



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 928 OF 2009

PAUL T. GICHUHI T/A

SAPAMO CONSULTING ENGINEERS PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED DEFENDANT

RULING

1. The Application herein is a Notice of Motion dated 16th March 2016. The same is brought under Order 8 Rule 3 of Civil Procedure Rules 2010, section 3A of the Civil Procedure Act and all Enabling Provisions of the Law.

2. The Application seeks for orders that the Honourable Court be pleased to grant the Plaintiff leave to further amend the plaint herein in the term of the annexed plaint and the costs of the Application be provided for. It is based on the grounds that:

- *While preparing for hearing of this matter the Plaintiff noticed that the retention of Kshs.2,958,813.08 which the Defendant is still holding was not included as part of his claim.*
- *This being a substantial amount, the Plaintiff prays that he be allowed to further amend the Plaint to include the said retention moneys.*
- *On consultation with Counsel for the Defendant whether the Plaint could be amend orally, Counsel for the Defendant was of the view that the formal application for amendment be made*
- *In order to set the suit down for hearing, it is imperative that the Plaint be amended further.*

3. The Application is supported by an affidavit sworn by PAUL THANGA GICHUHI dated 16th March 2016. It is however opposed vide a replying affidavit sworn by GLORIA ROBAI KHAFABA dated 13th May 2016 and filed in court on the same date.

4. I have considered the said Application, the grounds and the affidavit in support thereof and the annexed draft of the further amended plaint. In a nutshell, the applicant seeks to amend the plaint further, allegedly to include a sum of Kshs.2,958,813.08 which is described as a retention amount, being held by the Defendant, and which had been left out of the claim. The grounds advanced for seeking for leave are that, the amount involved is substantial, and that the amendment will enable the Court to determine all the issues. That the said sum was left out inadvertently.

5. As aforesaid, the Application is opposed on the grounds that the claim is time barred, the amendment will occasion great injustice to the defendant as it would be defending a claim that is already barred by the

limitation of law, and that, the amendment will not assist the Court in determining the real issue in the matter.

6. The parties filed written submissions on the application which I have considered alongside the authorities cited therein. In a nutshell the Applicant's submitted that, the proposed amendment will not amount to an introduction of a new cause of action. That it is part and parcel of the claim being raised in the plaint. They relied on the case of **Kuloba vs Oduol Civil Case No. 1 of 2000**. They further submitted that the law allows amendment of proceedings at an stage of the proceeding and on such terms as to costs or otherwise as the Court may deem just and in such manner as it may direct, or allow any party to amend the pleadings. They relied on Order 8 R 2, 3 (1) and (5) of Civil Procedure Rules. That, the Court can grant leave even if the limitation period is over. Finally, the Applicant submitted that, the inclusion of the sum stated in the plaint will assist the Court to determine all the issues in the case, and will not prejudice the Defendants/Respondents.

7. The Respondents in their submissions reiterated the grounds in the Replying Affidavit, to the effect that it's six years since the suit was filed, and two years since the plaint was last amended; and the matters relied on were in the Plaintiff's knowledge all through. That the inordinate delay has not been explained. That the Applicant does not explain why the amendment was not made when the plaint was first amended. Hence there are no exceptional and peculiar circumstances in this case to warrant the granting of leave to amend the plaint. The Respondent relied on the case of **James Ochieng Oduor t/a Ochieng Oduol & Co. Advocates –vs- Richard Kuloba (2008) eKLR** and the case of **Kenneth Kariuki Githi - vs - Royal Media Services Ltd 2009 eKLR**. Finally, the Respondent submitted that to allow the amendment will be to aid a negligent pleader. This is because, the provisions of Order 8 Rule 3 (1) of the Civil Procedure Rules were not intended to aid a negligent pleader; and more so where it's effect will be to defeat an accrued Defence of limitation, which has accrued in favour of the Defendant.

8. The law on amendment of pleadings is found under Order 8 Rule 3 of the Civil Procedure Rules as aforesaid. It is also well established in a number of Court decisions. The main legal principles thereof are, that the power of the Court to allow the amendment is to determine the true substantive merits of the case; amendments should be timorously applied for and the power to so amend can be exercised at any stage of the proceedings (including the appeal stage). That, the amendment should be allowed if made in good faith and provided costs can compensate the other party. Similarly an amendments that may introduce a new ground of defence may be allowed unless it will change the action into a substantially different character which could more conveniently be made in a fresh action. That in deed a Plaintiff will not be allowed to reframe his case if the same will deprive the Defendant of the right to rely on Limitation Acts.

9. All these principles were laid down in the case of **Joseph Ochieng and 2 Others –vs- First National Bank of Chicago Civil Appeal No. 149 of 1991**. In the case of **AAT Holdings Limited –vs- Diamond Shields Ltd 2014 eKLR**, the Court held that, the amendment should be necessary for the purpose of determining the real question or issue raised by the parties and it is just to do so. Thus the Court has the discretion to determine the deserving cases for amendment. It the case of **Central Kenya Ltd –vs- Trust Bank Ltd and 5 Others (2000) eklr**, it was held that an amendment will be allowed, inter alia, to avoid multiplicity of suits provided there has been no undue delay. That there is no vested interest or accrued legal rights affected, and or, there does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

10. I now turn to the matter before the Court and more specifically the proposed amendment, and firstly, I find that the amendments to be made as per the draft further amended Plaint is to change the firms of lawyers representing the Plaintiff Applicant, and the Defendant Respondent accordingly. Second, there is an introduction of a claim of Kshs.2,958,813.08 a sum referred to as a retention sum which the Defendant are allegedly holding. That sum relates to the main subject matter of the suit, namely the provision of professional engineering service. I therefore don't agree with the submission that the introduction of the said claim amounts to a new cause of action. As regards the issue of whether the said claim is statute barred the Defendants/Respondents can only deal with the same through a formal hearing where evidence will be adduced. That cannot be determined on documents filed at this interlocutory stage and before the

hearing. It would therefore be prejudicial to the Applicant to shut them out on mere submissions from the Respondent that the alleged claim is statute bared. On the issue of prejudice to the Defendant, I find that the Respondent will be at liberty to apply to amend their defence if need arises. Indeed the spirit of Article 48 of the Constitution of Kenya, and the overriding objectives of Section 1A and 1B of Civil Procedure Act, states that every person has a right to access to justice, in a fair and just manner.

11. In that regard I find that it will be in the interest of justice to allow the Application so that all the issues relating to the subject matter herein are heard and determined at once. That will avoid multiplicity of suits and clogging of the Courts thus, creating backlog. I am however rife to the observation by the Defendant's/Respondents that, the Applicants have not been vigilant in prosecuting the matter and have been making numerous Applications to amend pleadings, even on issues that were within their knowledge. I agree with the Respondents that the Applicants should now move to expeditiously dispose off the matter.

12. In conclusion:

(i) I allow the application as prayed with costs to the Respondent.

(ii) The annexed further draft amended Plaintiff will be deemed duly filed and served upon payment of the requisite Court fees.

Orders accordingly.

DATED AND DELIVERED IN AN OPEN COURT AT NAIROBI THIS 28th DAY OF JUNE 2016.

G. L. NZIOKA

Ruling Read in open court in the presence of:

Jelle hb for Miss Kitonga for the Plaintiff

Mr. Bukania hb for Mrs Kariuki for the Defendant

Teresia – Court Clerk