REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 168 OF 2007

BUTALI SUGAR MILLS LIMITED.....PLAINTIFF/RESPONDENT

- VERSUS -

WEST KENYA SUGAR COMPANY LIMITED.....1ST DEFENDANT

KENYA SUGAR BOARD.....2ND DEFENDANT

RULING

1. What is before court is the 1st defendant's notice of motion application dated ***28th May 2018***. By that application the 1st defendant seeks the leave of the court to further amend its defence dated ***3rd October, 2015***.

2. By the affidavit in support of that application the director of the 1st defendant, ***Jaswant Singh Rai***. By that affidavit it was deponed that the 1st defendant on changing its advocate it was advised that it was necessary to re-amend its defence in order to clarify various issues pleaded. That such amendment will enable the court to fully and effectively determine the issues in controversy in this case.

3. To say the application was opposed would be putting it midly. The 2nd defendant, by its replying affidavit, stated that it vehemently opposed the application, while the plaintiff by its written submissions stated that the application is supremely contested.

4. The plaintiff's opposition began by referring to the court of appeal case **CENTRAL KENYA LTD VS TRUST BANK LTD & 5 OTHERS [2000] eKLR**. In that case the Court of Appeal held that:

> **"Mere length of proposed amendments is not a ground for declining leave to amend. The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties…. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs."**

5. The plaintiff's main opposition is on the ground of delay on the part of the 1st defendant to seek the amendments now sought. The plaintiff set out, in its submissions, the chronology of this case. That summons were served on the 1st defendant and that defendant filed its defence on ***30th May 2007***. That defendant filed an amended defence, after leave was obtained on ***3rd October, 2015***. That the case appeared before court on ***2nd March, 2018*** when Case Management Conference, as provided under Order 11 of the Civil Procedure Rules (*the Rules*). At that case management the learned judge who presided over it went through the case management check list, including satisfying herself that there were no pending interlocutory application. That on so satisfying herself the learned judge confirmed the suit was ready for trial and fixed the suit for hearing on ***29th May 2018***. That 1st defendant filed the present application on ***28th May 2018***.

6. The plaintiff submitted that the 1st Defendant had not placed before court evidence before court to enable the court exercise its discretion. That the 1st defendant's amendments sought to introduce in this suit the issue that 1st defendant had exclusive zone to be sole operator in the Kabras Sugar Zone, yet the High Court rendered itself by its judgment in the case **WEST KENYA SUGAR COMPANY LIMITED VS AGRICULTURAL FISHERIES and FOOD AUTHORITY & 11 OTHERS [2017] eKLR,** and determined that issue and found that the law does not provide for exclusive zones for any miller. That by the 1st defendant seeking to re-litigate that issue it was an abuse of the court process. That the issue was ***res judicata*** and ought not to be permitted by the proposed re-amendment.

7. The 2nd defendant by its replying affidavit echoed the plaintiff's submission on delay and in the proposed re-amendment seeking to introduce an issue already litigated upon.

8. The 1st defendant submitted that an amendment to pleadings may be allowed at any time and on such terms as to costs and that such amendment should be made for the purpose of determining the real question in issue. 1st defendant in this regard relied on the case **ELIJAH KIPNGENO ARAP BII V KENYA COMMERCIAL BANK LIMITED [2013] eKLR** where the court held:

> **"The ratio that emerges out…is that the power of the court to allow amendment is to determine the true, substantive merit of the case; amendments should be timerously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); 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 otherside; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendment introduce a new case or new grounds 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…"**

9. 1st Defendant submitted that the proposed amendments are necessary for the purpose of determining the real question or issue raised by the parties.

ANALYSIS AND DETERMINATION

10. The plaintiff and 2nd defendant opposed the application the delay, on the part of the 1st Defendant, in seeking to re-amend its defence.

11. As correctly stated by the parties in opposition, this indeed is a very old case. It was filed in the year 2007. That is now 11 years ago. No doubt there has been delay in the conclusion of this case.

