



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 2048 OF 2000

DIAMOND TRUST BANK KENYA LIMITED.....PLAINTIFF

VERSUS

JOHN WAKABA JOSEPH.....1ST DEFENDANT

JOSEPH GITHUNGO WAKABA.....2ND DEFENDANT

RULING

1. By a Motion on Notice dated 19th February, 2013, the Defendants sought leave to amend their Amended Defence dated 10th August, 2004 to include a Counter-claim against the Plaintiff. Annexed to the application was the intended Further Amended Defence and Counter-claim. The grounds for the application were contained on the face of the application. The Motion was supported by the Affidavit of the 1st Defendant, sworn on 19th February, 2013.
2. The 1st Defendant contended that while preparing for the suit, it was discovered for the first time that a Counterclaim ought to have been filed with regard to how the Plaintiff exercised its statutory power of sale in the disposal of the property known as L.R No. 2787/1420 Nanyuki (“the suit property”). The suit property was charged to the Plaintiff by the 1st Defendant as collateral for loan facilities. It was further averred that the Defendants wanted to challenge the sale of the suit property and which challenge, if successful would lead to an award of damages. That accordingly, a claim for damages could only arise if there was a counterclaim alongside the statement of defense. It was thus contended that the amendments sought will enable the court to determine the real issues in controversy between the parties.
3. The Plaintiff, on its part, strenuously opposed the motion by filing grounds of opposition dated 3rd May, 2013 and a Replying Affidavit of Elizabeth Hinga sworn on the same date. The Plaintiff contended that the application was fatally defective as the Defendants sought to introduce a counterclaim founded on a breach of contract and certain aspects of tort, both of which are time barred. The Plaintiff stated that the latest the Defendants could have brought their claim on the alleged improper sale of the suit property, was 17th December, 2007. That the suit property having been disposed off on 18th December, 2001, the Defendants had sufficient time to scrutinize the manner in which the property was disposed off and challenge the sale, which they had failed to.
4. It was also contended that the Defendants had not previously pleaded any counterclaims in which they had sought any reliefs from the same facts or substantially the same facts as envisaged under Order 8 Rule 3(5). Accordingly, the Plaintiff argued that the Defendants’ counterclaim could not

- fall under the exception to limitation created under the aforesaid provision. The Plaintiff also accused the Defendants of undue delay in filing the application as the instant suit was filed on 17th November, 2000. In conclusion, the Plaintiff requested the Court to exercise its discretion judiciously and dismiss the instant application.
5. At the hearing of the application, it was agreed that this matter be disposed off by way of written submissions. Learned Counsel for the Defendants submitted that this court should allow the application for the amendment as the issues raised in the counterclaim flowed from the facts in issue in the instant case. That the Defendants had the right to claim damages for the suit property which was sold at a gross under value. Counsel further argued that the Plaintiff in addition to disposing off the suit property had also sued the Defendants for additional amounts at an unconscionable interest rate. In reply to the issue on Limitation of action, it was submitted that the same was a matter of law and that the Court had the discretion to allow a party to amend a pleading at any time before the suit is heard, provided that such amendments would not prejudice the opposing party. The Defendants relied on the cases of **Erastus Chooba Wahome & 2 Others –vs- David Kariuki Gitaiga & 4 Others (2006) eKLR, Kiahuria Properties Ltd –vs- National Bank of Kenya Limited & another (2006) eKLR, Amos Kinuthia & Anor Vs Unga Ltd (2006) e KLR and others** in support of their arguments. The Defendants also submitted that the Plaintiff would not be prejudiced if the application was allowed and any delay in bringing the application could be adequately be compensated by an award of costs. The Defendants therefore urged the court to allow the application.
 6. Learned Counsel for the Plaintiff while opposing the application submitted that the counter claim is time barred on account of the Limitation of Actions Act Cap 22 Laws of Kenya, as the claim for damages correlated to the alleged improper exercise of the statutory power of sale which was founded on contract and tort. That the application before the court was therefore an abuse of the court process intended to delay the hearing and determination of the suit. The Plaintiff in addition submitted that there was delay in bringing the application as the sale of the said property was done on 18th December, 2001 and that the amendment would highly be prejudicial to the Plaintiff. The Plaintiff maintained that such prejudice could not be remedied by way of costs as the Defendants by introducing the counterclaim have sought to capitalize on failing human memory, lack of witnesses and deteriorating evidence to defeat its claim. In conclusion, it was submitted that the Defendants had failed to advance sufficient reason which would enable the court to grant them the orders sought. The Plaintiff relied on, inter alia, on **Halsbury's Laws of England 3rd Edn, Marshall Vs London Passenger Transport Board (1936) 3 All ER 83, Central Kenya Ltd Vs Trust Bank Ltd (2000) EA 365** in support of its case. The Plaintiff therefore urged the court to dismiss the application with costs.
 7. I have given careful consideration to the arguments advanced, both for and against the application. I have also considered the Affidavits on record, the submissions of counsel and authorities relied on. The issue for determination is whether the Defendants have established a case to warrant this court grant them leave to amend their Amended Statement of Defence to include a Counterclaim. The law on amendments is well settled. A careful reading of Order 8 Rule 5 of the Civil Procedure Rules will show that the granting or refusal of leave to amend any pleading is a matter that is within the discretion of the court. Such discretion however should be exercised judiciously and not capriciously. Amendments should be freely allowed, unless it is demonstrated that a party will suffer prejudice that cannot be compensated by way of costs. See the case of **Central Kenya Limited –v- Trust Bank Limited (2000) EALR 365**

Have the Defendants thus demonstrated that they are entitled to the orders sought?

