



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL SUIT NO. 91 OF 2011

KAKAMEGA PAPER CONVERTERS LTD.....PLAINTIFF

VERSUS

MOHANLAL ARORA.....1ST DEFENDANT
SUSHILAMOCHANLAL ARORA.....2ND DEFENDANT
PASPULATIJAYASURYA SUNIL RAJ.....3RD DEFENDANT
EAST AFRICA PAPER CONVERTERS LTD.....4TH DEFENDANT
BANK OF BARODA (K) LTD.....5TH DEFENDANT

RULING

Leave to amend defence

[1] Before me is a Motion for leave to amend defences filed herein by the 1st, 2nd and 4th Defendants. The Motion is dated 8th April 2014 and is expressed to be brought under section 1A, 1B and 3A of the Civil Procedure Act ("the Act") as well as Order 8 rule 3(1) and Order 51 rule 1 of the Civil procedure rules.. The 1st, 2nd and 4th Defendants ("the Applicants") also filed draft amended defences showing the manner in which the amendment should be carried. The Application is supported by the affidavit sworn on 8th April, 2014 by the 1st Defendant, Mr. Mohanlal Arora ("the Supporting Affidavit").

[2] The Applicants argued that after discussion with their advocates, they were convinced that there is need to amend the defence filed in order to introduce additional material facts and substantial issues of law that were hitherto unaddressed in the respective original Statements of Defences. The issues will enable the Honourable Court to effectually adjudicate upon the real issues in controversy between the Plaintiff and the Applicants. The said issues include a fuller explication of the circumstances under which the agreement for sale and purchase was reached; the role of the 3rd Defendant as agent for the Plaintiff and the misrepresentations he made on its behalf; the circumstances surrounding the Directorship of the 1st Defendant in the 4th Defendant which will enable the Honourable Court to appreciate with better accuracy the background and

basis of the matter under dispute and further provide better particulars of the relationship between 1st and 2nd Defendants with the 4th Defendant with a view establish the Applicants' intended Defence of misjoinder, etc.

[3] They submitted that the court should be guided the overriding objective in Sections 1A and 1B of the Civil Procedure Act and Order 8 of the Civil Procedure Rules and exercise it wide discretion to grant leave to amend. 2010 Rule 3 (1) provides for the amendment of pleadings with leave in the following terms;

“Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.”

They relied on the case of *KASSAM vs. BANK OF BARODA (KENYA) LTD* [2002] 1 KLR 294, by Kuloba J. who held that very wide and comprehensive powers are given to the court to allow any amendment which may be necessary, at whatever stage of the suit when the application for amendment is made. See also the case of the *Mbayo & Another v. Sinani* [2007] 2 EA 306, the Court of Appeal of Uganda stated that the duty of the court when dealing with settlement of a dispute is to determine the rights of the parties and not to punish them for mistakes they commit in the conduct of their cases. See also the case of *Central Kenya Limited v. Trust Bank Limited* [2000] 2 EA. 365.

[4] Flowing from the above decisions, the Applicants' humbly submitted that the proposed amendments will provide the Court with further and better particulars of the events leading up to the agreement from which the suit emanated, thus, will enable the determine the real issues in controversy. The amendments are further intended to furnish the court with better particulars of the representations made by the Plaintiff to the Defendants herein which fundamentally led the said Defendants to enter into the agreement forming the substrate of the dispute between the parties herein. Additionally, the Applicants intend to plead the defence of material misrepresentation and a plea of mis-joinder in the suit given the relationship between the 1st and 2nd Defendants and the 4th Defendant. They are therefore necessary amendments. These amendments will not prejudice the Plaintiff. In fact, the only substantive issue which the Plaintiff has raised in opposition to the application is delay in filing and pursuing applications for amendment. The record does not support that allegation considering the following events.

