REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL CASE NO. 1 OF 2017

SAMMY NG'ANG'A NDUNGU.....PLAINTIFF

-VERSUS-

KENYA COMMERCIAL BANK.....DEFENDANT

RULING

[1] The Notice of Motion dated **16 June 2020** was filed herein by the Plaintiff for orders that he be granted leave to amend his Plaint; and that the costs of the application be provided for. The application is expressed to have been filed pursuant to **Order 8 Rule 3** of the **Civil Procedure Rules, 2010,** and is predicated on the twin grounds that the amendments are intended to clarify the real issues in controversy between the parties; and that the same has been sought in good faith. It is supported by the accompanying affidavit sworn by the applicant on **16 June 2020**.

[2] In his Supporting Affidavit, the plaintiff averred that the purpose of the proposed amendment is to plead an aspect of his case that his erstwhile advocates omitted; namely, that the defendant unlawfully caused his name to be listed by the **Credit Reference Bureau** as a defaulter. He therefore asserted that the application for amendment has been sought in good faith. He annexed a draft Amended Plaint to his affidavit, indicating the proposed changes, notably at Paragraphs 4A, 6 and 6A of the draft Amended Plaint.

[3] On behalf of the defendant, Grounds of Opposition were filed herein dated **7 July 2020** by **M/s Gumbo & Associates**. The defendant thereby opposed the application on the following grounds:

> **[a]** The application is lacking in merit;
>
> **[b]** The application, if allowed, will be prejudicial to the defendant as the proposed amendments constitute new causes of action that are already time-barred, and therefore contrary to **Section 4(2)** of the **Limitation of Actions Act, Chapter 22**, **Laws of Kenya;**
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> **[c]** The application if allowed will deprive the defendant of the defence of limitation, to the detriment of the defendant;
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> **[d]** There has been undue delay in making the application and the same is an afterthought;
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> **[e]** The application as filed will delay the expeditious disposal of the suit contrary to the provisions of **Order 2 Rule 15(1)(c)** of the **Civil Procedure Rules;**
>
> **[f]** The application is frivolous, vexatious, without merit and thus an abuse of the court process and should therefore be dismissed with costs to the defendant.

[4] The application was urged by way of written submissions, pursuant to the directions given herein on **24 June 2020**. In the plaintiff's written submissions, dated **20 July 2020**, counsel reiterated the assertions of the plaintiff that he filed this suit through **M/s Andambi & Co. Advocates**; and that the said firm failed to plead the unlawful listing of his particulars by the **Credit Reference Bureau**. He urged that the omissions of counsel be not visited on the plaintiff. Counsel further submitted that the proposed amendment will enable the Court to fully deal with the issues in controversy between the parties; and that the plaintiff merely seeks to align his pleading with the rule that requires that reliefs be expressly pleaded. He relied on **Kenya Oil Co. Ltd vs. Fleur Investments Ltd** [2005] eKLR in support of his arguments.

[5] Regarding the contention by the defendant that the cause of action in the draft Amended Defence is time-barred, it was the submission of **Mr. Kigamwa** that the Court's discretion is unfettered, and is not constrained by the defence of limitation. Counsel cited **Institute For Social Accountability & Another vs. Parliament of Kenya & 3 Others** [2014] eKLR wherein a three-judge bench held that:

> **"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."**

[6] Counsel urged the Court to consider that the instant application has been made before the commencement of the trial; and therefore that it is not intended to delay the determination of this suit. As to whether the proposed amendments have the effect of changing the complexion of the suit, counsel referred the Court to **Capital Fish (Kenya) Limited (formerly Fish Products (Kenya) Limited) vs. Kenya Power and Lighting Co. Ltd** [2007] eKLR and **Manji Kunverji Ramji vs. Nomura Insurance Brokers Ltd & Another** [2014] eKLR.

[7] On her part, learned counsel for the defendant, **Ms. Nasiloli**, submitted that, even though the Court has a wide discretion when dealing with applications of this nature, the discretion ought to be exercised cautiously, judiciously and on the basis of defined principles of law. To this end, she relied on **Rubina Ahmed & 3 Others vs. Guardian Bank Ltd (sued in its capacity as a successor in title to First National Finance Bank Ltd)** [2019] eKLR; **John Nahashon Mwangi vs. Kenya Finance Bank Ltd (In Liquidation)** [2015] eKLR; and **Central Kenya Ltd vs. Trust Bank Ltd**, Civil Appeal No. 222 of 1998.

