



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 347 OF 2008

FIDELITY COMMERCIAL BANK LTD.....PLAINTIFF

VERSUS

AFRICA ECO-CAMPS LTD.....1ST DEFENDANT

AZIM RAJWANI.....2ND DEFENDANT

RULING

1. The Application before me is the Defendants' Notice of Motion dated **6th September 2013** and filed in Court on **9th September 2013**. It is expressed to be brought under **Order 8 Rules 3 (1) and 5, Order 50 Rule 1** of the **Civil Procedure Rules** and **Sections 1A, 1B and 3A** of the **Civil Procedure Act**.
2. The Application seeks the following Orders:-
 1. ***That this honourable Court be pleased to grant leave to the 1st Defendant/Applicant to amend the Defence in terms of the Draft amended Defence and Counterclaim annexed hereto.***
 2. ***That upon grant of prayer 1 above, the draft amended Defence and Counterclaim be deemed as duly filed subject only to payment of the requisite court fees.***
 3. ***That the costs of this application be in the cause.***
3. The Application is based on the grounds stated therein and is supported by the affidavit of **AZIM JIWA RAJWANI** sworn on **6th September 2013**.
4. The deponent who is the 2nd Defendant herein avers that the Defendants had instituted a suit against the Plaintiff in the year 2006, being Milimani HCC No. 373 of 2006 but the said suit was dismissed for want of prosecution in the year 2012. He further avers that the issue in dispute in both the aforesaid suit and the suit herein is over the payment of the hire purchase accounts of motor vehicles registration Nos. KAS 469K, KAS 468K and KAS 467K. It's his position that, in the dismissed suit the 1st Defendant had sought to recover from the Plaintiff herein over Kshs. 30,000,000/=.
5. The 2nd Defendant avers that he has been advised by his Advocate that it would be provident and in better administration of justice that the 1st Defendant's claim is introduced herein by way of

- counterclaim other than instituting a separate cause of action. It is also his averment that the pleadings in this matter had closed hence the need to obtain leave of this Honourable Court before the said amendment is effected.
6. It is the Defendants' case that the proposed amendments are necessary for the proper determination of the real matter in dispute between the parties and also to enable the Court effectively adjudicate on and settle all issues in this suit expeditiously and cost effectively.
 7. The application is opposed. The Plaintiff filed a **Replying affidavit** sworn by its Legal Officer, **Stella Mbuli** on **25th November 2013**. The Plaintiff also filed a **Further Replying Affidavit** sworn by the said Legal Officer on **10th December 2013**.
 8. In the Replying affidavit, the deponent avers that on **22nd February 2012**, one of the Applicants herein filed a similar application in **HCCC 373 of 2006** seeking leave of Court to file an Amended Defence and Counterclaim. The Plaintiff annexed a copy of the said application marked as **SM 1**. I have looked at the said application and noted that the case therein is Civil Case No. 717 of 2006 and not HCCC 373 of 2006 as indicated by the Plaintiff. It's therefore not clear which suit they are referring to but nevertheless I have noted that the attached application was one seeking leave of the Court to file an amended defence and counterclaim.
 9. The deponent goes ahead and states that the Court granted the Applicants in the said application 21 days to file the amended Defence and Counterclaim. The Applicants failed to do so and the Courts orders consequently lapsed. The Plaintiff's case is that the current application is *res judicata* and an attempt by the Applicant to bring in the matters they had pleaded in the other suit through this suit in the event that their application seeking extension of time to file a defence in the other suit is dismissed.
 10. It is further the Plaintiff's case that this Court should not allow the Counterclaim as the claims sought in it are time barred as provided for in the Limitation of Actions Act. According to the deponent, the application herein is an afterthought and has been filed after undue and unnecessary delay and with the mischievous intention of defeating or delaying hearing of the suit herein.
 11. Further, it is the deponent's averment that the application is an abuse of Court Process and that the interests of justice demand that the application be dismissed and the suit herein be allowed to proceed as currently pleaded.
 12. In response to the above, the 2nd Defendant in his undated supplementary affidavit filed in Court on **9th December 2013**, avers that paragraphs 3 & 4 of the Replying affidavit sworn by Stella Mbuli are untrue and merely meant to mislead the Court. In the said paragraphs the deponent averred that in HCCC 373 of 2006, the Defendants had filed a similar application to the current one seeking to file an amended Defence and Counterclaim. The 2nd defendant however, did not substantiate the aforesaid allegation. He further avers that the Plaintiff to the Counterclaim herein is within the time provided for by law.
 13. It is also the 2nd defendant's averment that they have not filed any application seeking for any extension of time to file a defence in any matter and hence the averment of paragraph 5 of the replying affidavit to that effect is misconceived.
 14. In her Further Replying Affidavit, the Plaintiff's legal officer reiterated the contents of her Replying affidavit in its entirety. It is her deposition that the Applicant is attempting to mislead the Court by denying the contents of paragraphs 3 and 4 of her replying affidavit yet the said application has been attached as evidence.
 15. The deponent confirms that the Plaintiff to the Counterclaim indeed filed an application dated **22nd August 2013** seeking extension of time to file a Defence and Counterclaim on **9th**