a) In April, 2011 the 1st and 2nd Defendants' passports were deposited in court as security. Subsequently, the 1st and 2nd Defendants filed an application seeking to retrieve their passports to facilitate the 1st Defendant's travel abroad for medical treatment hence the application dated 18th September, 2014 ("the 1st Application"). However, it became necessary to amend the 1st Application but when this necessity was communicated to the Respondent's counsel; he insisted that a formal application be made. Consequently, the 1st and 2nd Defendants filed the application dated 1st November, 2013 seeking leave to amend the 1st Application ("the 2nd Application"). By a ruling delivered on 22nd November, 2013, Hon. J.B. Havelock J. allowed the 2nd Application. As a result of the foregoing, the Amended Notice of Motion was filed on 28th October, 2014 ("Amended Notice of Motion") and a ruling thereto was delivered by Hon. J.B. Havelock on 26th June, 2014 wherein the same was dismissed. It is after the disposal of that Amended Notice of Motion that the instant application was filed in court with the sole intention being to permit the Applicants' Defences to aptly capture the main facts and address all issues in controversy and to further plead other defences available to them at law.

b) By a Notice of Discontinuance dated 5th March, 2014, and filed and served on

even date, the 4th Defendant unconditionally discontinued its application dated 23rd August, 2011 ("earlier application"). Consequently, the dispositions contained at paragraphs 7, 8, 11, 12 and 13 of the Replying Affidavit relating to that earlier application are un-merited and ought not to be considered in determining this application.

c) Within the same year of filing suit i.e. on 23rd August 2011, the first amendment application was filed proposing the same amendments as currently proposed save for a few particulars. The untimely demise of the 1st, 2nd and 4th Defendants' counsel (Mr. ZulAlibhai) however immensely contributed to the slight delay in prosecuting the amendment application. The process of reconciling and updating matters previously handled by a deceased advocate is no mean task but even so, as soon as the current advocates received instructions to take over the conduct of this matter they filed the present application expeditiously and have always been ready to prosecute it. The delay in prosecuting the same has further been caused by other intervening applications by both the Plaintiff and the respondent which were well within the parties' rights to file and for which they ought not to be punished.

[5] In any event, mere delay is not a ground upon which, an application for amendment may be declined. See the case of *Central Kenya Limited v. Trust Bank Limited*. The delay must be such as is likely to prejudice the opposite party beyond monetary compensation in costs. See the decision of the English Court of Appeal in *Beoco Ltd v Alfa Laval Co Ltd & another*[1994] 4 All ER 464, Stuart-Smith LJ was categorical in his rejection on the argument that the amendment had been sought far too late. See also *Molu & Another v. Kenya Railways & Another* [2002]2 KLR 551, the Respondent had objected to an application to amend on the grounds that the amendments sought were so drastic that they would alter the whole substratum of the suit and further that there was inordinate delay in filing the application. Onyango Otieno J. (as he then was)held:

"First, on the question of delay, I do agree there was delay in filing this application and I cannot say the period is reasonable.Indeed no time limit can be spelt out for an application for amendment as it is an application that can be made at any time even after the case is heard but before judgment."

Other cases were quoted such as *Tulip Properties Ltd v Mohammed Koriow & 6 others* [2013]eKLR, Nyamweya J. See also "*Mulla on the Code of Civil Procedure, Vol II, 15th edition* at page 1182 that:

"However negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs. ...there is one panacea which heals every sore in litigation, and that is costs. Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated in costs." -

[6] Contrary to the claims by the Plaintiff, the Applicants stated that they are not improving their defences as the matter progresses. They also merely alleged that grave injustice and prejudice will befall the plaintiff without giving particulars of the injustice and prejudice. The Applicants also discounted as untrue the submissions by the Plaintiff that they are introducing '*several new defences and allegations*'. The Applicants explained that the defences they are putting forth have either (a) always been taken up on behalf of the 1st and 4th Defendants since inception of these proceedings and/or (b) arise out of the same facts or substantially the same facts as the ones earlier pleaded by the Defendants. The 1st and 4th Defendant's merely seek to expound on defences hitherto raised by supplying better and clearer particulars. Indeed, the 4th Defendant has always maintained that it exercised its right to rescind the contract because of misrepresentation.

Similarly, the 1st Defendant has always maintained and still maintains that it is improperly enjoined in this suit as the issues in dispute concern a company in which he was merely a director/shareholder. See *Central Kenya v Trust Bank* case that:

“Likewise, the trial judge having come to the conclusion that the Appellant’s proposed amendments to the plaint did in a way clarify the Appellant’s case, he should have granted leave as by doing so the other parties would have neither been prejudiced nor would the amendments lead to undue delay in resolving the matters in controversy between the parties.”

