



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 497 OF 2008

EQUIP AGENCEIS LIMITED ::::::::::::::::::::::::::::::::::::::: PLAINTIFF

VERSUS

MUHORONI SUGAR COMPANY LIMITED

(IN RECEIVERSHIP) ::::::::::::::::::::::::::::::::::::::: DEFENDANT

R U L I N G

1. The application before the court is a Notice of Motion dated and filed in court on 18th July 2014 by the Plaintiff. It is filed pursuant to Sections 1A, 1B and 3A of the Civil Procedure Act, Order 8 Rules 3 (1) (5) of the Civil procedure Rules and all enabling provisions of the law. The application seeks to secure the following orders:-
 1. ***That this Honourable Court be pleased to grant the Plaintiff leave to amend the Plaint as proposed in the annexed copy of the Amended Plaint.***
 2. ***That the costs of the application be in the cause.***
2. The application is premised on the grounds set out therein, and by affidavit of **Divyesh Indubhai Patel** dated **18th July 2014**, to which is attached a draft copy of the proposed amended Plaint. The Plaintiff now proposes to amend the Plaint to *inter-a-lia*, include an alleged contractual interest rate of 3% per month on the goods which the Defendant had rejected, and the price of which the Plaintiff claims.
3. The Defendant/Respondent has opposed the application vide the Grounds of Opposition filed in court on 24th September 2014, the gist of which is that the amendments sought by the Plaintiff have all along been within the knowledge of the Plaintiff, and that considering that for the past six (6) years the Plaintiff has not brought the amendments, the same is an afterthought and should be denied.
4. The brief history of the application is that vide a Plaint filed in court on 29th August 2008 the Plaintiff claimed a sum of Kshs.8,273,556.70 with costs and interest from the Defendant on account of goods supplied and delivered. By its defence filed in court on 15th September 2008 the Defendant denied the claim in toto, but, entirely without prejudice, admitted the supply of the said goods but which the Defendant rejected on account of not being fit for purpose. The hearing of the suit started in earnest on 5th November 2012, and the Plaintiff's first witness has concluded giving evidence. During evidence, the PW 1 Divyeshkamar Patel testified that the Plaintiff and the Defendant had agreed that overdue payments would be charged interest at 3% per month. This 3% per month rate of interest, was not however, reflected in the Plaintiff's claim as filed in court, and this application now seeks to bring into the said pleadings the same, and is the main reason for the application.

5. Parties field submissions. The Plaintiff did that on 7th November 2014 while the Defendant filed theirs on 21st November 2014. The Applicant's main submission is that the proposed amendment has been made in good faith to specifically plead the contractual rate of interest which had been inadvertently omitted. It is further submitted by the Plaintiff that the grant of the prayer will not cause the Defendant to suffer any prejudice which cannot be compensated for by costs and that if there is any delay in bringing this application the ground of delay above is not enough to disallow the application for amendment.
6. On its part the Defendant submitted that the grant of the application will cause the Defendant prejudice in that the Plaintiff's main witness has already testified and may have to be recalled thereby prolonging the case and costs related to it. The Defendant further submitted that the Plaintiff all along knew the supposed interest rate of 3% per annum and that the delay in bringing the application now shows that it is made in bad faith, and amounts to litigation in instalment, and in this case also amounts to a fresh suit.
7. I have carefully considered the application and the submissions of the parties. In my view, the issues for consideration in order to arrive at a Ruling are the following.
 1. ***Whether the proposed amendments introduce a new cause of action.***
 2. ***Whether the application is filed after undue delay.***
 3. ***Whether the Respondent stands to suffer any prejudice that cannot be compensated for in costs.***
8. The broad legal principles for amendments of pleadings may be summarised as follows. Under the provisions of **Order 8 Rule 3 and 5 of the Civil Procedure Rules** this Court may at any stage, on such terms as to costs or otherwise as may be just, allow any party to amend his pleadings notwithstanding that such an application is made after the expiry of a period of limitation upon which the other party might be entitled to rely or substitute a party or alter the capacity in which a party sues or even add or substitute a new cause of action.

In the celebrated case of **Tildesley Vs. Harper [1878] 10 Ch D 393** Bramwell L held as follows:

“My practice has always been to give leave to amend unless I have been satisfied that the party applying was acting mala fide or that . . . he has done some injury to his opponent which cannot be compensated by payment of costs or otherwise.”

