



**Nest Manor Residence & Suites Limited & another v African Banking Corporation Limited
& another (Civil Case 8 of 2019) [2022] KEHC 16162 (KLR) (8 December 2022) (Ruling)**

Neutral citation: [2022] KEHC 16162 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NYERI
CIVIL CASE 8 OF 2019
FN MUCHEMI, J
DECEMBER 8, 2022**

BETWEEN

NEST MANOR RESIDENCE & SUITES LIMITED 1ST PLAINTIFF

PETER MAHU MUTHEE 2ND PLAINTIFF

AND

AFRICAN BANKING CORPORATION LIMITED 1ST DEFENDANT

S. M. GATHOGO T/A VALLEY AUCTIONEERS 2ND DEFENDANT

RULING

Brief Facts

1. This application dated 20th January 2022 seeks for orders of leave to amend the defence dated 26th July 2019 to include a counterclaim and to join G.M. Kariuki Hardware Limited, New Age Developers Limited and Annette Edna Muthoni as defendants.
2. The respondents filed a replying affidavit dated 25th April 2022 in opposition to the application.

Applicants' Case

3. The applicants state that the respondents instituted the instant suit vide a plaint dated 2nd July 2019. The applicants then filed their defence dated 26th July 2019 without any supporting documents. The matter then proceeded to pretrial conference and was certified ready for hearing. The applicants aver that they have compiled their documents in support of their defence and it has become imperative to amend the defence to include a counterclaim and join other parties as defendants in the counterclaim that are not in the suit herein, so as to avoid multiplicity of suits. They contend that since pleadings have closed, they seek the leave of the court to amend their defence in light of the compiled bundle of documents and counterclaim.



The Respondents' Case

4. The respondent states that the application is mischievous, a total abuse of the court process and incompetent as it is inconsistent with the supporting affidavit which was sworn a year before the purported application was drafted and dated. Moreover, the respondents contend that the proposed counterclaim cannot be sustained as it is time barred under section 35 of the *Limitation of Actions Act* read together with section 19 of the *Limitation of Actions Act*. The proposed counterclaim seeks to initiate a claim for an issue that was already raised in the defence yet the applicants had elected not to file a counterclaim on the same at the time of filing the defence. Furthermore, the respondents argue that the issue of limitation of actions is jurisdictional and therefore the court has no jurisdiction to entertain a claim which is time barred.
5. The respondents contend that the time taken by the applicants to file the instant application is inordinately long and will prejudice the respondents' interests to have the suit heard and determined expeditiously. Further, the respondents argue that the applicants have not given any substantive reason for the delay in bringing the current application. The respondents further argue that all the information and materials relied upon by the applicants have been within their knowledge all this time and the applicants have not explained why they have taken this long to file the current application. Hence the respondents state that the application is an afterthought, having been brought after a prolonged period of over four (4) years since the inception of the suit.
6. The respondents argue that the court has a mandate under article 159(2)(b) of the *Constitution* to administer justice expeditiously and without delay and thus allowing the present application stands to delay the suit. As such, the respondents request the court to issue them with a hearing date of the main suit.
7. The respondents contend that the application does not meet the mandate of order 8 rule 5 of the *Civil Procedure Rules 2010*. Further the respondents argue that the proposed amendments are so extensive that they change the nature and tenor of the original suit. The respondents state that the applicants are seeking to rewrite the original defence and improve their case as the matter progresses.
8. The respondents further contend that the applicants seek to introduce a counterclaim joining G. M. Kariuki Hardware Limited, New Age Developer Limited an Annette Edna Muthoni as parties to the suit without exhibiting any documents proving that the said intended parties are guarantors of the purported loan facility and without being subjected to the legal test as to the propriety of their joinder in the suit. Furthermore, the application to join the said parties as guarantors in the counterclaim is without merit as the 1st applicant has not yet exhausted its remedies against the defendants in the intended counterclaim as it still continues to hold a number of securities for the purported loan facility.
9. The respondents argue that the proposed amendments are illegal as the dates indicated are fictitious and the interest rate claimed of 36% per annum is prohibited by section 33 of the *Banking Act* of Kenya. Moreover, the respondents contend that the applicants have sold some of the suit properties and have not disclosed this to the honorable court. It is deposed that this conduct amounts to non-disclosure of material facts and thus the applicants are misleading and derailing the court from the key issues by filing the current application.
10. The applicants filed a Supplementary Affidavit dated 3rd June 2022 and aver that the court has authority to allow any kind of amendment of pleadings at any stage before delivery of the judgment pursuant to order 8 of the *Civil Procedure Rules*. Moreover, the applicants contend that the respondents have not disclosed any justifiable cause why the proposed amendments should not be allowed by the court.