[7] The proposed amendments seek to bring to the fore the Plaintiff's conduct prior to, during and after the conclusion of the sale agreement subject of this suit. The challenged rescission was premised on the said plaintiff's conduct and representations and forms the gravamen of the Defendant's defence and counterclaim. See also the following authorities:- **Omar Vs EA Cargo Handling Services Ltd; Bayusuf Brothers Ltd vs. Kyalo and Kyalo vs Bayusuf; Julia AkeloKunguru vs Seth Lugonzo& others; and Patel v Amin.**In view of the above, the Applicants humbly urged this Honourable Court to allow the Application and grant the prayers as set out in the Notice of Motion as the proposed amendments are *bona fide* required for purposes of the full and effectual adjudication of all the matters in dispute between the parties.

The Plaintiff opposed the application

[8] The Plaintiff opposes this second Application for amendment of the Defence by the 4th.defendants and the first application on behalf of the 1st.Defendant (hereinafter together referred to as “the said defendants”), on the grounds set out in the Affidavit in Reply sworn by DIPAKPANACHAND SHAH on 30th.September 2014 and filed in court on 2nd.October 2014. The first application to amend the 4th.Defendant’s Defence was filed on 23rd.August **2011** by its former advocates Anjarwalla& Khanna (“A&K”) **under a certificate of urgency accompanied by an application that the said application be heard during the August 2011 court vacations.** The said A&K never made any attempt to have this application fixed for hearing. Although the firm of Oraro & Company formally came on record as representing the 1st.2nd.and 4th.defendants by filing a Notice of Change of Advocates on 13th.june 2013 Mr. Oraro of the said firm started appearing as lead counsel in the matter (leading the late Mr. ZulAlibhai of A&K) as from 11th.June **2012, some two years and three months back, when he must obviously have read the pleadings in the case.**

[9] On 24th.August 2013 the Plaintiff’s advocates received a Supplementary Affidavit sworn by Mr. George Oraro of Oraro & Company on 31st.July 2013 (see pp 28/29) of the Affidavit in Reply in which the said Mr. Oraro swore as follows:

“2. That I swear this affidavit further to the affidavit dated 7th January, 2013 sworn by Mr Hannington Amol, advocate.

3. That I have carefully perused the pleadings and proceedings in this matter since its inception and believe that it shall be in the interest of justice for the court to dispose of the application dated 23rd August 2013 seeking leave to amend the 4th Defendant Defense and to grant additional leave for the amendment of the 1st Defendant pleadings as well.

4. That it is my professional view that in order to enable the court to appreciate all the legal and factual issues attendant to this suit and to render justice to all concerned parties, the said Defences ought to be amended in accordance with the draft amended Defences attached herewith and marked G.O.1 AND G.O.2 respectively.

5. That I verily believe that this court has the inherent jurisdiction in law to grant leave for the amendment of Pleadings in a suit at any time in the proceedings.

6. That I pray that the draft amended Defences attached herewith be adopted as the amended Defences of the 1st and 4th Defendants by the Court.

7. That I swear this affidavit in support of the Application dated 23rd August 2011.

8. That whatever is deposed to herein is true to the best of my knowledge and belief, save for information whose sources are disclosed”.

[10] According to the Plaintiff, the dates 7th.January 2013 and 23rd.August 2013 in paragraphs 2 and 3 of the affidavit reproduced above respectively should read 23rd.January 2011 and 23rd.August 2011 respectively. Less than one year after the swearing of the aforesaid affidavit on **31st July 2013** Oraro & Company are urging the court to allow the 4th. Defendant to amend its Defence as per exhibit “G.O.2” drafted by A&K where the 4th. Defendant is putting forward through the same firm of advocates, Oraro & Company, a very different version of the 4th.Defendant’s Defence attached to the present application, this time supported by the affidavit sworn by the 1st.defendant on information and advice supplied by the said Oraro & company, which contains new allegations and averments some of which are inconsistent with the previous Defences of the said defendants. Their submissions that the proposed amendments will ostensibly “enable the court to determine the real issues in controversy” or is as a result of “reviewing of pleadings, documents and proceedings on record” are wholly untrue. This is therefore **the second attempt to** amend the 4th.Defendant’s Defence and the 1st.Defendant’s first attempt, 3 years and 7 months after his existing Defence was filed.