September 2013. To this end she attached a copy of the said application marked as annexure “SM A”. It is her position that the Applicants are not being honest with the Court yet equity demands that he who seeks equity must come with clean hands.

16. The application was orally canvassed before me on **11th December 2013** with Mr. Kanjama appearing for the Plaintiff while Mr. Otieno appeared for the Defendants.
17. Mr. Otieno submitted that the Defendants had a cause of action against the Plaintiff which arose from the same facts pleaded by the Plaintiff. He further submitted that the cause of action was the illegal sale by the Plaintiff of 3 vehicles mentioned in the Plaintiff. It was also his submission that the illegal sale accrued on **14th December 2007** and therefore the application was within 6 years which is within the limitation period.
18. In reply, Mr. Kanjama submitted that the Plaintiff opposed the Defendants’ application on grounds that it was an abuse of court process, the application was *res judicata* and the counterclaim was barred by limitation of time.
19. He submitted that there was inconceivable delay in bringing the said application as the matter had come up for pre-trial on May 2012 and had been fixed for hearing on several occasions. He further submitted that the counter claim was a different cause of action and the applicant could file a separate suit for that.
20. On the issue of *res judicata*, Mr. Kanjama submitted that in HCCC 717 of 2006 the Defendants filed a similar application to introduce a counterclaim which was virtually the same as the current one. He further submitted that the Defendants were granted the orders which they did not comply with and thereafter applied for leave to file the Counter Claim out of time. Counsel referred to the cases of Geoffrey Mundia Kabethi v Peter Njogu & another [2013] eKLR and Mombasa Maize Millers Limited v Hassan Sura Dele & another [2013] eKLR on the issue of *Res judicata*.
21. With regard to limitation of time, Mr. Kanjama submitted that an exception applied to an amendment that did not seek to introduce a new cause of action. It was his submission that any amendment seeking to introduce a new cause of action could not be allowed under the rules when it was disallowed by the Limitation of Actions Act.
22. In reply, Counsel for the Defendants submitted that HCCC 717 of 2006 was between the Plaintiff and the 2nd Defendant only and that the same was totally a different case which had no bearing to the current application. It was his submission that the authorities cited by Counsel for the Plaintiff were distinguishable. He further submitted that **Order 8 rule 3 (5)** of the Civil Procedure Rules allowed amendments which may introduce a new cause of action.

ANALYSIS

23. I have considered the application herein, the affidavits on record as well as oral submissions by Counsel.
24. In my view the following are the issues for determination;
 - a. ***Whether the application herein is res judicata;***
 - b. ***Whether the Counterclaim is time barred; and***
 - c. ***Whether the Defendants are entitled to orders of amendment in terms of the Draft Amended Defence and Counterclaim.***
25. The first issue for determination is whether the current application is *res judicata*. The law as regards *res judicata* is provided for under **Section 7** of the **Civil Procedure Act** which provides as follows-

“No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same

parties, or between parties under whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court.”