11. The applicants argue that the issues raised by the respondents on the limitation of actions are issues that should be raised in a defence if and when the counterclaim is allowed and not at this point.
12. The applicants contend that the mix up in dates is an inadvertent human error as the supporting affidavit was sworn on 20th January 2022 in support of the application dated 20th January 2022. Further, the error is technical and does not affect the substantive process.
13. The applicants aver that the respondents ought to have made sure the suit is prosecuted, as they have not made a single step in ensuring their suit is certified ready for hearing and cannot purport to unprocedurally ask for a hearing date in their replying affidavit.
14. The applicants contend that the applicants have not demonstrated the prejudice they stand to suffer if the application is allowed. In any event, the applicants aver that if the amendments are allowed, it will prevent multiplicity of suits and the respondents shall be spared the rigors of defending another suit before another court while prosecuting the present suit. Furthermore, the necessity of the joinder of the parties sought to be joined as defendants in the counterclaim shall be demonstrated once the application is allowed and the applicants are granted leave to file the Deeds of Guarantee and indemnity executed by the parties signed by the parties sought to be joined as defendants in the counterclaim.
15. The applicants argue that it ought to be left to the parties that are sought to be joined in the counterclaim to defend themselves against the bank's case and the respondents herein should not purport to do so on the intended defendants' behalf.
16. The applicants further contend that the issue on the interest rates has already been comprehensively dealt with and disposed of by this court in its ruling dated 20th May 2021 and therefore the respondents are trying to unprocedurally and unlawfully sneak in the issue through their replying affidavit.
17. The applicants aver that the issue of alleged non-disclosure of material facts does not arise and therefore the issue is neither here nor there. Further, the issue of alleged sale of some of the charged properties is a matter that ought to be canvassed during trial of the main suit and not in the current application for amendment. In any event, the applicants contend that pursuant to its ruling dated 20th May 2021, this court dismissed the respondents' application for grant of interim injunction and in essence gave the applicants the green light to go ahead and sell the charged properties.
18. Parties hereby disposed of the application by way of written submissions.

The Applicants' Submissions

19. The applicants rely on order 1 rule 10(2), order 8 rule 3(1) of the *Civil Procedure Rules* and section 1B of the *Civil Procedure Act* and submit that the court is tasked to handle all matters before it for the purposes of attaining the just determination of proceedings and the efficient disposal of the business of the court. The applicants submit that after filing their defence, they discovered various documents which were not presented before the closing of pleadings and the 1st applicant realized that it has a counterclaim against the respondents and other parties that are not party to the present suit. Thus, the applicants have brought the instant application in a bid to avoid multiplicity of suits and to dispose of this suit expeditiously.
20. The applicants make reference to the decision in *C. A. Patel v E.A. Cargo Handling Service* [1974] E.A. 75 and submit that the court has a duty to do justice in exercising its discretion and not to impose conditions on itself to fetter the wide discretion given to it by the rules.



21. The applicants rely on the case of *Central Kenya Ltd v Trust Bank Ltd* [2000] EALR 365 and submit that applications for amendment of pleadings should be liberally and freely permitted unless prejudice and injustice will be occasioned to the opposite party. The applicants further submit that no injustice will be occasioned to the respondents if the application is allowed as prayed. In any event, the applicants argue that the respondents have not demonstrated to the court how or if at all, they stand to suffer prejudice if the application is allowed.