[8] It was also the view of **Ms. Nasiloli** that the proposed amendments cannot lie because they have the effect of not only introducing a new cause of action, but also one that is inconsistent with the previous cause of action. She submitted that, whereas in the Plaint the cause of action was based on malice, the draft Amended Plaint has introduced the elements of breach of contract and tort; claims which are totally different from the original claim. She added that, in any event, a claim founded on tort ought to be filed within the period stipulated in **Section 4(2)** of the **Limitation of Actions Act;** and therefore that, granting leave to the applicant to amend the Plaint will outrightly rob the defendant of the opportunity of raising a defence or preliminary point of law based on the **Limitation of Actions Act**. She relied on **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Ltd** [2013] eKLR and **Garley Enterprises Ltd vs. Agricultural Finance Corporation & Another** [2018] eKLR.

[9] Last but not least, is the contention by **Ms. Nasiloli** that the delay in bringing the application for amendment has not been explained; and that the amendment is likely to prejudice the respondent beyond compensation in costs. She submitted that, although **Mr. Kigamwa** claims to have come on record well after the Plaint was drafted by his predecessor, he has been on record now for three years; and has not explained why the instant application was not filed sooner. Counsel relied on **Garley Enterprises Ltd** (supra) for the proposition that the Court should not exercise its discretion in favour of an applicant who fails to provide a good reason for delay. She added that the application is nothing but an afterthought and is lacking in good faith. Thus, **Ms. Nasiloli** urged for the dismissal of the application dated **16 June 2020** with costs for not having met the threshold to warrant the granting of leave to amend the Plaint.

[10] I have given careful consideration to the plaintiff's application, the averments in the Supporting Affidavit as well as the Grounds of Opposition filed in response thereto by the defendant. I have likewise paid attention to the written submissions filed herein by learned counsel on behalf of the parties and the authorities relied on by them. There is no gainsaying that the discretion to grant leave to amend pleading is indeed a wide one. But it is also trite that the discretion is not intended to be exercised whimsically or capriciously. Hence, **Order 8 Rules 3(1)** of the **Civil Procedure Rules**, is explicit that:

> **"...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."**

[11] The rationale for amendment of pleadings need not be belaboured; it is so that the Court can then effectively and effectually determine the issues in controversy between the parties to the suit. In **Nyamodi Ochieng Nyamogo vs Kenya Posts and Telecommunication Corporation [2007] eKLR**, for instance, it was held that:

> **"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between the parties is conducted not on false hypothesis of the facts already claimed but rather on the basis of the true state of facts or relief or remedy which the parties really and finally intend to rely on or to claim."**

[12] The same thought was carried in **Counsel cited Institute For Social Accountability & Another vs. Parliament of Kenya & 3 Others** [2014] eKLR thus:

> **"The object of amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts which the parties really and finally intend to rely on. The power of amendment makes the function of the court more effective in determining the substantive merits of the case rather than holding it captive to form of the action or proceedings."**

[13] What, then, are the principles that guide the exercise of discretion in an application of this nature? In **Elijah Kipngeno Arap Bii vs. Kenya Commercial Bank Limited** (supra), the Court of Appeal took the following view of the matter:

> **"The law on amendment of pleading … was summarized by this Court, quoting from Bullen and Leake & Jacob's Precedents of Pleading – 12th Edition, in the case of Joseph Ochieng & 2 others vs. First National Bank of Chicago, Civil Appeal No. 149 of 1991 as follows:-**
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> ***"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be***

exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on Limitation Acts." (see also **Central Kenya Ltd vs. Trust Bank Ltd & 5 Others** [2000] eKLR)

[14] Hence, the issues that emerge for determination, from the averments in the affidavits filed in respect of the instant application as well as the written submissions filed herein, can be summarised as hereunder:

[a] Whether the proposed amendment is necessary and sought in good faith;

[b] Whether the proposed amendment will introduce a new cause of action;

[c] Whether the proposed amendment will deprive the defendant of the defence of limitation;

[d] Whether the application for leave to amend was brought without undue delay;

[15] On whether the proposed amendment is necessary, I have looked at the initial Plaint dated **4 January 2017**. It is manifest therefrom that the cause of action relates to a loan agreement between the parties by which the defendant advanced a sum of **Kshs. 550,000/=** to the plaintiff. At paragraph 4 of the Plaint, the crux of the plaintiff's cause of action is expressed; and it is that:

"…the defendant without any reasons forwarded his name to the Credit Reference Bureau, depicting him as a loan defaulter."

