



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**COMMERCIAL AND ADMIRALTY DIVISION**  
**CIVIL SUIT NO. 1250 OF 1999**

**UNGA LIMITED.....PLAINTIFF**

**VERSUS**

**MAGINA LIMITED ..... DEFENDANT**

**RULING**

1. The plaintiff craves leave to amend its plaint. By a notice of motion dated 7<sup>th</sup> February 2012, the plaintiff proposes to amend its claim for unpaid consignment of *grain flour* to read *assorted goods*. The supporting deposition of George Ogembo, an advocate, states that his firm “*inadvertently and erroneously misconstrued that the claim was only limited to the grain flour*”.
2. The motion is contested. The grounds of opposition are three-pronged: first, that the motion seeks to introduce a new cause of action; secondly, that it is meant to defeat the ends of justice; and, thirdly, that it would prejudice accrued rights of the defendant. In its written submissions, the defendant has also submitted that the plaintiff is guilty of undue laches.
3. On 1<sup>st</sup> October 2013, directions were granted to determine the application by written submissions. The plaintiff’s submissions were filed on 8<sup>th</sup> October 2013; those of the defendant on 9<sup>th</sup> October 2013. On 21<sup>st</sup> January 2014, the parties confirmed to court that they would rely entirely on those submissions.
4. I have considered the motion, the grounds of opposition and the rival submissions. 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 effectually and finally determine the suit. See *Leroka Vs Middle Africa Finance Company Limited* [1990] KLR 549, *Eastern Bakery Vs Castelino* [1958] E.A. 461, *Kuloba Vs Oduol* [2001] 1 E A 101 as well as the dictum of Madan J A (as he then was) in *D.T. Dobie & Company Vs Muchina* [1982] KLR 1.
5. There are exceptions to that general rule. An amendment will be disallowed if it would cause a serious injustice to the other party. It will also be disallowed if it prejudices the rights of the opposite party accrued at the date of the proposed amendment. A good example is an amendment that would deprive the defendant of a defence of limitation that has crystallized since the issue of the writ. See *Eastern Bakery Vs Castelino* (supra) at page 462, *Weldon Vs Neal* (1887) 19 QBD 394 and *Hilton Vs Sutton Steam Laundry* [1946] K.B 65. See also *Chimanlal K.N. Shah & others Vs Trust Agencies Limited* Nairobi, High Court case 1387 of 2001 [2012] eKLR, *Barclays Bank of Kenya Limited Vs Mary Wamaita and 13 others* Nairobi, High Court case 237 of 2007 (unreported), *Central Kenya Limited Vs Trust Bank Limited and others* Nairobi, Court of Appeal, Civil Appeal 222 of 1998 (unreported), *James Ochieng Oduol Vs Richard Kuloba* Nairobi, Court of Appeal, Civil Appeal 2 of 2002 [2008] e KLR.

6. This court is now enjoined to do substantial justice to the parties: it must disregard technical procedures and aim at settling the *root* of the dispute. That is the spirit and letter of article 159 of the Constitution as read together with sections 1A and 1B of the Civil Procedure Act. This overriding principle is a guiding beacon for the court:

*“The principal aims of the overriding objective include the need to act justly in every situation; the need to have regard to the principle of proportionality and the need to create a level playing ground for all the parties coming before the courts by ensuring that the principle of equality of arms is maintained and that as far as it is practicable to place the parties on equal footing”.*

Harit Sheth Advocate Vs Shamas Charania Nairobi, Court of Appeal, Civil Appeal 68 of 2008 [2010] eKLR. See also Miraflowers Apartments Limited Vs Caleb Akwera and another Nairobi, High Court ELC case 633 of 2011 [2012] e KLR, Chimanlal K.N. Shah & others Vs Trust Agencies Limited Nairobi, High Court case 1387 of 2001 [2012] e KLR.

7. Section 100 of the Civil Procedure Act and Order 8 of the Civil Procedure Rules 2010 grant this Court wide discretion to amend pleadings. The primary aims are to do justice to the parties and to effectually and finally determine all matters in the suit. It also prevents multiplicity of suits.
8. The defendant takes up cudgels on the motion on the ground that the proposed amendment raises a fresh cause of action. Order 8 rule 3 (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 an amendment”.*

9. I agree with the submissions by the plaintiff that leave to amend can be granted even when a new cause of action is introduced. The overriding objective would be whether justice can still be done. The defences available to the defendant of limitation of action are not *ipso facto* wiped out. But by abandoning a very *specific* plea for the value of *grain flour* to one for *assorted goods*, the proposed amendment widens the scope of the claim so much as to change the entire *character* of the suit. The defendant cannot be said to know clearly the nature of the suit it will meet at the trial. See Unet Kenya Limited Vs Telkom and another [2005] eKLR. See also *Mulla’s Code of Civil Procedure* 7<sup>th</sup> ed, vol. II at 1849.
10. The remedy sought by the plaintiff is also discretionary. This suit was presented to Court nearly *thirteen years* ago: on 8<sup>th</sup> September 1999 to be specific. The pleadings closed many years ago. An earlier application for judgment on admission was dismissed way back on 26<sup>th</sup> February 2004. The plaintiff’s learned counsel, who is the deponent to the supporting affidavit, concedes his inadvertence and errors that found their way into the plaint. No *explanation* for the *inordinate* delay in presenting the motion has been tendered. That is taking the Court for granted.
11. When delay is established, unless a plausible explanation is forthcoming, it is deemed to be inexcusable. See Allen Vs McAlpine & Sons Ltd [1968] 1 ALL ER 543. I find that the delay of nearly *thirteen years* is so inordinate as to prejudice the defendant beyond monetary compensation. Central Kenya Limited Vs Trust Bank Limited and others (supra). It will re-open the pleadings and lead to further delay of the determination of the suit. That is anathema to the overriding objective found in article 159 of the Constitution and sections 1A and 1B of the Civil Procedure Act. I am thus *disinclined* to exercise my discretion in favour of the plaintiff.
12. For all the above reasons, the plaintiff’s notice of motion dated 7<sup>th</sup> February 2012 is devoid of merit. I dismiss it with costs to the defendant.

It is so ordered.

**DATED, SIGNED and DELIVERED at NAIROBI** this 18<sup>th</sup> day of February 2014

**GEORGE KANYI KIMONDO**

**JUDGE**

**Ruling read in open court in the presence of-**

Mr. No appearance for the plaintiff instructed by Okoth & Kiplagat Advocates

Ms. M. Mungai for the defendant instructed by Igeria & Ngugi Advocates.

Mr. C. Odhiambo, Court clerk.