



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 369 OF 2010
RAMCO INVESTMENT LIMITED.....PLAINTIFF
VERSUS
NAIROBI CITY WATER &
SEWERAGE COMPANY LIMITED.....DEFENDANT

RULING

1. Nairobi City Water & Sewerage Company Limited, (herein after “the Defendant”), filed a Notice of Motion Application dated 14th December 2016 seeking for orders that the Defendant be granted leave to amend its statement of defence, as per the annexed Draft Amended Statement and Counter Claim. The costs of the Application be in the cause.
2. The Application is brought under Section 1A and 1B of the Civil Procedure Act, Order 8 Rule 3 of Civil Procedure Rules and all the enabling provisions of the law. It is based on the grounds on the face of it and the Affidavit sworn by Scolla Njambi dated 14th December 2016.
3. The Applicant’s case is that, it was contracted by the Plaintiff for the supply of water and other water related services and as a result the Defendant has been issuing bills to the Plaintiff. In the year 2010, the Defendant discovered that, it has been sending erroneous bills to the Plaintiff in the year 2002 to 2010. The error arose as there was an omission to apply a multiplier effect of 10 to the units consumed by the Plaintiff in order to arrive at the actual consumption. After reconciliation of the Plaintiff’s consumption, it was found that the Plaintiff owes the Defendant a total sum of Kshs.103,775.572.81, as at February 2010. The Defendant therefore wishes to amend its statement of Defence, to include a counter-claim and to recover part of the arrears for a period of six (6) years. The six years period is informed by limitation of Actions Act. The Defendant argued that the intended amendment is necessary to enable the Court to determine the real issues in controversy and to prevent multiplicity of suits. That the Plaintiff will not suffer any prejudice if the amendment is allowed.
4. The Application was however opposed. The Plaintiff relied on the grounds of opposition filed and a replying affidavit sworn by Kantilal Shah dated 19th January 2017. The Plaintiff argued that, the claim sought to be included in the counter-claim is statute barred by virtue of Section 4(1) of the Limitation of Actions Act, Cap 22, and Laws of Kenya. The cause of action arose in February 2010 when the Defendant carried out the meter reading and when the alleged error on billing was discovered. Thus the Defendant

had up to February 2016 to lodge the claim as such the Defendant's claim is statute barred as aforesaid.

5. The Parties agreed to dispose of the Application through written submissions. The Applicant reiterated the contents of the supporting affidavit and the Respondent referred mainly to the grounds of opposition and replying affidavit filed. I have considered the rival submissions. The general power of the Court to amend pleadings is based on section 100 of Civil Procedure Act, and the Parties to the suit have a right to amend their pleadings at any stage of the proceedings; so long as the same will enable the court to determine real issues in question. Similarly amendments of pleadings is allowed under the procedural provision of Order 8 Rule 3 of Civil Procedure Rules, which states that inter alia that;

“Where an Application to the Court for leave to make an amendment such as is mentioned in sub-rule (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”.

6. Therefore generally amendment of pleadings is freely allowed, if made without injustice to the other side. This is supported by several cases, including but not limited to the cases of

- *Eastern Bakery Vs Castelino (1958) EA 461.*
- *Central (K) Limited Vs Trust Bank of Kenya Ltd (2002) 2EA 365.*

7. The purpose for which an amendment is sought is important consideration by the Court. In the case of *Joseph Ochieng & 2 others Vs First National Bank of Chicago Civil Appeal No. 149 of 1999*, the Court stated as follows:

“The ratio that emerges out of what was quoted from the same 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 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 claim if by an amendment of the Plaintiff the Defendant would be deprived of his right to rely on Limitation Acts.”

8. In the instant case, the issue before the Court herein is whether the claim that the Defendant wish to include vides the Counter-Claim is statute barred. The provisions relating to the same are found under Section 4(1) of the Limitation of Actions Act, which provides:

- i. ***“The following actions may not be brought after the end of six years from the date on which the cause of action accrued –***
 - a) ***actions founded on contract;”***

9. The Plaintiff submitted that, the cause of action is based on contract and can only be pursued within six (6) years from the date it arose. However, the Applicant submitted that from the averments in the Plaintiff, the Plaintiff has sought for a declaratory order arguing that it does not owe the Defendant Kshs.103,775,517.81. This is the sum the Defendant wish to claim. The Defendant argued that this indicates that, the Plaintiff was aware of the Defendant's claim as , the two claims arise from the same facts.

10. In further submission the Plaintiff submitted that the Defendant has relied on Order 8 Rule 3(2) of Civil Procedure Rules 2010, and argued that: ***“An order in a subsidiary legislation cannot amend an Act of Parliament which is coached in mandatory terms”***. The Plaintiff further submitted that, Order 8 Rule 3, relates to various circumstances which include the amendment necessary to correct the name of a party,

alter the capacity in which a party sues, and amendment of a relief already sought. Therefore Order 8 Rule 3 is irrelevant in the given circumstance.

11. In my considered opinion I find that, whether the claim intended to be introduced through the amendment sought herein is statute barred or not, can only be established once the intended Amended Statement of Defence and counter claim is allowed on record. At that point, and once on record the Plaintiff raise either through a Preliminary Objection or a formal Application or at the hearing of the suit the issue of statutory limitation of the action or the validity of the claim and adduce evidence in support to the same.

12. If I were to disallow the Application at this stage and deny the Defendant leave to amend the Statement of defence and/or introduce the claim in the counter claim I will lock and deny the Defendant access to and drive it away from the seat of justice. That would be unconstitutional and against the rule of substantive justice. It is against this background that I allow the Application as prayed in terms of prayer 1 with orders as to costs in favor of the Plaintiff. The Annexed Draft Amendment Statement of Defence should be filed and served upon the Plaintiff within seven (7) days of this order. Failure to file and serve the same, the order granting the leave herein shall stand vacated.

13. Those then are the orders of the Court.

Dated, signed and delivered in an open court at Nairobi on this 24th of May 2017.

G. L. NZIOKA

JUDGE

In the presence of:

Mr. Mutua holding brief for Mr. Macharia for the Applicant

Ms Kirege holding brief for Ms Matai for the Respondent

Teresia Court Assistant