REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL &ADMIRALTY DIVISION

CIVIL CASE NO. 290 OF 2002

JEREMIAH MATOKE...PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED .... 1ST DEFENDANT

WILLIAM WILHITE ANYENDA .... 2ND DEFENDANT

R U L I N G

1. The Notice of Motion before the court is dated 17th July 2014 and is filed in court on 6th August 2014. The application is filed under Order 8 Rule 3 of the Civil Procedure Rules and Section 3A of the Civil Procedure Act.
2. The application seeks the following orders:-
    1. ***Leave be granted to the Plaintiff to amend the Plaint in terms of the amended Plaint filed herein.***
    2. ***The Amended Plaint duly field be deemed to have been filed with leave of the corut.***
    3. ***Costs of the this application be in the cause.***
3. The application is premised on the grounds mentioned therein and is supported by affidavit of **Jeremiah Matoke**, the Plaintiff herein, dated **17th July 2014**.
4. Both the 1st and 2nd Defendants have opposed the application. The 1st Defendant filed a Replying Affidavit by **Paul Bill** on **19th September 2014**. The 2nd Defendant has filed in court on 28th September 2014 a Notice of Preliminary Objection to the application stating that:-
    1. ***The suit herein through the proposed amended Plaint seeks to enforce judgement and decree issued in Kitale HCCC No. 132 of 1997 which is statute barred by dint of Section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya.***
    2. ***The suit and application herein is frivolous and an abuse of the Honourable Court's process and the same should be struck out.***
5. All the parties filed written submission. The Plaintiff submitted that the Court of Appeal in the case of **Central Kenya Limited – Vs – Trust Bank Limited & others [2000] eKLR, quoted in Trinity Pharam Limited & 2 Others – Vs – Giro Commercial Limited [2006] eKLR** summed up the principles that should guide courts in determining applications for amendment of pleadings as follows:-
    1. ***An amendment ought to be allowed if it is necessary for determining the real question in controversy or dispute.***
    2. ***Amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustices to the other side, and that there is no injustice if the other side can be compensated by costs.***

3. ***An amendment can be allowed to avoid multiplicity of suits.***
4. ***An amendment should only be disallowed where a new or inconsistent cause of action is introduced that is if the new cause of action does not arise out of the same facts or substantially the same facts as the cause of action in the existing case.***

6. The Applicant submitted that the intended amendment herein falls within the rules above. In fact, it is brought to introduce a further prayer. The amendment does not introduce a new cause of action. Contrary to the 2nd Respondent's assertion and Preliminary Objection, there is no reference to the Kitale Case in the intended amendment. In any event, it was submitted, a Preliminary Objection cannot be based on matters which require that facts be delved into.
7. The 1st Defendant opposed the application and filed a replying affidavit sworn by Paul Biui on the 19th September 2014, in which two broad groups that impugn on the application for leave are raised namely:-

a. ***That the amended Plaint was filed without leave and is therefore a nullity ab initio and the nullity cannot be cured by the application for leave, and***
b. ***That the proposed amendments are being sought too late in the day and are intended to enforce a judgement in another suit and therefore calculated to deny the 1st Defendant a valid defence of limitation.***

To expound on these grounds, the 1st Respondent submitted that as a general rule, the discretion to grant leave to amend pleadings is wide and unfettered and will be granted unless the court is satisfied, *inter-a-lia* that:-

i. ***No vested interest or accrued legal rights are affected; and***
ii. ***So long as it does not occasion prejudice or injustice on the other side.***

viii. It was submitted for the 1st Respondent that is not in dispute that the Plaintiff sued the 2nd Defendant in Kitale HCCC No. 132 of 1997 and obtained judgement on the 3rd day of May 1997. Neither is it in dispute that the 1st Defendant was never a party to that suit. Now the Plaintiff is purporting to amend the Plaint to bring forth a prayer whose effect is to enforce the order and obiter dictum in Kitale HCCC No. 132 of 1997. The first effect of such an eventuality is that the 1st Defendant will suffer the ignominy of being condemned unheard. The second and more fundamental result of such an amendment will be that the Plaintiff will have found a window to enforce the judgment in Kitale HCCC No. 132 of 1997 in this suit. Two illegalities will result from this result as follows:-

a. ***The provision of Section 34 (1) of the Civil Procedure Act (Cap 21) will have been violated as the enforcement of the judgment and the decree in HCCC No. 132 of 1997 will have been brought into this case.***
b. ***The judgement and decree in Kitale HCCC No. 132 of 1997 is more than 12 years old, having been passed on the 3rd May 1997. A period of more than 17 years has lapsed since the judgment was delivered and the amendment if allowed, would have added effect of validating the enforcement of the said judgement and denying the 1st Defendant the defence of Limitation of Actions.***

The 1st Respondent relied on the Court of Appeal in **Sebastian Nyamu – Vs – Gilbert Kaberere M'mbijiwe and Malawken Arap Maswai – Vs – Paul Kosgey** to support above submissions, and urged the court to dismiss the application with costs. We conclude by submitting that the application dated 17th July 2014 should be dismissed with costs to the Defendants.