26. It was submitted by Counsel for the Plaintiff that in **HCCC 717 of 2006** the Defendants filed a similar application to the current one to introduce a counterclaim. I have perused the said application which is attached to the Replying affidavit sworn on the Plaintiff's behalf on **25th November 2013** as well as the Draft Defence and Counterclaim annexed therein *vis a vis* the Current application.
27. Having done so, I have deduced that other than the orders sought for therein there is no similarity between the said application and the current one. A look at the supporting affidavit sworn in the former application reveals that the facts and issues therein are different from those in the current application. More so, the Draft Defence and Counterclaim as annexed in both applications raise totally different issues.
28. That notwithstanding, one thing is clear, the applications in question herein were filed in different suits that is HCCC 717 of 2006 and the current one HCCC 347 of 2008. I therefore find that the issue of *res judicata* does not arise herein.
29. On the issue of time limitation, it was submitted for the Defendants that the cause of action, being the purported illegal sale of the motor vehicles mentioned in the Plaintiff herein, arose on 14th December 2007. The lengthy Draft amended Defence and Counterclaim reveals that the Defendants started having problems with the Plaintiff on or around 4th April 2005 which problems persisted up until 14th December 2007 when the Plaintiff herein repossessed and sold the hire purchase motor vehicles.
30. It is discernible that the Counterclaim herein is a consequence of the repossession and subsequent sale of the hire purchase motor vehicles in December 2007. In that case, going by the latter date of 14th December 2007, the Counterclaim herein was brought within six years and is therefore not time barred.
31. The third and last issue is whether the Defendants are entitled to orders of amendment in terms of the Draft Amended Defence and Counterclaim. Under **Order 8 rule 5** of the **Civil Procedure Rules** the Court has wide discretion and power to grant orders amending pleadings.
32. Furthermore, in the **12th Edition** of “**Precedents of Pleadings**” by **Bullen & Leake & Jacob**, the learned authors say at **page 124** –
- “The guiding principle of cardinal importance on the question of amendments is that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings. The rule of conduct of the Court is 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.”*
33. In addition under **Order 8** of the **Civil Procedure Rules**, amendments may be allowed even if the effect would be to introduce a new cause of action and they may be allowed at any time before judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs.
34. It is submitted for the Plaintiff that there was inconceivable delay in bringing the application for amendment and that the counter claim was a different cause of action and the applicant could file a separate suit for that. I have perused the Defence and Counterclaim and it is my view that the

Defence and Counterclaim though raising many issues does not raise a different cause of action. The main issue raised therein is with regard to the hire purchase of the motor vehicles, which is also the issue in the Plaint filed herein. The issue for delay is not substantiated and in any case I cannot refuse an amendment on that basis if the prejudice caused to the Plaintiff, if any, can be compensated by way of costs.

35. Further the purpose of allowing counterclaims and set offs is to avoid multiplicity of suits between the same parties. The trial of the main suit and a counterclaim together ought to be the rule and exceptions ought to be clearly justifiable.

36. The upshot is that the Defendants' Notice of Motion dated **6th September 2013** and filed in Court on **9th September 2013** is allowed as follows:-

1. *That leave is hereby granted to the 1st Defendant/Applicant to amend the Defence in terms of the Draft amended Defence and Counterclaim annexed hereto.*
2. *That the draft amended Defence and Counterclaim be deemed as duly filed subject only to payment of the requisite court fees.*
3. *That the costs of this application shall be for the Plaintiff.*

DATED, READ AND DELIVERED AT NAIROBI THIS 17th DAY OF MARCH 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for Plaintiffs

Omolo holding brief Kanjama for Defendants

Teresia – Court Clerk