The Respondents' Submissions

22. The respondents submit that the proposed amendments are so extensive and changes the entire nature and tenor of the suit. Further the counterclaim raises new issues and they are highly prejudicial and unjust to them. The respondents make reference to the decision of *Eastern Bakery v Castelino* [1958] EA 462 (CAU) and submit that the proposed amendments have introduced a totally new claim which stands to defeat their plaint. The respondents contend that the counterclaim introduces new parties to the suit yet the applicants have failed to exhibit any documents proving that the proposed parties to the suit are guarantors of the purported loan facility. Further, the respondents argue that the proposed new parties have not been subjected to the legal test as to the proprietary of their joinder in this suit. Additionally, the respondents argue that the defendant back has not exhausted its remedies against them as it continues to hold a number of securities for the purported loan facility.
23. The respondents further submit that the documents sought to be filed is an amended witness statement which is incompetent as a witness statement cannot be legally amended. The respondents rely on the case of Migori HCCC No. 5 of 2019 *Lewar Ventures Limited v Equity Bank Limited* to support their contentions.
24. The respondents further submits that the proposed counterclaim is time barred under section 35 of the *Limitation of Actions Act* read together with section 19 of the *Limitations of Actions Act*. The respondents argue that all the information and materials have been within the applicants' knowledge all this time and it beats logic why they have waited for a period of over four (4) years to file the current application. As such, the respondents submit that if the amendments are allowed, they stand to be prejudiced as the original tenor of the suit and defence will be entirely lost to their detriment. Moreover, the respondents argue that limitations of actions is not a procedural technicality and failure to file the suit on time cannot be remedied by article 159(2)(d) of the *Constitution*. Further, the respondents make reference to the case of *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* [1989] KLR and submit that this court has no jurisdiction to entertain a claim which is time barred.
25. The respondents rely on the case of *Kassam v Bank of Baroda* (2002) eKLR and submit that the applicants have not given any substantive reason for the delay in bringing the present application. Furthermore, the respondents contend that they will suffer extreme prejudice which cannot be compensated by way of costs. To support their contentions they rely on the cases of *Lawrence Owino Omondi v Kenneth Inea Muyera* (2017) eKLR and *John Mulwa Kangaatu v Pan African Insurance Co. Ltd* (2015) eKLR. Moreover, the respondents contend that the court has a duty to administer justice expeditiously and without delay pursuant to article 159 (2) (b) of the *Constitution* and sections 1A, 1B and 3A of the *Civil Procedure Act*. As such, the respondents argue that allowing the amendments will lengthen the matter thus delaying the final conclusion of the suit and prolonging the determination of the suit.

Whether the application for amendment has merit and ought to be entertained.

26. The general power to amend pleadings draws from section 100 of the *Civil Procedure Act*. Parties to a suit have a right to amend their pleadings at any stage of the proceedings albeit that right is not absolute,



for it is dependent upon the discretion of the court. However, this discretion should be exercised judiciously and in line with the criteria set out under order 8 rule 3 of the [Civil Procedure Rules](#) which stipulates:-

Subject to order 1, rules 9 and 10, 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.

27. Further order 8, rule 5 gives the court the general power to amend or to allow amendment and provides:-

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 on 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.

28. The Court of Appeal outlined the principles in amendment of pleadings in the case of [Central Kenya Limited v Trust Bank Limited & 5 Others](#) [2002] eKLR whilst referring to commentaries on the Indian Civil procedure Code by Chittaley and Rao as follows:-

That a party is allowed to make such amendments as may be necessary for determining the real question controversy or to avoid a multiplicity of suits provided that 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.

29. These principles have been elaborated in Mulla the Code of Civil Procedure, 18th Ed Vol 2 pages 1751 -1752 and cited in the case of [Coffee Board of Kenya v Thiks Coffee Mills Limited & 2 Others](#) (2014) eKLR where it stated as follows:-

- a. Amendments should be allowed which are necessary for determination of the real controversies in the suit;
- b. The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;
- c. Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of fact would not be allowed to be incorporate by means of amendments;
- d. Proposed amendments should not cause prejudice to the other side which cannot be compensated by means of costs;
- e. Amendments of a claim or relief barred by time should not be allowed;
- f. No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse of time;
- g. No party should suffer on account of the technicalities of law and amendment should be allowed to minimize the litigation between the parties;
- h. The delay in filing the petitions for amendment should be properly compensated by costs;