[11] The Plaintiff argued that there are several new defences which are being raised and **several new averments and allegations** are also being made in the latest version of the 4th.Defendant’s Defence under the guise of an attempt “to supply the court with better and further particulars of the events leading up to the agreement in dispute with a view to assisting the court to appreciate with reasonable accuracy the background and the basis of the matters in dispute”. There are other excuses set out in paragraphs 7,8,9 and 10 of the supporting affidavit of the 1st. Defendant Mohanlal Arora. In particular the contents of paragraph 10 of the said affidavit are not true because contrary to the assertion by the Applicants, the amendments will not “narrow down the issues in dispute between the parties, ensure the timely and efficient disposal of this case, and ensure the just resolution of the dispute herein”. Instead, the true character and intention of the amendments is to completely re-write the original Defences of the 1st and 4th.Defendants. In fact, the Plaintiff is convinced that the Applicants are simply improving their case as the case progresses and as and when they choose to change advocates. Such conduct of the said defendants constitutes gross abuse of the process of the court. The delay herein has also not been explained at all. The first defence of the first defendant was filed as far back as 19 April 2011 by R.K. Somaia Advocate of Kisumu and the first defence of the fourth defendant was filed on 18th of April 2011 by Gichaba & Co advocates. Meanwhile several applications have been argued before different judges in this case and rulings delivered in the same including an application by the Plaintiff against the 4th.Defendant for judgement in the sum of Kenya shillings 51,462,424.00 plus costs and interest filed on 18th.April 2011.This application was heard by Muga Opondi J. who ruled in favour of the Plaintiff on 24th.August 2011 and the Plaintiff recovered the decretal amount partly by recourse to garnishee proceedings against the 5th.Defendant. The plaintiff has been trying to have this case set down for hearing since the middle of the year 2013 and the case was fixed by consent for pre- trial conference on 11th.October 2013 but the defendants have thwarted all such attempts by the Plaintiff in order to delay the hearing of this case as much as possible and this

latest application for amendment of the defences of the said Defendants is just another step in this direction which will inevitably result in great delay in the hearing of this suit. It is the Plaintiff's contention that "the amendments are not sought in good faith and have not been sought at an early and opportune moment having regard to the progress of the case.

[12] They urged the court to refuse the application. they relied on the case of **OMAR Vs EA CARGO HANDLING SERVICES LTD** where High Court at Mombasa Aragon J disallowed amendment as it would be unjust to allow on account of the long delay. Also **BAYUSUF BROTHERS LTD Vs KYALO** High Court at Mombasa Kneller J refused amendment. Similarly, in **KYALO v BAYUSUF BROTHERS LTD** Court Of Appeal At Mombasa Madan ,Law & Miller JJA (1983) KLR the judgment of Kneller J was upheld where he said that (1) applications for amendment of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the court process. In this case the amendment came six years late (2) Amendments that contain allegations that are completely inconsistent with the previous pleadings cannot be allowed, especially if they are late, as they would delay fair trial and prejudice the other party (3) the learned judge exercised rightly and judicially in refusing to grant leave and there was no reason to interfere with the principles applicable as they are rightly applied. See also **JULIA AKELOKUNGURU vs SETH LUGONZO AND KENYA TOURIST DEVELOPMENT CORPORATION** Milimani Commercial Courts Civil Suit No. 197 of 2001. In this case Ringera J accepted the propositions of law that the amendments should be sought in good faith "and the test of good faith is whether the amendments are sought **at an early and at opportune moment having regard to the progress of the case.....**". In **PATEL Vs. AMIN** High Court at Nairobi Tanui J held that (1) An application for amendment **should be made at the earliest possible moment** (2) The application was made nearly five years later and was an afterthought.

[13] For all the above reasons, the Plaintiff submitted that the amendment should be refused.