And, in paragraph 5, the plaintiff went on to complain that:

"…due to the defendant's malicious actions, he has been affected psychologically and mentally since his reputation has been injured nationally and internationally as he cannot secure a loan from any other financial institution, yet he is a businessman…"

[16] Pursuant to that cause of action, the plaintiff prayed for an order compelling the defendant to rectify the situation, by clearing his name from the **Credit Reference Bureau** as well as general damages for psychological torture; and an order compelling the defendant to pay him special damages for the financial loss he has suffered owing to the defendant's action, to the tune of **Kshs. 359,660,000/=;** together with interest thereon and costs of the suit. What is sought, by the proposed amendment, was well articulated by **Mr. Kigamwa** in his written submissions, namely, to align the Plaint with the rule that requires that reliefs be expressly pleaded. Thus, the proposed amendment seeks to expound more on the cause of action by introducing additional information, at paragraphs 6 and 6A as to the loss that ensued from the alleged adverse listing. It is also noteworthy that, in the prayers, the special damage component of the plaintiff's claim has been converted from **Kshs. 359,660,000/=** to an annual rate of **Kshs. 1,000,000/=** from the year **2016** until date of judgment.

[17] To my mind therefore, the proposed amendment is not only necessary, but has also been brought in good faith. Necessary because, whereas in his original Plaint the plaintiff alleged that he was unable to secure a loan from any other financial institution as a result of the listing, in the proposed amendment, he seeks to furnish better particulars in connection with the declined loan applications. It is therefore plain that the assertion by counsel for the defendant that the proposed amendment has the effect of raising a new cause of action in tort, is baseless; for, the issue of reputational damage was the foundation of the plaintiff's cause of action and was adverted to at paragraphs 5, 6 and 7 of the initial Plaint.

[18] In the premises, it cannot be argued, as counsel for the defendant purported to do, that the proposed amendment would have the effect of totally changing the complexion of the plaintiff's cause of action into a completely different one. The cause of action was premised on the alleged wrongful listing of the plaintiff as a loan defaulter by the **Credit Reference Bureau** for which he blames the defendant; and it remains just that. In any event, **Subrule (5)** of **Rule 3** stipulates that:

"An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

[19] On whether the proposed amendment will deprive the defendant of the defence of limitation, having found that there is no new cause of action that will be introduced by the proposed amendment, this argument clearly lacks traction. Moreover, **Rule 3(2)** of **Order 8, Civil Procedure Rules**, recognizes that:

"Where an application to the court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do."

[20] Consequently, I am persuaded by the expressions of **Lord Denning** in **Mitchell vs. Harris Engineering Co. [1967] 2 QB 703** at page **718** that:

> **"Some of the judges in those cases spoke of the Defendant having a "right" to the benefit of the Statute of Limitations; and said that the "right" should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff. Take the statute here in question. It is Section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty "the action shall not be brought" after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the Plaintiff must issue his writ within three years from the date of the accident. But there is nothing in the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute…"**

[21] Last, but not least, is the question whether the application for amendment was filed within time; and if not, whether the delay has been sufficiently explained to the satisfaction of the Court. In this regard, counsel for the defendant pointed out that the firm of **Wambua Kigamwa & Company Advocates** has been on record herein for three years; and that it was not until **16 June 2020** that the plaintiff found it necessary to file the instant application. She added that no explanation whatsoever has been given for the delay.

[22] The record does confirm that the firm of **Wambua Kigamwa & Company Advocates** filed a Notice of Change of Advocates herein on **17 April 2018**; and therefore that the instant application was indeed filed after a period of slightly over 2 years. It is however noteworthy that most of the period of the perceived delay was spent by the parties in an attempt to settle the dispute through the Court Annexed Mediation Programme; and therefore that there is a plausible explanation for the delay; and I so find. Moreover, it is significant that the application has been brought before the commencement of the hearing; and therefore that no prejudice will befall the defendant for which costs would be inadequate recompense. In **Eastern Bakery vs. Castelino** [1958] EA 461 it was held thus:

> **"...amendment to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs."**

[23] Indeed, as aptly pointed out by **Apaloo, JA** in **Philip Chemwolo vs. Augustine Kubende** [1985] KLR 492, the duty of the Court is to do justice to the parties and not to punish them for their mistakes or omissions. The Learned Judge expressed his viewpoint thus:

> ***I think the broad equity approach to this matter, is that unless there is fraud or intention to overreach, there is no error or default that cannot be put right by payment of costs. The Court, as is often said, exists for the purpose of deciding the rights of the parties and not for the purpose of imposing discipline."***

[24] In the result, it is my finding that the plaintiff's application dated **16 June 2020** is meritorious. The same is hereby allowed and orders granted as prayed in the following terms:

[a] That leave be and is hereby granted to the plaintiff to amend his Plaint in terms of the draft Amended Plaint annexed to the Supporting Affidavit herein.

[b] That the Amended Plaint be filed and served within 14 days from the date hereof; with corresponding leave to the defendant to amend its Defence, if need be.

[c] That the costs of the application be borne by the plaintiff in any event.

Orders accordingly.

DATED, SIGNED AND DELIVERED AT ELDORET THIS 27TH DAY OF APRIL, 2021

OLGA SEWE

JUDGE