



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 543 OF 2007

HOUSING COMPANY OF EAST AFRICA LIMITED PLAINTIFF

VERSUS

THE BOARD OF TRUSTEES NATIONAL SOCIAL SECURITY FUND ... 1ST DEFENDANT

KISIMA MANAGEMENT LIMITED 2ND DEFENDANT

R U L I N G

1. At the close of the evidence of PW 1 today, learned counsel for the Plaintiff made an oral application to amend the Amended Plaint dated 30th November 2011. The proposed amendment was as regards prayer d) 2) by the addition at the end of that sub-prayer of the words:

“and refund of the sum of KShs 44,525,000/- paid by the Plaintiff to the first Defendant together with interest thereon at commercial rates from the perspective payment dates until payment in full.”

The Application was brought under the provisions of **Order 8 rule 5 (1)** of the *Civil Proceeded Rules, 2010* which reads:

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”

Counsel further noted that under the provisions of rule 8 of the same Order the Court could hear and determine an oral application made under the said Order. Counsel also referred to the general power to amend as conferred on the Court by **section 100** of the *Civil Procedure Act*.

2. Mr. Regeru, learned counsel for the Plaintiff, submitted that the Plaintiff would be claiming a refund of the monies that it had paid to the first Defendant under the Sale Agreement dated 10th December 2004 should the Plaintiff be not granted the Order for Specific Performance of the said Agreement by the Court. Counsel asked that the limited amendment be allowed for the purposes

of determining the real issues in dispute between the parties herein. If the proposed amendment was allowed, the Defendants would be at liberty to amend their pleadings. In the body of the Amended Plaintiff, the proposed additional prayer had already been dealt with under paragraphs 6 and 19 thereof. The Plaintiff was merely seeking to remedy the defect in the prayers by introducing the proposed amendment. In counsel's view the amendment was minor and merited. He maintained that no prejudice would be caused to the Defendants by the introduction of the phrase as they would have all aptitude to bring before the Court any evidence in resistance to the amended prayer.

3. Both counsel for the first and second Defendants noted that the amendment sought to introduce a prayer for the sum of Shs. 44 million which in all the circumstances could not be considered a minor amendment. The Plaintiff was filed in 2007 and the amendment would bring into effect the provisions of the Statute of Limitations. In their view, the amendment was unwarranted and would cause enormous prejudice to particularly the first Defendant. Learned counsel for the second Defendant brought to the attention of the Court that the last payment made by the Plaintiff to the first Defendant as per paragraph 17 of PW 1's Witness Statement was on 27th September 2007. The proposed amendment would ordinarily be open to the Plaintiff up to the 26th September 2013 otherwise it will be caught by the Limitation of Actions Act. Both counsel asked the Court to disallow the proposed amendment accordingly.
4. In a brief response, learned counsel for the Plaintiff mentioned that he had been involved in the Court of Appeal matter being **Joseph Ochieng v First American Bank** to which the learned counsel for the first Defendant had referred. However the amendment proposed in that case had been disallowed by the Court of Appeal and the authority had no bearing on the matter before this Court. Counsel emphasised that this was not a material amendment being consequential upon an existing pleading of a cause of action. It was the kind of amendment that the Court itself could introduce to settle fully and finally all the issues between the parties. The application was fully merited and counsel pointed the Court to the provisions of **Order 8 rule 3 (2)** where the court could grant leave in the circumstances mentioned in **sub rules (3), (4) and/or (5)** thereof in relation to any relevant period of limitation. Those sub rules read as follows:

“(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was genuine mistake and as not misleading or such as to cause any reasonable doubt as to the identity of the persons intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) 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 the amendment”.

5. I have considered the submissions of all three counsel as regards the Plaintiff's said oral application to amend the Amended Plaintiff as regards prayer d) 2). Paragraph 6 of the Amended Plaintiff details the fact that the Plaintiff has paid to the first Defendant on various dates the total amount of Shs. 46,025,000/-. Paragraph 19 of the Amended Plaintiff points to breaches of the said Agreement by the first Defendant but nowhere does the paragraph mention any rights of the Plaintiff to the reimbursement of monies that it has already paid to the first Defendant under the said Agreement. The first Defendant, in its Amended Defence has prayed for the forfeiture of the deposit of Shs. 7,725,000/- paid by the Plaintiff. The said Amended Defence is silent as to the other monies undoubtedly received by the first Defendant towards payment of the purchase price by the Plaintiff under the Agreement. In my view, if specific performance was not granted to the

Plaintiff herein under prayer d) 1) on page 8 of the Amended Plaintiff then the Plaintiff and the first Defendant should be put back into the position whereby the Agreement is nullified with the resulting consequences. There will undoubtedly be an issue concerning the refund or otherwise of the said deposit amount paid by the Plaintiff to the first Defendant. However, and as emphasised by learned counsel for the Plaintiff in his Application before Court, it would be most unfair for the first Defendant to not only receive monies for the suit property from the second Defendant but also the Plaintiff. I would apply the provisions of **Order 8 rule 3 (2), (3) and (5)** as I am satisfied that the omission is a mistake that ought to be corrected and was genuine. I do not consider that the proposed amendment has the effect of adding or substituting a new cause of action which would be in any way affected by the Limitation of Actions Act. As a result, I will allow the oral application of the Plaintiff to amend the prayers in its Amended Plaintiff and direct that a Further Amended Plaintiff to reflect such amendment will be filed herein and served within 14 days of the date hereof. In all the circumstances, I make no order as to costs.

DATED and delivered at Nairobi this 28th day of May, 2014.

J. B. HAVELOCK

JUDGE