12. In my perusal of the court file I find that the 1st Defendant cannot solely be blame for the delay herein. All parties in this action, including the plaintiff have contributed to the delay of hearing of this matter.

13. Pleadings in this case closed in July 2007. After the closure of pleadings the plaintiff did not actively proceed with prosecution of this suit. The deputy Registrar fixed the case for plaintiff to show cause on ***23rd October 2009*** why the suit should not be dismissed for want of prosecution. The record does not show whether cause was shown why the suit should not be dismissed but that seemed to have triggered the plaintiff into action to fix this case for hearing.

14. Failure on the part of the plaintiff also led the 1st Defendant to move the court by an application dated ***29th January 2014*** whereby the 1st Defendant meticulously set out persistent failure of the plaintiff to file and serve witness statements and document.

15. The 1st Defendant amended its defence with leave on ***3rd November 2015***. It now seeks by the present application to re-amend that amended defence. The re-amendment is sought three years after the first amendment. The 1st defendant deponed that on its present learned counsels, ***Kinoti & Kibe Company Advocates***, coming on record it received advise which necessitate the amendment sought in the proposed re-amendment.

16. The fact that the 1st Defendant obtained fresh advice from their present counsel could explain why the re-amendment was not sought earlier. It is not unusual for two counsels to give differing legal advise. It will be noted that the present counsel for the 1st defendant came on record on ***1st March, 2018***. The present application was filed on ***28th May 2018***. The delay in seeking re-amendment is in my view explained by the above sequence of events. That delay, therefore, does not defeat the 1st Defendant's prayer for re-amendment. This finding in view of the provision of Order 8 Rule 3 of the Rules which provide:

> **"….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 pleading."**

17. The above Rule has been re-stated in various decisions of the court such as **DAVID JONATHAN CRANTHAM & ANOTHER V NATIONAL SOCIAL SECURITY FUND [2007] eKLR** where it was stated:

> **"…amendment should be timerously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stage); that as a general rule however late the amendment sought to be made should be allowed if made in good faith provided costs can compensate the other side…"**

18. The last consideration of the arguments before me is whether the amendments sought were seeking to re-litigate an issue previously decided.

19. I have looked at the amendments proposed in the re-amendment and have also considered the plaintiff's plaint. The pleadings clearly relate to a very different period to that which was litigated before the Kakamega High Court in the case **WEST KENYA SUGAR COMPANY LIMITED V AGRICULTURAL FISHERIES AND FOOD AUTHORITY & 11 OTHERS [2017] eKLR**. The plaint in this case related to the period of the year 2005 when the plaintiff alleged interference in its licence. The proposed re-amendment to 1st Defendant's defence relate to that same period and to the determination of the effects of the Sugar Act 2001. I therefore find that the 1st Defendant, by its proposed re-amendment is not seeking to re-litigate matters that have been litigated.

20. In my view the proposed re-amendments will not prejudice the other parties. It ought also to be remembered that amendments are mere allegations yet to be proved by evidence and each person will be afforded an opportunity to prove the same. In my view the plaintiff and 2nd

defendant erred in opposing the application on the ground they did.

21. It is for the above reasons that I make the following orders:

a. The 1st Defendant is hereby granted leave to re-amend its defence as proposed to the annexture to the Notice of Motion dated **28th May 2018**. To that end the 1st Defendant shall file that re-amended defence within 7 days from today's date.

b. The plaintiff and 2nd Defendant shall within 14 days of service of that re-amendment defence file their amended pleadings, if any.

c. The costs of the Notice of Motion dated **28th May 2018** shall be in the cause.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **29th** day of **November,** 2018.

MARY KASANGO

JUDGE

Ruling read and delivered in open court in the presence of:

Court Assistant.....Sophie

..... for the Plaintiff

..... for the Defendants

MARY KASANGO

JUDGE