



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
HCCC NO. 111 OF 2017
HUNKAR TRADING COMPANY LIMITED... PLAINTIFF
VERSUS
TOTAL KENYA LIMITED.....DEFENDANT
RULING

1. The following statement made by the President of the Court of Appeal for East Africa in Eastern Bakery vs Castelino [1958] EA 461 has been the steady guide on how the Courts should treat requests for leave to amend pleadings where hearing has not commenced:-

“Amendments 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.”

2. The Application of Hunker Trading Company Ltd (Hunker or the Plaintiff) dated 5th March 2020 for leave to amend the Plaintiff is resisted by Total Kenya Ltd. (Total or the Defendant). In the affidavit in support of the Application, Peter Kariuki offers the rationale for leave. Hunker states that its claim was based on the provisions of the LPG Cylinder Exchange Pool established under Regulation 14(1) of the Energy (Liquefied Petroleum Gas) Regulation 2019 which pool has since been disbanded vide an amendment to the Energy Act 2019. That the amendments proposed to the pleadings are intended to capture the recent changes made to the Energy Act, 2019 and to align the reliefs sought to that change. Second, that the gas cylinders which are the subject matter in the suit have been unlawfully withheld by Total since 2014 and have depreciated to the point of being wholly useless. Hunker says that the proposed amendments also seek to update and quantify the damages suffered by the Plaintiff to-date and to state the proper amount of the Plaintiff’s claim.

3. Total opposes the application on the grounds that the amendment seeks to introduce a new claim for loss of business and that the Defendant will be deprived of its right to rely on the defence of limitation under the Limitation of Actions Act. That the proposed amendment introduces new particulars and claims that prejudices and causes grave injustice to the Defendant. Lastly, that the application is brought in bad faith and is an abuse of Court process.

4. The Court has considered the application and the written arguments made by the rival sides.

5. The statutory basis for an application for leave to amend pleadings is Order 8 Rule 3 of the Civil Procedure Rule which reads:-

“Amendment of pleading with leave.

(1) 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.

(2) 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.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the

effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the

identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) 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.”

6. Order 8 Rule 5 is then on the general power to amend and which reads:-

“(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. As correctly pointed out by Total this application for leave has not been brought promptly as this suit was filed in April 2017, in excess of three years now. That does not score in favour of Hunker.

8. That said, and notwithstanding its age, the suit has not been set down for hearing and so while the application is brought late in the day, it is not after hearing has commenced.

9. On another front, I note that what Hunker seeks to introduce is a claim for loss of business and also costs of replacing or purchasing cylinders. The entire suit was premised on what Hunker sees as unfair detention of some 4,425 cylinders by Total. There is no doubt therefore that any loss of business or costs in replacing or purchasing other cylinders arose substantially from the same facts as the existing cause of action. For that reason, leave would ordinarily be granted as the Court does not perceive that the amendments sought substantially alter the character of the cause of action before Court.

10. What must be of greater concern is whether to allow the application would weaken or extinguish Total’s defence of Limitation. Admittedly, the claims sought to be introduced would be time barred regardless of whether they are in Tort or Contract. In weighing on this question the Court bears in mind that they will be occasion when amendments brought outside limitation periods are nevertheless allowed. But to be deserving, such applications must be brought in good faith as the Court will be accommodating a claim that deprives a party of a defence. Of such good faith the Court of Appeal in *Rubina Ahmed & 3 Others v Guardian Bank Ltd* (Sued in its capacity as a successor in Title to First National Finance Bank Ltd) [2019] eKLR said;

“The issues of delay, good faith and prejudice were certainly relevant for consideration and the trial Judge did not err in considering them. The learned authors of Halsbury’s Laws of England, 4th Ed. (re-issue), Vol. 36(1) at paragraph 76, state the following about amendments of pleadings:-

“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings, and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion. The person applying for amendment must be acting in good faith. Amendment will not be allowed at a late stage of the trial if on analysis of it is intended for the first time thereby to advance a new ground of defence. If the amendment for which leave is asked seeks to repair an omission due to negligence or carelessness, leave to amend may be granted if the amendment can be made without injustice to the other side...”. [Emphasis added].

In our view, in considering the various factors he did, the learned Judge was simply balancing the injustice and hardship of allowing the amendment against the injustice and hardship of refusing it.”

11. On the question of loss of business, the Plaintiff asserts that the claim was motivated by the need to align its claim with the changes in law brought by amendments to the Energy Act 2019. What Hunker does not demonstrate is the nexus between the changes in the statute and the claim of loss of business sought to be introduced. An applying party must candidly state the reason for seeking an amendment. If it is to add a claim that was inadvertently left out then that needs to be said. Candor must count for something! Now, in the matter before me the explanation offered by the applicant as regards the need to now plead loss of business is unconvincing and the Court must therefore entertain a doubt about the bona fides of that explanation.

12. As to value of the cylinders, it is explained that the cylinders detained by Total are wholly useless due to adverse effects of direct sunlight and bad weather. That seems to be a good reason to seek for compensation instead of their return.

13. This Court, mindful that to grant leave may deprive Total of a defence to the claims, only allows that portion that appears to be brought in good faith.

14. The Notice of Motion dated 5th Marcy 2020 is allowed in part. Leave is granted only to include a claim for Kshs.14,588,093.75 being the

cost of replacing and/or purchasing cylinders withheld by the Defendant. Each party to bear its own costs.

Dated, Signed and Delivered in Court at Nairobi this 21st Day of December 2020

F. TUIYOTT

JUDGE

ORDER

In view of the declaration of measures restricting Court operations due to the COVID-19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on 17th April 2020, this Ruling has been delivered to the parties through virtual platform.

F. TUIYOTT

JUDGE