



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT ELDORET
CIVIL SUIT NO. 7 OF 2004

MOSORIOT QUARRY LIMITED.....PLAINTIFF

VERSUS

KENYA INDUSTRIAL ESTATES LIMITED.....DEFENDANT

RULING

1. The plaintiff craves leave to further amend its *amended Complaint* dated 4th June 2007. The amendment sought is to “*correct figures pleaded in the complaint*”. The plaintiff contends that the particulars are germane to the suit and will disclose the real issues in controversy. The plaintiff also prays that the suit be transferred to the subordinate court for hearing and determination.
2. Those matters are set out in the chamber summons dated 26th November 2013; and, the deposition of Phillip Kiplelei Arap Magut, a director of the plaintiff. He avers that the plaintiff instructed its legal counsel to lodge a claim against the defendant for Kshs 2,719,681. He stated that the plaintiff relied on a set of preliminary accounts. Upon verification, the true sum should be Kshs 3,920,640.88. He avers that the mistake was *bona fide*. The plaintiff states that since the pecuniary jurisdiction of the subordinate court has been enhanced, the suit should be transferred there. Lastly, he contends that the amendment will not cause prejudice to the defendant.
3. The motion is contested. There are grounds of opposition filed on 18th March 2014. In a nutshell, the defendant pleads that the motion is an afterthought; that it is defective; that there has been *laches*; that the amendments have been caught up by the statute of limitation; and, that there are no sufficient grounds to invoke the leave of the Court.
4. The parties filed written submissions: those by the plaintiff were filed on 8th July 2014; those by the defendant on 17th July 2014. On 28th October 2015, learned counsels informed the court they would rely entirely on their written submissions. I have carefully considered the chamber summons, depositions, grounds of opposition and the rival submissions.
5. I am alive to the notion that amendments to pleadings should be liberally allowed. An application for amendment may be made at any stage before judgment. The key rationale is to allow a court to effectively and finally determine all the issues in the suit. See *Leroka v Middle Africa Finance Company Limited* [1990] KLR 549, *Eastern Bakery v Castelino* [1958] E.A. 461, *Kuloba v Oduol* [2001] 1 EA 101, *Unga Limited v Magina Limited* Nairobi, High Court Case 1250 of 1999 [2014] eKLR and the dictum of Madan JA (as he then was) in *D. T. Dobie & Company v Muchina* [1982] KLR 1.
6. In addition, the Court is now enjoined by article 159 of the Constitution and Sections 1A and 1B of the Civil Procedure Act to do substantial justice to the parties. That is the overriding objective. See *Harit*

Sheth Advocate v Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR.

7. Justice is however a two way street. Accordingly, amendments will not be allowed where they cause a serious injustice to the other party. Eastern Bakery v Castelino, supra, at page 462. Since the grant of leave is a *discretionary power*, a party who abuses the process of court or seeks to cause further delay of the suit will be denied the remedy. See Unga Limited v Magina Limited [2014] eKLR, supra.

8. The suit here was filed on 15th January 2004. That is *thirteen years* ago. At that time, the plaintiff was deemed to *know* the true nature and extent of the sums owed to it by the defendant. Furthermore, on 4th June 2007, the plaint was amended. The amended plaint was filed on 5th June 2007. The plaintiff reduced its claim from Kshs 3,287, 365.40 to Kshs 2,719,681.08. That was *three years* from the date of the suit; and, *nine years* ago. So much so that if the plaintiff had originally made a mistake, it had a clear opportunity to make amends. Now the plaintiff, *thirteen years* after filing suit, wishes to *further amend* the plaint to claim Kshs 3, 920, 640.88. If the plaintiff was clear in its arithmetic, then those facts could have been conveniently pleaded at the last amendment of the plaint *nine years* ago.

9. The delay in presenting the present motion for those many years is *not* well explained. The casual answer proffered is that the preliminary accounts have now been verified. No documentary evidence or accounts are annexed to support that allegation. I got the distinct impression that it was a red herring. When delay is established, unless it is well explained, it is deemed to be inexcusable. See Allen v Mc Alpine & Sons Ltd [1968] 1 All ER 543, Ivita v Kyumbu [1984] KLR 441, Unga Limited v Magina Limited Nairobi, High Court Case 1250 of 1999 [2014] eKLR.

10. There is obvious prejudice to the defendant. He is held hostage by the lethargy of the plaintiff. This suit has not taken off for *thirteen years*. If the further amendment is allowed, it will reopen the pleadings and cause additional delay. That would be anathema to the overriding objective.

11. Granted all those circumstances, I am *disinclined* to grant leave to further amend the amended plaint. The upshot is that the plaintiff's chamber summons dated 26th November 2013 is devoid of merit. It is *dismissed with costs* to the defendant. Lastly, I allow the prayer for transfer of the suit to the subordinate court. The Deputy Registrar shall now cause the original records and file to be transferred to the Chief Magistrates Court at Eldoret for hearing and determination of the suit. To avoid further delays, the suit shall be mentioned before the Chief Magistrates Court, Eldoret on 27th January 2016 for directions.

It is so ordered.

DATED, SIGNED and DELIVERED at ELDORET this 21st day of January 2016

GEORGE KANYI KIMONDO

JUDGE

Ruling read in open Court in the presence of:

No appearance for the plaintiff.

Mr. Wamasa for Mr. Nyamwange for the defendant.

Mr. Lesinge, Court Clerk.