REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND TAX DIVISION

CIVIL SUIT NO. 128 OF 2004

KOBIL PETROLEUM LIMITED……....……..PLAINTIFF

- VERSUS –

KENYA PORTS AUTHORITY…….DEFENDANT

RULING

1. The application dated 22nd August 2016 seeks leave to amend the Re-Amended Defence and Amended Counterclaim dated 16th February 2011.

2. The defendant told the court that it had reconciled all the accounts belonging to the plaintiff, and that it had established that the plaintiff's true indebtedness to the defendant, on account of the Account of Stevedoring and of Shorehandling charges, was Kshs. 431,402,194/-.

3. The defendant explained that that sum was in addition to the U.S $ 2,160,471.93 which is contained in the Re-Amended Defence and Amended Counterclaim dated 16th February 2011.

4. It is the defendant's view that if the proposed amendment was given effect, the Court would be in a position in which it could then make conclusive determinations on the real issues which were in controversy between the parties.

5. As the plaintiff pointed out, if the court did grant leave to the defendant to re-amend the Re-amended Defence and Amended Counterclaim, that would constitute the third amendment at the instance of the defendant.

6. The first amendment was done in 2005, by consent of the parties.

7. The second amendment was made after the court allowed the defendant's application dated 17th January 2011.

8. It is the plaintiff's contention that this court must pay particular attention to the reasons given by the defendant when it made the application dated 17th January 2011, because at that time, the defendant had said, that;

> **"….following a comprehensive reconciliation of the records of the Defendant in preparation for trial of this action, it was realized that the sums pleaded in the Defence and Counter-Claim were not wholly accurate...."**

9. In those circumstances, the defendant went on to say that proposed amendments *(in 2011);*

> **"….were required for purposes of determining the real questions in controversy between the parties herein".**

10. If, as the defendant had said, it did conduct a comprehensive reconciliation of its records in 2011, it would be expected that by that date, any information which pre-dated 2011, would have been un-earthed during the comprehensive reconciliation.

11. Therefore, when in 2016, the defendant appears to have un-earthed some information covering the period between 2003 and 2009, the plaintiff believes that the attempt to now introduce such information into the case, through the proposed amendment, is nothing more than an after-thought.

12. It is not just because it should have been possible for the defendant to have found the information by the year 2011, which causes the plaintiff to oppose the application to amend the Re-amended Defence and the Amended Counterclaim; the more fundamental objection stems from the contention that the new claims which the defendant seeks to introduce, are already time-barred.

13. Therefore, it is the opinion of the plaintiff that the prejudice which would be occasioned by the proposed amendment, would not be capable of being compensated by an award of costs.

14. The prejudice which the plaintiff alludes to is that the proposed amendment would defeat the Defence of Limitation.

15. As far as the plaintiff was concerned, the court can no longer afford to show the same indulgence towards the negligent conduct of litigation, as was perhaps possible in a more leisured age. The plaintiff quoted the following words of the Court of Appeal in **MUNICIPAL COUNCIL of THIKA & ANOTHER Vs LOCAL GOVERNMENT WORKERS (THIKA BRANCH), CIVIL APPEAL No. NAI. 41 of 2001;**

> **"....There will be cases in which justice will be better served by allowing the consequences of the negligence of the lawyers to fall on their own heads rather than by allowing amendment at a very late stage of the proceedings".**

16. I have no doubt that in appropriate circumstances, the court will conclude that the interests of justice shall be better served by rejecting an application for the amendment of pleadings, if such an application was brought at a very late stage of proceedings, and if the reason for bringing it late was the negligence of the advocate.

17. In this case, I have found no suggestion that the defendant's advocate had been negligent. If anything, the plaintiff appears to be heaping blame on **PATRICK W. NYOIKE** of Kenya Ports Authority.

18. I am not suggesting that if the applicant is shown to have been negligent, the court would necessarily overlook such conduct. In much the same way as the court could allow the consequences of an advocate to prevail, so too, the court could allow the consequences of the applicant to prevail.

19. The plaintiff has acknowledged that the court has the discretion to determine whether or not to allow any of the parties to the case, to amend his/her pleadings.

20. The court records show that the trial of the case had commenced before Kimondo J. However, on 13th May 2014, when the trial was scheduled to resume, the parties consented to having it adjourned. The reason for the adjournment was that Mr. Esmail, the learned advocate for the plaintiff, was indisposed.

21. The court adjourned the case and also directed that the trial would thereafter start *de novo,* before any other Judge.

22. The need for the case to start anew stemmed from the fact that the trial Judge was proceeding on transfer, to Eldoret.

