



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NYERI
CIVIL CASE NO.86 OF 2000

ELECTRICAL SERVICES LIMITEDPLAINTIFF/APPLICANT

VERSUS

KENYA WILDLIFE SERVICES DEFENDANT/RESPONDENT

RULING

1. By a chamber summons dated 20th May 2009 the plaintiff/applicant moved the court under then **Order VIA rules 1, 3, 5 (i) and 8 of Civil Procedure Act** for an order that:-

“The plaintiff herein be permitted to amend its plaint filed on 20th April 2000 for the purposes of determining the real question in controversy between the parties as per enclosed draft amended plaint.”

2. It was supported by an affidavit sworn by PERMINDER SINGH SEMBHI wherein he deponed that the plaintiff company received all the principal sums for work done and that the dispute was only in respect of interest from 1998 making the total amount due at Kshs.5,086,476/=.

3. It was deponed that due to the death of the applicant's advocate then on record the same could not trace the file which they only did when Letters of Administration to the Estate of the then Advocate was confirmed on 6th March 2009.

4. In reply to the said application the defendant/respondent on 5th November 2009 filed a replying affidavit deponed by one Thomas Ogolla wherein he deponed that the suit arises out of two original contracts entered into between the plaintiff and the defendant dated 13th December 1994 and 20th August 1998 for the construction and rehabilitation works at Kora National park and Meru National Park headquarters at Murera for a total sum of Kshs.178,463,509/= and US\$501,447/= and Kshs.26,100,000/= respectively and that by the plaint the plaintiff/applicant demanded Kshs.2,868,634.20 yet in his draft amended plaint the same sought to introduce the issue of interest at 24% on the unpaid amount totaling to Kshs.5,086,476/= yet according to interrogatories the total amount outstanding is Kshs.211,165,274/=.

5. It was deponed that the applicant sought through the amendment to introduce a new, different and inconsistent cause of action which should not be allowed by the honourable court. It was further deponed that there had been unreasonable delay in filing the application.

6. On 23rd November 2009 the applicant filed a supplementary affidavit in which it was deponed that the delay in filing the application was due to the demise of the plaintiff's previous advocates and that the interest was provided for under the contract.

7. On 4th June 2012 the defendant by a notice of motion under **Order 17 Rule 2 (1) and (3) and Order**

51 Rule 1, Order 54 Rule 2 moved the court for an order that the application dated 20th April 2009 as well as the entire suit be dismissed for want of prosecution with cost to the defendant.

8. The application was supported by the annexed affidavit of Thomas Ogolla wherein he deponed that on 4th February 2009 due to the inaction on the part of the plaintiff, the defendant filed an application seeking to dismiss the plaintiff's suit for want of prosecution which prompted the plaintiff to change advocates and file the application dated 20th May 2009 which application was compromised at a cost of Kshs.7000/=.

9. That the matter was last in court on 9th November 2010 when the plaintiff sought leave to file a supplementary affidavit and since that time the plaintiff has neither had the application or the main suit fixed for hearing. It was further deponed that the plaintiff was guilty of prolonged, contumelious, inexcusable and inordinate delay in prosecuting the suit and therefore it will be impossible for justice to be done as the defendant will be unable to secure the attendance of its crucial and important witnesses who has since left its service.

10. In reply to the said application, the plaintiff swore an affidavit in which it was deponed that the plaintiff's advocate had been following the matter to fix dates to no avail as the dates are not available and that the defendant's advocates had been invited for fixing of hearing dates and each time the court file could not be traced. In support thereof copies of the invitation letters were attached.

Plaintiff's Submissions

11. On behalf of the plaintiff it was submitted that the amendment was necessitated by interest on delayed payment which was provided for under the contract. It was submitted that the plaintiff had explained the reasons for the delay which was caused by the death of the plaintiff's previous advocates and that since the principal amount had been paid it was necessary to amend the plaint to plead the correct amount. It was further submitted that the court has a wide and inherent power to allow amendment.

