



REPUBLIC OF KENYA



**Family Bank Limited v Mak’ojuando (Civil Appeal E103 of 2021)
[2024] KEHC 6529 (KLR) (31 May 2024) (Judgment)**

Neutral citation: [2024] KEHC 6529 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT KISUMU
CIVIL APPEAL E103 OF 2021**

MS SHARIFF, J

MAY 31, 2024

BETWEEN

FAMILY BANK LIMITED APPELLANT

AND

PAUL ODALO MAK’OJUANDO RESPONDENT

*(Being an appeal from the ruling and order of the Hon. S. N. Telewa (SRM)
delivered on the 30th day of July, 2021 in Kisumu CMCC No. 540 of 2016)*

JUDGMENT

Case Background

1. The Respondent herein filed a suit in the subordinate court vide a plaint dated 11th day of October 2016, seeking the following reliefs;
 - a. A declaration that the defendant’s instructions to attachment of the Plaintiff’s motor vehicle registration KBS 497V and KBS 492V on account of the overdraft facility is illegal null and void.
 - b. A declaration that the amount sought (if any) on account of the overdraft facility can only be sought by way of recovery of the relevant security being motor vehicle registration number KAY 606S and not attachment, repossession and/sale of motor vehicle registration numbers KBS 497V and KBS 492V.
 - c. An order of permanent injunction restraining the defendants, its servants, agents, employees and all such persons acting on its behalf from attaching, repossessing, seizing, alienating, selling, auctioning and/or interfering with the plaintiff’s motor vehicle registration numbers KBS497V and KBS 492V.
 - d. The defendant be ordered to render accounts in terms of paragraph 15 of the plaint.



- e. Costs of the suit.
 - f. Any other relief this court may deem fit to grant.
1. It was pleaded that by a letter dated 22nd July 2013, the plaintiff who is the respondent herein applied for an overdraft facility of Ksh.750,000 that would attract an interest of 22.5% per annum on a reducing rate where the respondent would provide security in form of chattels mortgage over motor vehicle registration number KAY 606S and the defendant who is the appellant herein obliged to the plaintiff's request and granted the said facility whose purpose was for what was described on the aforesaid letter as working capital.
 2. The respondent was aggrieved by the exorbitant interest rate that the appellant later levied on the facility hence the lawsuit in that, having repaid the overdraft to the tune of Kshs.500,000 and despite making such substantial payments the Appellant proceeded to demand from the plaintiff the sum of Kshs.4,069,559.93 as against the sum of Kshs.750,000.00.
 3. The main suit and an application filed under certificate of urgency were brought and filed before the court on the 10th of October 2016 wherein interim orders were granted in favor of the respondent herein who was the Plaintiff.
 4. The Appellant herein then the defendant filed its statement of defense dated 28th November 2016. The matter was then set down for hearing of the main suit on the 16th of April 2021 and its upon learning of this date did the Appellant file notice of Motion Application dated 12th April 2021 approximately 5 years later seeking amendment of the statement of defense as well as seeking to introduce a counterclaim.
 5. This was rebutted by the Respondent herein and after deliberation before the court both parties canvassed the application by way of written submissions wherein the Senior Resident Magistrate S.N Telewa setting the threshold for grant of orders sought as the issue for determination issued a ruling over the same and stated that the application lacked merit and she dismissed the same with costs.
 6. The Appellant was aggrieved by the said ruling thus filed this appeal. He premises his appeal on the following grounds.
 - i. The learned Magistrate erred and misdirected herself in fact and in law in dismissing the Notice of Motion Application dated the 12th of April 2021 seeking amendment of the Appellant's statement of Defense dated the 28th day of November 2016 in terms of the annexed amended statement of defense and counterclaim("application").
 - ii. The learned magistrate erred in fact and law and misdirected herself in failing to consider, interpret and apply the legal principles for the grant of the orders of amendment of pleadings and as a result arrived at a wrong conclusion.
 - iii. The learned magistrate erred in fact and in law and misdirected herself in her interpretation and application of the principles governing the application that was before her determination.
 - iv. The learned magistrate erred in fact and in law and misdirected herself in failing to consider, interpret and apply the grounds applicable with respect to an application for amendment of pleadings and as a result arrived at a wrong conclusion.
 - v. The learned judge erred and misdirected herself on law by failing to uphold the doctrine of stare decisis in light of clearly established legal principles from the superior courts with respect to amendment of pleadings.



