



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL SUIT NO. 529 OF 2010

MOTOR MEC MOTORS LTD.....PLAINTIFF/RESPONDENT

VERSUS

THE BOARD OF TRUSTEES (Sued on behalf of the NSSF).....DEFENDANT/APPLICANT

RULING

1. The applicant herein brought an application dated 30th April 2019 under Order 8 Rule 5, Order 51 Rule 1 of the Civil Procedure Rules, Section 1A, 1B, 3A of the Civil Procedure Act and Article 159 2(d) of the Constitution.
2. The said application is seeking the following orders;
 - a. That the defendant/applicant be granted leave to amend the statement of defence dated 8th October 2010 as per the draft amended statement of defence and counterclaim.
 - b. That the costs of the application be provided for.
3. The application is supported by the grounds thereto and a Supporting Affidavit dated 30th April 2019 sworn by Caroline R. Odera the secretary of the applicant company.
4. She deposed that the time allowed under the Civil Procedure Act and Rules, 2010 for amendment of pleadings had expired and the courts leave is required for the defendant/applicant to amend its statement of defence and counterclaim. Further, the proposed amendment is intended to give the correct position and have the facts of the matter captured correctly.
5. It is therefore necessary and in the interest of justice and fairness that the proposed amendments be allowed to facilitate the courts determination on the issues at hand and questions in controversy in the main suit and that the orders sought be granted and the application to the proposed amendment be allowed as the applicant stands to suffer irreparable harm, loss and damage unless the orders sought are granted.
6. The respondent filed a Replying Affidavit dated 24th June 2019 sworn by Yusuf K. Sayani the respondent's director.
7. That the application is an afterthought and is purposely and deliberately filed with a view of delaying the suit further hence it should not be entertained as it is brought nine (9) years since the cause of action accrued and when the plaint was first filed in court. This therefore makes the proposed counterclaim statute barred and there exists unexplained delay which delay is inordinate, unjustified, lethargy, unreasonable and whimsical. Further, the proposed amendments seek to introduce a new cause of action through a back door and which is statute barred as the contract between the respondent company and the defendant/applicant was entered into in 1999 and should therefore not be allowed as the limitation period for a cause of action in contract is six (6) years.
8. That the application is meant to violate the overriding objective and principles of; fair, just, speedy, proportionate, time and cost saving in the proposal of the main suit and the proposed counterclaim is statute barred by virtue of the Limitation of Actions Act. Further, the proposed amendments and/or application are made in bad faith and are meant to harm, injure, and/or prejudice the plaintiff's case especially in light of the proposed counterclaim seeking accumulated arrears and 15% interest in the whopping sum of Kshs. 10,162,042.70/=.
9. The proposed amendments introducing for the first time the claim for Kshs. 10,162,042.70/= is too drastic in magnitude and far reaching as to change the character/essence of the suit and to warrant the lodgment of a fresh/separate suit to agitate such a claim and new cause of

action.

10. It was the plaintiff's expectation that litigation should come at an end and to allow the application would in essence prolong the matter further bearing in mind that the plaintiff would be called to defend the counterclaim thus prolonging the hearing contrary to the overriding objective of the Civil Procedure Act and the judicial process as a whole.

11. Further, the applicant had not explained in any way or in any convincing manner, as to why it seeks to introduce the counterclaim or why the proposed amendments were not incorporated in the initial defence or the reason for the delay, despite having had legal representation throughout the existence of the suit and the facts of the case nor any position in status have never changed.

12. That the plaintiffs have always been willing to proceed and on 3rd December 2018, the matter came up for hearing but the applicants asked for to be allowed to have an out of court settlement which prayer was granted. The matter came up for mention on 18th January 2019 wherein it was still under negotiation but was never concluded hence the application is only a delay tactic and should be dismissed with costs to the plaintiff.

13. The parties addressed the court orally and I have considered the same herein. Be that as it were, I have considered the court record and note the matter herein commenced by filing in court in court on 3rd August 2010, a plaint dated 2nd August 2010 and the defence dated 8th October 2010 filed on 11th October 2010.

14. On 8th May 2012, the plaintiff filed a list and bundle of documents and on 22nd May 2012, a statement of issues was filed in court. On 24th June 2013, the defendant filed a list of witnesses and/or witness statements and bundle of documents and finally, on 11th June 2014, the plaintiff filed a further list of documents.

15. The court record further shows that the matter was certified for hearing ready for hearing as far as 25th September 2012. A period of about seven (7) years has gone by. Indeed, the parties have appeared for hearing on several dates, and the defendants have always indicated they are ready to proceed. At no time did the defendant seek to amend its defence and/or file a counterclaim.

16. Yet the current application has been filed nine (9) years after the suit was filed. The reasons advanced are that; the amendments are necessary to ensure fair and just determination of the real issues of controversy. The defendant does not at all explain the inordinate delay in seeking for leave to; file an amended defence or counterclaim.

17. The respondent on its part argues inter alia that, the claim sought to be introduced under the counterclaim is statute barred. The applicants argue otherwise. However, I have considered the same and I find that the averments, the applicant avers in the counterclaim that the cause of action, allegedly arose on; 29th May 2010, when the plaintiff failed to make further payments.

18. That is nine (9) years ago. If it is a contractual claim, as it is, then it became statute barred after six (6) years. Therefore, the objection raised by the respondent is valid and on that ground alone, the application is not merited. In the same vein, in the absence of a sufficient reason to explain the delay, I find that the application has no merit.

19. It is noteworthy that, the provisions of; Article 159 (2)(b) of the Constitution of Kenya 2010 states that, "in exercising judicial authority, the courts and tribunals shall be guided by inter alia, the principle that; justice shall not be delayed...".

20. Similarly; sections 1A and 1B of the Civil Procedure Act states that; the overriding objective of the Act and the Rules made hereunder; is to facilitate the just, expeditious, proportionate and affordable resolution of the civil disputes governed by the Act; with the aim attaining the following: -

- a. the just determination of the proceedings;
- b. the efficient disposal of the business of the court;
- c. the efficient use of the available judicial and administrative resources;
- d. the timely disposal of the proceedings, and all other proceedings in the court, at a cost affordable by the respective parties; and
- e. the use of suitable technology".

21. Further the provisions of; Order 8 Rule 3 of the Civil Procedure Rules, 2010, provides that an amendment will be allowed if, it is necessary for determining the real question in controversy, to avoid multiplicity of suits and has been filed without undue delay. It will not be allowed, where a new or inconsistent cause of action, does not arise out of the same facts or substantially the same facts as the existing cause of action, or where vested interest or accrued legal right is affected and if it occasions prejudice or injustice to the other side which cannot be properly compensated for in costs (see; *Joseph Ochieng and 2 others vs. First National Bank of Chicago (Civil Appeal) No. 149/1991*,

23. The upshot thereof; is that, the application herein lacks merit and it is dismissed with costs to the Respondent.

24. It is so ordered.

Dated, delivered and signed in an open court this 23rd day of January 2020.

G. L. NZIOKA

JUDGE

In the presence of:

Ms. Nasanga for Mr. A.S. Masika for the plaintiff/respondent

Ms. Kipruto for defendant/applicant

Dennis-----Court Assistance