23. On 1st July 2014, the plaintiff's advocate sought an adjournment as his client had not given him instructions.

24. On that date, the defendant was ready to proceed with the trial, and they had 2 witnesses in court. Consequently, although the case was adjourned, the court ordered the plaintiff to pay Court Adjournment Fees; the defendant's costs for the day; and the witness expenses for the defendant's 2 witnesses.

25. When the case was next scheduled for trial, Mr. Luseno advocate represented the plaintiff. He informed the court about the fact that his client had approached the defendant, with the intention of seeking to find a global settlement of this case, together with other cases which were pending between the parties.

26. The parties consented to the adjournment, although the plaintiff was to reimburse the Travelling Accommodation and other expenses incurred by the plaintiff's 2 witnesses.

27. It is clear that the case had reached the stage of trial, at some point in time. Indeed, the trial did commence. However, the learned trial Judge was transferred, and it became necessary for the trial to start *de novo.*

28. Due to a number of factors, the trial did not start again. First, the plaintiff had issues with its advocates, leading to a change of advocates. Secondly, the plaintiff approached the defendant for the purposes of trying to achieve a negotiated settlement.

29. Thirdly, there was a change of personnel at the Kenya Ports Authority.

30. In my understanding, it is during the period when the parties carried on with direct negotiations, that the defendant became aware of the further information, which it now seeks to introduce into the pleadings, through amendment.

31. In my considered opinion, the plaintiff has failed to demonstrate to the court that the application for an amendment is an afterthought. My said opinion is based upon the fact that it was the plaintiff who initiated the latest series of negotiations. At that time, the defendant had indicated its readiness to proceed with the trial, but the plaintiff expressed a desire to explore the possibility of finding a global settlement of this case together with the other cases which were pending between the two parties.

32. Perhaps if the trial had proceeded, as the defendant wanted, the issue of the proposed amendment may never have arisen. But because the plaintiff initiated negotiations, the parties re-examined the documentation.

33. In my assessment, the defendant cannot therefore be said to have had an afterthought when it is the plaintiff who precipitated the negotiations, out of which there emerged information which appears to be capable of assisting the defendant. If only the plaintiff knew that things could turn out as they have done, perhaps it may have steered clear of the negotiations.

34. However, the plaintiff submitted that the cause of action which the defendant seeks to introduce is already time-barred.

35. First, if it is true that those matters do factually exist and that they have existed from as far back as between 2003 and 2009, that would mean that the facts are not new. Therefore, the said facts should not be a matter of surprise to the plaintiff.

36. But the more direct answer to the plaintiff's contention, as regards the attempt to defeat the defence of limitation, is provided by Order 8 Rule 3(2) of the Civil Procedure Rules. The said sub-rule says;

> **"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 it just so to do".**

37. Subrule (3) allows for an amendment which could have the effect of substituting a new party, if the mistake sought to be corrected was a genuine mistake and was not misleading.

38. Subrule (4) allows an amendment which could alter the capacity in which a party sued.

39. Both subrules (3) and (4) do not apply to this case.

40. Meanwhile, subrule (5) provides as follows;

> **"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".**

41. In my understanding of the application, the defendant is seeking to rely on the same facts or substantially the same facts as the cause of action in respect of which it has already sought a relief.

42. Indeed, the plaintiff appears to acknowledge that the two parties have had and continue to have contractual relationships. The said relationships include the provision of shorehandling and stevedoring services by the defendant to the plaintiff.

43. There exist an accounting system through which the plaintiff is supposed to settle the payments for the services it had received.

44. Both parties appear to agree that the plaintiff had been making some payments, in respect to the outstanding accounts.

45. As to whether or not the payments made served to give rise to a new cause of action, will be a question that can only be resolved at a trial.

46. On the other hand, I know that if the defendant was granted leave to amend its Defence and Counterclaim, that would not, of itself, imply that the court had made a determination on the possible defence of limitation. I find absolutely nothing in law, to bar the plaintiff from putting forward the defence of limitation, if it is so minded.

47. Therefore, by allowing the application, the court would not be depriving the plaintiff of the defence of limitation or any other defence.

48. I also find that by allowing the defendant leave to amend its pleadings as it has proposed, would give to the court and to the parties, an opportunity to have the whole dispute between them, determined.

49. I therefore find merit in the application dated 22nd August 2016, and grant leave to the defendant to amend its Re-Amended Defence and Amended Counterclaim.

50. However, although the application is successful, I find no reason to burden the plaintiff with its costs. I so find because if the defendant had been adequately diligent, it could have either brought out its whole case from the start, or it could have incorporated all necessary amendments in its earlier applications.

51. I order that each party will meet its own costs of the application.

DATED, SIGNED and DELIVERED at NAIROBI this 21st day of September 2017.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Wachira for Ruto for the Plaintiff

Miss Mulindi for Miss Mutea for the Defendant

Collins Odhiambo – Court clerk.