in my fervent view not a blanket provision for anything under the sun, or for all litigation aspirations of the litigants and their litigators, or a cure or sanitizer for all slips, omissions, errors and non-conformities. Neither was it meant to allow courts proceed arbitrarily or operate above or away from the law. Neither is it an ever-open escape from the consequences of transgressing express legal provisions, nor for filling the gaps in the existing law. This position has been emphasized from the High Court to the Court of Appeal and to the Supreme court.

15. With regard to Applications, I hold that an Application should together with its Supporting Affidavits and annexture if any, be self-contained and self-executing. Unlike a Plaint and Defence, that have to be accompanied with witness statements and documents bundle, an Application together with its Supporting Affidavit is a stand-alone package, just like hand in glove.

16. I hold that an Application is not to be amended like the institutive/constitutive or primary pleadings referred to hereinbefore. Unlike those, it is strictly speaking not a pleading; and if a pleading, then it is a pleading sui generis. In fact, a pleading within a pleading.

17. In the Civil Procedure Rules 2010, the principal Order on Applications is Order 51. This Order is in my view extensive, comprehensive as far as Application in civil proceedings under the *Civil Procedure Act* and Rules are concerned. Nowhere is amendment of Applications mentioned.

18. Had this Order contemplated that an Application can be amended, they would have expressly made provision for the manner, form and grounds for such amendment. I rely on the latin maxim expressio unius et excluscusio (whose English translation is, whatever is not expressly included, is expressly excluded).

19. On such a straight-jacket matter, a Court should not write into or read into the law what is not included therein. What Parliament or the Rules committee has not included, should not be included by craft

of judicial interpretation or extrapolation, or for the mere sake of judicial innovation. Innovation does not mean re-inventing the wheel.

20. It is my view that an Application is under the *Civil Procedure Rules* not amendable. If it were to be amended, what happens to its Supporting Affidavit. Especially given that an Affidavit is under the law not amendable. One will then in some such instances end up with a Supporting Affidavit that is either superfluous, irrelevant, unsupportive of or even contrary to amended Application. This is an absurdity, and the law as we all know abhors absurdity.

21. The purpose of rules of procedure is to ensure order, uniformity as well as convenience in procedure, and avoid absurd results such as that. To put the record straight, I hold that in my considered view, an Application can only be withdrawn and a fresh one filed with or without leave as the circumstances or the Court may direct. Unlike the principle in societal matters, that one is to do all except that which is prohibited, with law the principle is that you do only that which the law has permitted or prescribed.

22. For the foregoing reasons, the Plaintiff's amendment of its Application is hereby disallowed, and the Application as amended, is hereby struck out, with leave to file a fresh one.

DATED AND DELIVERED AT NAIROBI THIS 15TH DAY OF MARCH 2024.

PROF (DR) NIXON SIFUNA

JUDGE