- i. Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.
30. It is evident that the applicants wish to amend their defence for purpose of introducing a counterclaim. The respondents have opposed the application on the grounds that the application if allowed will change the character of the case between the parties, that the applicants are guilty of inordinate delay and that the proposed amendments are time barred under section 35 as read with section 19 of the Limitation of Actions Act.
31. The claim herein was instituted by the respondents vide their plaint dated 2nd July 2019 whereby the respondents are seeking for a permanent injunction against the applicants from selling their properties known as LR No 6392/124, LR No 6392/125, LR No 6392/131 and Title No. Nyeri Municipality Block 11/53. The respondents took up loan facilities from the 1st applicant and charged the said properties as security. I have looked at the proposed amendments as laid out by the applicants and it is my considered view that they do not alter the character of the case between the parties. It is not in dispute that the respondents took respective credit facilities with the 1st applicant. Furthermore, the respondents do not dispute that they are in arrears of the respective loan facilities. The proposed amendments substantially involve the loan facilities taken up by the respondents from the 1st applicant and they give an account on the principal borrowing by the applicants with detail of how the credit facilities grew to the amount they are being claimed for presently. As such, I am not convinced that the proposed amendments will change the character of the case. In fact it is my considered view that the proposed amendments are necessary for the purpose of determining the real questions in controversy between the parties.
32. The respondents further argue that allowing the application will cause them great injustice as the suit will be delayed. I have perused the court record and noted that the application seeking a temporary injunction was dismissed on 20th May 2021 and the advocates for the respondent filed a letter in the registry dated 26th August 2021 seeking a date for directions. It is my considered view that the respondents did not move the court with haste to fix the matter for hearing following the dismissal of the said application. As such, I am not persuaded that the proposed application is meant to delay the expeditious disposal of the suit. Moreover, the intended proposed amendments seek to determine the real questions in controversy which will assist the court determine the matter once and for all. Additionally, the hearing of the suit has not commenced and it would be prudent to allow the application at this stage to assist the court in achieving a just and final determination of the real issues in contention between the parties.
33. On the issue of delay, the suit was instituted vide a plaint on 3rd July 2019 to which the applicants filed their defence on 29th July 2019. The applicants have filed the current application for amendment on 25th January 2022, which is a period of three and a half years since the claim was filed in court. It is my considered view that the applicants are guilty of inordinate delay in bringing up the application since the inception of the suit herein. However, courts have generally allowed applications for leave to amend pleadings even where there is inordinate delay. In the case of Ocean Foods Limited v Osoipa Company Limited & 2 Others (2020) eKLR it was held that:-

The court however notes that, as rightly pointed out by the defendants, there was a long delay, on the part of the plaintiff in not only filing the defence to counterclaim, out of time, but also in filing the instant application. I find that the apparent long delay notwithstanding, this court still has the inherent power under section 3A of the Civil Procedure Act, to permit the plaintiff to amend its pleadings at any time before judgment.



In *J. C. Patel v D. Joshi* [1952] 19 EACA 12, the court held:-

The rule of conduct of courts in such a case is that however negligent or careless may have been the first omission and however late the proposed amendment, the amendment should be made if it can be made without injustice to the other side.

34. Despite the delay, it is my considered opinion that there is no evidence that the application is being made in bad faith. The delay in filing the counterclaim as discussed above, shall not occasion any prejudice to the respondents. In any event, the respondents can be compensated by way of costs for the delay.

35. The respondents further oppose the application for amendment on the ground that the proposed counter claim is time barred pursuant to section 35 as read with section 19 of the [Limitation of Actions Act](#). Section 19 of the [Limitations Act](#) stipulates that:-

An action may not be brought to recover a principal sum of money secured by a mortgage on land or movable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to receive the money accrued.

36. I have perused the court record and noted that the respondents advanced various credit facilities from the 1st applicant. The 1st credit facility was offered in 2011 to the 1st respondent vide letter of offer dated 5th August 2011. The parties the applicants intend to join in the counterclaim as defendants, G. M. Kariuki Hardware Limited and New Age Developers and Construction Limited were advanced the said facilities pursuant to a letter of offer dated 19th January 2015. As security, the respondents offered as security the land parcels Land Reference Number 6392/124, 6392/125, 6392/131 registered in the name of the 1st respondent and Nyeri Municipality Block II/53 registered in the name of the 2nd respondent to be charged in favour of the bank. These properties are the subject of this case instituted by the respondents. The respondents argues that the intended parties ought not to be joined as defendants in the counterclaim as some of the facilities are still running. It is my considered view that such issues cannot be dealt with at an interlocutory stage but can only be exhaustively ventilated at trial.