9. The tenor of the judgment of the Court of Appeal in the case of the **Central Bank of Kenya Ltd Vs. Trust Bank Limited [2000] 2 EA 365** is that a party should be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy. The Court went on to observe that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment did not result in prejudice or injustice to the other party that could not be properly compensated for in costs. With these principles in mind, I will now consider each of the issues I have stated above.

10. Do the proposed amendments introduce a new cause of action?

For the sole purpose of enabling this Court to determine the real questions in controversy between the parties, the Plaintiff has sought the leave of this Court to amend the Plaintiff, the gist of which is twofold:

- a. ***To explicitly plead the contractual rate of interest of 3% per month from November 2005 on the total sum of the unpaid goods delivered to the Respondent;***
- b. ***To claim for the total sum of the unpaid goods that were purportedly rejected by the Respondent under invoices No. 5529, 5552, 5563 and 5457 amounting to Kshs. 6,432,500.00 together with the contractual rate of interest of 3% per month from November 2005.***

11. I have noted that at the trial, the Applicant has already adduced evidence to substantiate its claim for the contractual rate of interest at the rate of 3 % per month on the unpaid goods. PW1 in his evidence stated that one of the express terms of the contract for the sale of the goods was that a price surcharge of 3% per month would be charged in all overdue accounts until payment in full.

12. It is implicit from the dicta of the Court of Appeal in the case of **Highway Furniture Mart Limited Vs. The P.S Secretary Office of the President Civil Appeal No. 52 of 2005** that an award of interest on the principal sum is generally to compensate the Plaintiff for the deprivation of money through the wrongful act of a Defendant. The Court of Appeal went on to cement the principle that the contractual rate of interest up to the date of filing the suit is a matter of substantive law and that the same must be specifically pleaded and proved at the trial.

The question that now begs to be answered is whether in the face of the evidence adduced at the trial, the Plaintiff specifically pleaded the contractual rate of interest? The answer is in the negative. The Plaintiff inadvertently failed to specifically plead in the Plaint that the contractual rate of interest on the outstanding unpaid goods of 3% per month was chargeable on the principal sum.

13. Under **Order 3 Rule 3 (5) of the Civil Procedure Rules** this Court has the power to allow an amendment 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 the cause of action in respect of which relief has already been claimed.

14. The next issue is whether the Applicant delayed in making the Application for leave to amend the Plaint and whether delay *per se* may deny an applicant an opportunity to amend. The Respondent contends that the Applicant is guilty of delay of a period of about 6 years in making the instant Application to amend the Plaint. In the case of **Central Bank of Kenya Vs. Trust Bank Ltd [2000] 2 E.A 365** the Court of Appeal reaffirmed the principle that delay is not a ground for declining to grant leave. The dicta of the Hon. Mr. Justice Visram in the case of **Capital Fish (K) Limited Vs. Kenya Power and Lighting Co. Limited HCCC 369 OF 1998** where the Learned judge allowed the Plaintiff to amend the Plaint in spite of a delay of 9 years. The Learned judge stated:-

“Delay alone is no reason to deny the amendments that I believe are fair, justified and submitted in good faith.”

I agree with the above conclusion and that delay alone cannot justify leave to amend being denied where other merits are available.

15. The next issue is whether the Respondent stands to suffer any prejudice that cannot be compensated for in costs? As per the Court of Appeal decision in **Central Bank of Kenya Vs. Trust Bank Ltd**, the policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs. In my view the Respondent has not demonstrated sufficiently or otherwise that it shall suffer prejudice that cannot be compensated for in costs for the following reasons:

16. From the foregoing reasons, I am satisfied that the application is merited and should be allowed, which I hereby do in the following merits:-

- i. ***The proposed amendments shall be filed and served upon the Defendants within 7 (seven) days of this Ruling.***
- ii. ***The Defendant shall file and serve an amended defence, if need be within 10 days of the service of the amended plaint.***
- iii. ***The costs of this application shall be for the Defendant/Respondent to punish the Plaintiff for delay in bringing the application. The same is hereby assessed at Kshs.20,000/= and shall be paid simultaneously with the service of the amended Plaint.***

Orders accordingly.

READ, DELIVERED DATED AND AT NAIROBI

THIS 30TH DAY OF JANUARY 2015

E. K. O. OGOLA

JUDGE

PRESENT:

Kiche holding brief for Odera for the Plaintiff/Applicant

Ngerega holding brief for Otieno for the Defendant/Respondent

Teresia – Court Clerk