Defendant's Submissions

12. It was submitted that the basis of the intended amendment had not been established to the court and that if the application was allowed it will wholly change and aggravate the inconsistencies already manifest in the pleadings and in support thereof the case of **Abdul Karim Khan -vs- Mohamed Roshan [1965] E.A. 289** was used. It was further submitted that the applicant was designed to defeat the limitation of actions for a claim founded on contract.

13. It was submitted that the applicant was guilty of inordinate and protracted delay in bringing the instant application which was lodged nine (9) years after the filing of the suit. In support thereof the case of **Dhanesvar -vs- Mehta -vs- Manilal M. Shah [1965] E.A. 321** where Spry J.A. Had this to say:-

“An application for amendment is always in the discretion of the court and in my view, the court would not have been justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a prima facie defence of limitation.”

14. It was further submitted in respect to the application for dismissal that even after the earlier application had been withdrawn the plaintiff did not take any action to prosecute the suit. In support thereof the case of **ET Monks & Co. Ltd. -vs- Evans [1985] KLR 584** where the court held that public policy demanded that the business of the court should be conducted with expedition. It was submitted that the conduct of the plaintiff has been that of disinterest in the suit.

15. From the pleadings and submissions the following issues have been identified for determination:-

- a. *Whether the plaintiff has met the conditions for a leave to amend its pleadings.*
- b. *Whether the plaintiff's suit ought to be dismissed for want of prosecution.*

Order 8 (3) of Civil Procedure Rules provides as follows:-

“3(1) subject to Order I rules 9 and 10 Order 24 rules 3, 4, 5 and 6 the court may at any stage of the proceedings on such terms as to cost or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings;

(2) Where an application to the court for leave to make an amendment such as it mentioned in sub rule (3), (4) or (5) is made after any relevant period of Limitation current to the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just to do so.”

16. It is therefore clear that this court has wide discretion to allow amendment of pleadings at any stage of the proceedings even when the intended amendment has the effect of defeating the defence of limitation and that the purpose of allowing the amendment is to determine the real questions of controversy between the parties and this is clearly provided for under **Order 8 Rule 5 (1) of Civil Procedure Rules**.

17. It is clear to my mind that the issue in controversy between the plaintiff and the defendant as at now stands is that of interest on late payment and whether or the plaintiff is entitled to the same. I am further unable to see any prejudice that the defendant will suffer should the sought amendment be allowed as the same will still have an opportunity to plead to the intended amendment and in this I find support in the Court of Appeal decision in **Central Kenya Ltd. -vs- Trust Bank Ltd [2000] 2 E.A. 365** where the court held that the overriding consideration is whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation in costs.

18. On the issue of dismissal of the plaintiff's suit for want of prosecution, this court takes the view that each suit must be determined on its merit and each party ought to have its day in court. The plaintiff has given an explanation for the delay in prosecuting the suit and in the case of **Ivata -vs- Kyumbu [1984] KLR 441** Chesoni J as he then was stated the principals on dismissal as follows:-

“The test applied by the courts in an application for dismissal of a suit for want of prosecution is whether the delay is prolonged and inexcusable, and if it is, whether justice can be done despite delay. Thus, even if the delay is prolonged, if the court is satisfied with the plaintiff's excuse for the delay and that justice can still be done to the parties, the action will not be dismissed but it will be ordered that it be set down for hearing at the earliest time. It is a matter in the discretion of the court.”

19. I would therefore allow the application by the plaintiff to amend the plaint herein and order that the annexed draft plaint be deemed to be duly filed upon payment of the court fees thereon. The defendant to file a defence to the amended plaint within the next 15 days from the date herein and in view of the age of this matter the same to be fixed down for hearing within the next 60 days from the date herein failure of which the suit stands dismissed for want of prosecution with costs to the defendant.

Signed and dated this day of 2014

J. WAKIAGA

JUDGE.

Delivered by Justice J. Ngaah on behalf of Justice J. Wakiaga this 18th day of December, 2014

J. NGAAH

JUDGE

In the presence of:

----- for Plaintiff/Applicant

----- for Defendant/Respondent