DETERMINATION

Threshold

[14] Ordinarily, courts should freely allow a party to make such amendments as maybe necessary for determining the real question in controversy or to avoid a multiplicity of suits. Provided that; 1) the application to amend is made without undue delay; 2) the amendments do not introduce new or inconsistent cause of action or abrogate or affect vested interest or accrued legal right or defence; and 3) the amendment does not cause injustice or prejudice to the other side which cannot be compensated in cost.

Inordinate delay

[15] The court may refuse an application for leave to amend where there has been inordinate and inexcusable delay. There is no precise measure of inordinate and inexcusable delay; however, it should be delay which exceeds ordinary limits and is easily discernible when it occurs, this will nonetheless depend on the circumstances of the case. Judicial decisions on this subject are legion and I do not wish to multiply them. This application has been attended to inordinate delay having been made three years after the suit was filed. But is it possible to excuse the delay and still do justice to the parties?

Prejudice to fair trial

[16] The foregoing question will depend on the analysis that follows. There are arguments by the Plaintiff that the amendments are aimed at delaying the hearing of this case. The record shows that the court has given several directions in the past that the suit shall be set down for hearing on the basis of priority. See the ruling by Mutava J dated 16th February 2012. Previously, amendments of the defences by the 1st and 2nd Defendants were allowed in a ruling delivered by Havelock J on

22nd November, 2013. There were other applications which were made by the defendants as well as the plaintiff. And the case has dragged on and on. Now the Applicants have applied for further amendments of their defences.

[17] Another argument which is profound is that these amendments are introducing new causes of actions and defences. The Applicants agree that the proposed amendments to the defence filed;

“...introduce additional material facts and substantial issues of law that were hitherto unaddressed in the respective original Statements of Defences”.

Their explanations which follows is that, the amendments are however necessary to enable the Honourable Court to effectually adjudicate upon the real issues in controversy between the Plaintiff and the Applicants; to provide a fuller explication of the circumstances under which the agreement for sale and purchase was reached; the role of the 3rd Defendant as agent for the Plaintiff and the misrepresentations he made on its behalf; the circumstances surrounding the Directorship of the 1st Defendant in the 4th Defendant which will enable the Honourable Court to appreciate with better accuracy the background and basis of the matter under dispute and further provide better particulars of the relationship between 1st and 2nd Defendants with the 4th Defendant with a view to establish the Applicants' intended Defence of misjoinder, etc.

[18] A close look at the proposed amendments reveal that most of them are particulars and others could be evidence which will be used to prove their cases. This is discernible from looking at the nature of the proposed amendments. Instead of making the pleadings neater and clear, they are clogging them. Similarly, new causes of actions which have been introduced especially in the counter-claims will have to be subjected to the defence of limitation. There are no exceptional circumstances in this case which would impel the court to allow amendment that will affect the defence of limitation of time. Such is a serious consideration in an application for amendment which introduces a new cause of action. See claims for loss and damage, fraud, misrepresentation and negligence which occurred between September and October 2010 if not earlier. I have also perused the defences to be amended. The particulars being presented through the proposed amendments could still be provided within the pre-trial process or at the trial as evidence. I do not think it is necessary to amend pleadings every time a party thinks he should provide better particulars of their claim. Taking into account all the circumstances of this case, the defendants are guilty of lashes and of placing hurdles in the way of this case. This suit has not been set down for hearing largely because of the interventions mostly by the 1st, 2nd and 4th Defendants at one time or other. He who comes to equity must come with clean hands.

The upshot

[19] The cumulative effect of all the foregoing is that the amendments offend the law, impinges on the rights of the other party and prejudices the general adjudication of cases as the court cannot also conclude this case despite its deliberate orders that the case be set down for hearing on the basis of priority. It is not, therefore, possible to allow the amendments without prejudicing fair trial of the case and the other party. For those reasons, I refuse the amendments sought and dismiss the applications dated 8th April 2014 with costs to the Plaintiff. I also order and direct that all parties shall file all the required forms in the new practice directions of the division within 14 days of today. The court will appoint a date for pre-trial conference for purposes of assigning the case a date for hearing. It is so ordered.

Dated, signed and delivered in court at Nairobi this 29th day of June 2015.

F. GIKONYO

JUDGE