- vi. The learned magistrate erred in fact and in law in finding that the application for amendment had not been filed within reasonable time. In so doing the learned magistrate arrived at a wrong conclusion.
 - vii. The learned magistrate erred in fact and in law in finding that the appellant's application for amendment sought to introduce a new claim. In so doing the learned magistrate arrived at a wrong conclusion.
 - viii. The learned magistrate erred in fact and in law in finding that the appellant's application for amendment was not desirous to enable the court to determine the real questions in issue. In so doing the learned magistrate arrived at a wrong conclusion.
 - ix. The learned magistrate erred in law in failing to consider the appellant's written submissions and list of authorities. In so doing the learned magistrate arrived at a wrong decision.
 - x. The learned magistrate erred in fact and in law in arriving at conclusions that were inconsistent, detached and at a complete variance to the evidence that was before her for consideration. In so doing the learned magistrate arrived at a wrong conclusion.
 - xi. The learned magistrate erred in fact and in law in considering matters which she ought not to have considered and failing to consider relevant matters in arriving at her decision.
7. The appeal was disposed of by way of written submissions. Both parties complied and their submissions have been considered.
 8. The Appellant in its submissions has clearly explained why it thinks that the Magistrate erred in dismissing its application for the amendment of pleadings, it has looked into the principles for the amendment of pleadings each in detail form, it also argue why they claims that the learned Magistrate failed to exercise her discretion judiciously. It also submitted that the learned magistrate failed to uphold the doctrine of stare decisis.
 9. The respondent submits that the learned magistrate was right in dismissing the application for the amendment of appellant's statement of defense and they clearly gave their reasons being that the appellant delayed in seeking to amend its statement of defense.
 10. This being a first appellate court I am duty bound to re-evaluate and reanalyze the evidence and make my own conclusions.
 11. My perusal of the record of appeal as well as the rival submissions, I note that the following issues stood out and therefore needs to be determined.
 - a. Whether the Learned magistrate erred in fact and in law in failing to properly consider and interpret the legal principles for the grant of the orders of amendment.
 - b. Whether the learned magistrate erred in failing to consider the Appellant's written submissions and authorities.
 - c. Whether the admission of the Notice of Motion application dated 12th April 2021 will be prejudicial.
 12. The amendment of pleadings is at the courts discretion pursuant to Order 8 Rule 5(1). Section 100 of the *Civil Procedure Act* which clearly stipulates that the court may at any time amend any defect in any proceeding in the suit. But for this amendment to be allowed the court needs to be satisfied that all the



principles for the amendment of pleadings have been met . This Principles are as set out in the case of *Central Kenya Limited v Trust Bank Limited And 5 Others* (2000) eKLR ;

- i. That is necessary for determining the real questions in controversy.
- ii. To avoid the multiplicity of suits provided there has been no undue delay
- iii. Only where new or inconsistent cause of action does not arise out of the same facts as a cause of action.

13. I am not satisfied that the appellant submissions had proved these principles satisfactorily since its amendment sought to introduce a new claim which was inconsistent to the original pleadings. The appellant herein do not intend to help the court to fully and finally determine the matters arising in the suit as the amendment sought was intended to rewrite the original defense. Its references in the intended amendment was of a different facility away from the one in contention in the trial suit and this would clearly divert the court's course from the seat of justice.

15. The application for leave to amend of the appellant's statement of defense was filed after 5 years after the institution of the suit and this undue delay was not explained to the satisfaction of the court, I am convinced the application was made in bad faith with the aim of prejudicing the respondent and an attempt to delay the administration of justice and was thus an abuse of the court process .

16. I therefore agree with the learned magistrate and I do not fault her for dismissing the appellant's application for the amendment of pleadings since as much as the appellant had all the rights to amend the pleadings as per section 100 of the *Civil Procedure Act*, at any time but he opted to sleep on its rights and took long to bring the application . This holding is rooted on the maxim of equity aids the vigilant and not the indolent as its also explained in the case of *Aloys Motaya Mosei v County Government Of Nyamira*(2016) eKLR, where it was stated that:

“ ... It is the claimant/respondent's averment that the issues raised in this application are a consequence of the laxity and belligerence of the respondent/applicant in the prosecution of the claim the causative of this application. She has been indolent through and through and this should not be rewarded. She avers that this application is not meritorious and should be dismissed with costs.

I agree with the sentiments of the claimant/respondent. This is not an application deserving of consideration. The respondent has been overtly negligent in the prosecution of her defense of the claim. She cannot on the eleventh hour be heard to plead for mercy or indulgence. Equity aids the vigilant and not the indolent. This is a long- time warning to careless litigants and others who seek recourse on equity.

17. I find that the learned magistrate indeed considered the Appellants written submissions. The appellant did not however point out that its pleadings sought to introduce a new claim contrary to order 2 rule 6 of the *Civil Procedure Rules*, it only cited cases that were inclined to show this court that the amendment of the pleadings should be allowed as per section 100 of the *Civil Procedure Act*.

18. The trial court gave consideration to all statutes and did not selectively choose what law to apply to favor any party.

20. I find that the admission of the Application dated 12th April 2021, by the appellant herein will be prejudicial to the respondent, the amended pleadings, sought to introduce a new claim which was inconsistent with the previous defense, there was undue delay in filing it and it did not seek to help the court determine the main issue in controversy.



21. In the case of *Giro Commercial Bank Limited v Michael Philip Theuri & 4 Others* [2014] eKLR, it has similar facts as those laid herein, the court stated that it is its duty to make sure that amendments of pleadings does not cause prejudice to other parties in the matter. This being the position I hereby find that it will be prejudicial to admit the Notice of motion application dated 12th April 2021.
22. In light of the above I agree with the trial Magistrate's ruling. The trial Magistrate did not error on any account by finding that the application before her lacked merit and dismissed it.
23. Appeal is hereby dismissed and the ruling of the Lower Court is upheld. Appellant shall have the costs of the suit.
24. It is so ordered.

DATED, SIGNED AND DELIVERED AT KISUMU THIS 31ST DAY OF MAY 2024.

MWANAISHA. S. SHARIFF

JUDGE.