37. On the issue of joinder of parties, order 1 rule 10(2) of the [Civil Procedure Rules](#) provides:-

The court may at any stage of the proceedings, either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of the person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.

38. In the case of [Lucy Nungari Ngigi & 128 Others v National Bank of Kenya Limited & another](#) [2015] eKLR the court stated as follows when considering whether to grant leave to join a party:-

Joinder of parties is governed by order 1 of the [Civil Procedure Rules](#). In law, joinder should be permitted of all parties in whom any right to relief of or arising out of the same act or transaction or series of acts or transactions is alleged to exist, whether jointly, severally, or in the alternative, where if such persons brought separate suits, any common question of fact would arise. See also order 7 rule 9 of the [Civil Procedure Rules](#). The court may in its own motion add a party to the suit if such party is necessary for the determination of the real matter in dispute or whose presence is necessary in order to enable the court to effectively and completely adjudicate upon and settle all questions involved in the suit. Therefore, joinder



of parties is permitted by law and it can be done at any stage of the proceedings. But joinder of parties may be refused where such joinder will lead to practical problems of handling the existing cause of action together with the one of the party being joined, is unnecessary; or will just occasion unnecessary delay or costs on the parties in the suit. In other word, joinder of parties will be declined where the cause of action being proposed or the relief sought is incompatible to or totally different from existing cause of action or the relief. The determining factor in joinder of parties is that common question of fact or law would arise between the existing and the intended parties.

39. The relevant tests for determination whether or not to join a party in proceedings were restated by Nambuye J (as she then was) in the case of *Kingori v Chege & 3 Others* [2002] 2KLR 243 where the judge stated that the guidelines when an intending party is to be joined are:-
- a. He must be a necessary party;
 - b. He must be a proper party;
 - c. In the case of the defendant, there must be a relief flowing from that defendant to the plaintiff;
 - d. The ultimate order or decree cannot be forced without his presence in the matter
 - e. His presence is necessary to enable the court effectively and completely adjudicate upon and settle all questions involved in the suit.
40. The applicants seek to join G. M. Kariuki Hardware Limited, New Age Developers Limited and Annette Edna Muthoni as defendants in the counterclaim. The respondents are opposed to this on the grounds that the applicants have not demonstrated that the said parties are guarantors of the loan facility or are related to this suit in any way. Further, that the 1st applicant has not yet exhausted its remedies against the defendants in the intended counterclaim as it still continues to hold a number of securities for the purported loan facilities. I have perused the court record and noted that the said intended defendants have executed the charge instruments as the principal borrowers and guarantors as well and that the respondents have attached supporting documents to the plaint. As such, it would be prudent to join them in the suit herein for them to plead out their case and further to assist the court to determine the real issues in controversy and further to avoid multiplicity of suits by the applicants. The applicants may attach the Deeds of Guarantee and Indemnity executed by the parties sought to be joined as defendants in their bundle of documents in the event that this application is allowed.
41. On the issue of interest as alleged by the respondents, the court rendered its ruling on 20th May 2021 and held that interest payable forms part of the contract of the parties and that the court cannot alter or write the contract. The respondents have not shown that the said contract was illegal, unconscionable or fraudulent. Therefore, the respondents cannot be allowed to sneak in the issue of interest during this stage.
42. All considered, I find that the applicant has ably demonstrated that the amendment of the defence is justified at this stage and that it will assist the parties and the court to wade away a situation where multiplicity of suits may be filed seeking to resolve issues which would have been resolved in this suit among others. In my considered view, no prejudice will be caused to the respondent if the orders sought are allowed. I am convinced that both parties in this suit will be accorded their right of hearing without occasioning any delay and that common questions of fact and law would arise between the existing and the intended parties.
43. The application dated 20th January 2022 is found merited and is hereby allowed.



44. The 1st defendant is granted leave of ten (10) days to file and serve the counterclaim.
45. The costs of this application shall abide in the suit.
46. It is hereby so ordered.

DATED AND SIGNED AT NYERI THIS 8TH DAY OF DECEMBER, 2022.

F. MUCHEMI

JUDGE

Ruling delivered through video link this 8th day of December, 2022

