



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO.340 OF 2011
GULF AFRICAN BANK LIMITED.....PLAINTIFF
VERSUS
BACTLAB LIMITED.....1ST DEFENDANT
HUSSEIN AHMED FARAH.....2ND DEFENDANT
SOFIA ASSALI.....3RD DEFENDANT
GREFORY SMARAGDIS.....4TH DEFENDANT
FARAH MOHAMED AWAD.....5TH DEFENDANT

RULING

1. The Prayers in the Notice of Motion dated 5th March 2015 have been substantially settled save for Prayer No. 2 in which the 1st, 2nd, 3rd and 5th Defendants seek Leave to amend the Defence and Counterclaim. Annexed to the Application is the Draft Amended Defence and Counterclaim.
2. In a Affidavit in support of the Application, the 5th Defendant depones as follows in respect to the plea for Leave to Amend,

“That I am advised by Mr. F.N. Wamalwa and I believe that it is in the interest of Justice that the 1st Defendant’s Counterclaim be amended to express comprehensively in the Document already filed as well as those it is declining to file and serve upon the Defendants”.(sic)
3. The Plaintiff resists the Motion. The Plaintiff asserts that the amendment sought is extensive. It introduces a new Party through the backdoor and is brought late, four (4) years after the original Pleading was filed. In a word, it prejudices the Plaintiff.
4. The amendments are sought before this matter has been heard and as a general proposition Amendments 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 it can be compensated in costs. However the Court will decline Leave where the Amendment would change the action into one of a substantiality different character. Again, it will be declined where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment eg. when it takes away a Defence of Limitation

(**Eastern Bakery Vs. Castelino** [1958] EA 461). In addition, an application for Leave to amend should not be brought without unreasonable delay because to allow a late amendment could amount to an abuse of the Court process [**Kayalo Vs. Bayusuf Brothers Ltd**].

5. The Defence and Counterclaim sought to be amended were filed on 30th September 2011. This would be about 3 years and 5 months before the filing of the Application on 10th March 2015. This, no doubt, is a considerable delay. Has the Applicant explained this delay?

6. This Court finds no explanation of the delay in the Affidavit or in grounds in support of the Application. But there was an attempt from the Bar. Counsel for Applicant explained that the issue of fraud could only be picked out after a study of the Plaintiff's documents. Specifically, he pointed to pages 70,81,87 and 106 of the Plaintiff's list of Documents. But the trouble with that explanation is that the Plaintiff's list and Documents were filed in Court on 4th August 2011 together with the Plaintiff. Those documents were available to the Defendants at the time they were filing their original Pleadings or so soon thereafter. The reason given by Counsel is not plausible and this Court must find that the delay is inordinate.

7. Delay could lead to an injustice on the other side. The Amendments that are sought introduce a cause of action founded partly on fraud and false misrepresentation. These are actions in tort and which ought to be brought before the end of 3 years from the date on which they accrued (Section 4(2) of The Limitation of Actions Act).

8. The Defendants cause of action would have accrued before the time of filing of their defence. More than 3 years has since passed. To allow the amendment could deprive the Plaintiff of a Defence of Limitation.

9. I am afraid the inordinate delay in bringing the Application must defeat it. The Application of 5th March 2015 for Leave to Amend the Defence and Counterclaim is disallowed with Costs to the Plaintiff.

Dated, Signed and Delivered in Court at Nairobi this 18th day of May,2017.

F. TUIYOTT

JUDGE

PRESENT;

Ochieng for Plaintiff

Wamalwa for 1st,2nd,3rd & 5th Respondent

Alex - Court Clerk