9. The 2nd Defendant has opposed the application by filing a preliminary Objection dated 26th September 2014 in which 2nd Defendant relies on. It was also submitted for the 2nd Defendant that:-
    1. ***That the suit herein through the amended plaint seeks to enforce judgment and decree issued in Kitale HCCC No. 132 of 1997 that is statute barred by dint of Section 4 (4) of the Lamination of Actions Act Cap 22 Laws of Kenya.***
    2. ***That the suit and application herein is frivolous and an abuse of the Honourable***

Court's process and the same should be struck out.

The 2nd Defendant contends that Order (b) as proposed in the amended Plaint is camouflaged and seeks to enforce decree judgment and decree issued in Kitale HCCC No. 132 of 1997 which is statute barred by dint of Section 4 (4) of the Limitation of Actions Act Cap 22 Laws of Kenya. This objection is premised on a clear statutory provision and therefore a valid objection.

The 2nd Defendant submitted that it is undisputed that the the Plaintiff obtained judgement on 3rd May 1997 in Kitale HCCC No. 132 of 1997 and that Order (b) was albeit issued and what remained was for the Plaintiff to enforce the said order. The Plaintiff slept on his rights and now seeks through the said suit to enforce the orders in Kitale HCCC No. 132 of 1997. The said suit and application herein based on orders sought in the Plaint and the amended plaint clearly seeks to enforce orders in Kitale HCCC No. 132 of 1997 whereas the Plaintiff had time and alternative remedies to enforce the said orders hence an abuse of the court process and the same should be dismissed with costs.

10. I have carefully considered the Application and opposition to it, and especially the Preliminary Objection by the 2nd Defendant/Respondent. The issue for the determination herein is only one, and that is whether the amended Plaint is coughed to mislead this court, and has the effect of affording the Applicant to realise the Judgment in Kitale HCCC NO. 132 of 1997 which is said to be already statute barred by dint of Section 4 (4) of the Limitation of Actions Act, Cap Laws of Kenya. That sections stases as follows:-**Section 4 (4)**

"An action may not be brought upon a Judgement after the end of twelve years from the date of which the Judgement was delivered."

11. The 2nd Defendant submitted that it is undisputed that the Plaintiff obtained judgement on 3rd May 1997 in Kitale HCCC No. 132 of 1997 and that Order (b) of the proposed amended Plaint herein was issued in the said Kitale HCCC No. 132 of 1997 but the Plaintiff has over a period of 17 years failed to enforce it and it has since become time barred and that this application seeks to illegally validate the said Judgement. This submission is also taken up by the 1st Defendant/Respondent. The law as regards the enforceability of a Judgement is as contained in the said Section 4 (4) of the Limitations of Actions Act. A Judgement becomes stale after twelve years without execution. So in this case, if it is proved that indeed such a Judgement in terms of prayer (b) of the proposed amendment Plaint indeed exists, then that would be the end of this matter. The issue to determine then is whether indeed such a Judgement exists as alleged by the Respondents.
12. The Plaintiff/Applicant either in its application or the Plaint or submission has not referred to or alluded to existence of such a Judgment. Neither did the Plaintiff seek leave to respond to these allegations, but merely stated in its submission that there is no reference to the Kitale Case in the intended amendment. On the face of it the proposed amendments indeed do not raise any alarm, and any court would not hesitate to allow the same, considering the large latitude in discretion that the court enjoys when faced with such applications. However, any proof of the existence of orders given in the Kitale Court would show that the Plaintiff is acting in bad faith and is misusing the process of this court to achieve an objective which is already time barred. It if upon the Respondents to show to the court that indeed the alleged orders existed in the Kitale case. It is not enough for the Respondents to merely state that the existence of such orders in the Kitale case is common knowledge and is not disputed. Even if it is common knowledge, the court is not aware of it and cannot take judicial notice of the same. The Plaintiff/Applicant has not stated that it is aware of its existence in a manner to convince the court of its existence. Nothing had stopped both Respondents from attaching such a Judgement or even the proceedings of the Kitale Court to convince the court of the existence of any such orders. The court is ignorant of any such orders and cannot act on allegations which are not admitted by one of the parties, and which the court cannot take judicial notice of. As I have stated herein above, the application is one which I would grant unless the Respondents proved to me the existence of orders which under Section 4 (4) of the Limitations of Actions Act would prove that the Plaintiff is misleading the court or is acting in

bad faith. Pursuant to the foregoing, I am not satisfied that the 2nd Defendant's Preliminary Objection meets the threshold required, or that the 1st Defendant's opposition herein is sustainable. The upshot is that the Plaintiff's application dated 17th July 2014 is allowed as prayed with costs in the cause.

Orders accordingly.

READ, DELIVERED AND DATED, AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

No appearance for the Plaintiff

No appearance for the Defendants

Teresia – Court Clerk