8. In this case, the Defendants intend to introduce a Counterclaim against the Plaintiff. The same is based on the contention that the suit property, was disposed off by the Plaintiff at a throw away price while exercising its statutory power of sale. The Defendants therefore want to challenge the sale thereof and claim for damages, which can only be done through a counterclaim. The Plaintiff has however complained that the counterclaim is statute barred as the Defendants have sought the amendment too late in the day.
9. From the record, it is clear that this suit was instituted on 23rd November, 2000, about 12 years ago. It is only now that an amendment to include a counterclaim has been sought. While I agree

that the amendments should be sought at the earliest opportune time, I hasten to add that amendments are allowed at any stage before judgment is entered provided that a party seeking leave for amendment of a pleading, can demonstrate sufficient reason. The record shows although this suit is very old, it is still in its infancy as it has not yet been heard, despite having in the past come up severally for trial.

10. The Plaintiff has complained that the Counterclaim is statute barred by virtue of Section 4 of the Limitation of Actions Act Cap 22 Laws of Kenya. The Plaintiff cited **Halsburys Laws of England 3rd Ed. Vol.30, Mulla's code of Civil Procedure (abridged), 13th Edn and Marshal Vs London Passenger Transport Board (1936) 3 All ER 83.** Those texts and authorities are to the effect that an amendment will not be allowed to defeat a defence of the limitation enactment. They are also to the effect that if at the time of the proposed amendment limitation has set in, the amendments will be disallowed notwithstanding that as at the time the action was instituted limitation had not set in. This position according to the Plaintiff was upheld in the Court of Appeal case of **Central Kenya Ltd Vs Trust Bank Ltd (2000) EA 365.**
11. The Defendants on their part argued that there was jurisdiction to allow an amendment notwithstanding that such amendments were caught by the Limitation Act. Several cases were referred to.
12. I have looked at the authorities relied on by both parties. Whilst the authorities relied on by the Plaintiff are to the effect that no amendment can be allowed to defeat the defence of limitation, those relied on by the Defendants propagate that an amendment can be granted limitation notwithstanding. I think I should set them out hereunder for conclusivity.
13. In **Halsburys Laws of England 3rd Edn. Vol. 30** at page 34 the learned writers observe:-

“If, owing to the way in which the pleading has been framed, the other party has been put into such a position that an injury would be done to him by an amendment, the court will not give leave (c). The amendment must not injure the other party so that he cannot be compensated in costs (d). Thus, where a period of limitation has run since the issue of the writ, an amendment will not be allowed which would defeat a defence of the limitation enactment”.

In **Mulla's Code of Civil Procedure (Abridged) 13th Edn.** Butterworth's at page 708 the learned authors posit:-

“3. Except in very special cases leave to amend will be refused where the effect of the proposed amendment is to take away from the defendant a legal right which has agreed (sic) to him by lapse of time.

The leading English case on the subject is WELDON VS NEAL. The facts of that case may be stated in the form of an illustration: A sues B for damages for slander. A afterwards applies for leave to amend the plaint by adding fresh claims in respect of assault and false imprisonment. These claims are at the date of the application barred by limitation although they were not barred at the date of the suit. The application should be refused, for the effect of allowing it would be to take away from B the defence under the law of limitation and, therefore, unjustly to prejudice him. ‘We must act’, said Lord Esher Mr. on the settled rule of practice, which is that amendments are not admissible when they prejudice the rights of the opposite party as existing at the date of such amendments. Under very peculiar circumstances the Court might perhaps have power to allow such an amendment, but certainly as a general rule it will not do.”

In **Marshall Vs London Passenger Transport Board (1936) 3 ALL ER 83** the court delivered itself thus:-

“I think if an amendment were allowed setting up a cause of action, which, if the writ were issued in respect thereof at the date of the amendment, would be barred by the Statute of Limitations, it would be allowing the Plaintiff to take advantage of her former writ to defeat the statute and taking away an existing right from the defendant, a proceeding which, as a general rule, would be, in my opinion, improper and unjust.”

14. In all the foregoing, it is clear that the learned authors and the English Court of Appeal were in agreement that where a right had accrued to a party in a suit e.g. a defence of limitation, an amendment will not be allowed to defeat such a right. It is clear however, that the first two (2) texts allude to the fact that only on very peculiar circumstances would such an amendment be allowed.
15. In **Lakhamshi Khimji Shah & Anor Vs Ajay Shantilal Shah & 2 others (2010) eKLR** after considering various authorities on the subject, Nambuye J (as she then was) observed that leave to amend should be refused where there has been undue delay and where vested interests or accrued interests or accrued rights of a party are effected.
16. In **Erastus Chooba Wahome & 2 Others –vs- David Kariuki Githiga & 4 Others (2006) eKLR**, Kimaru J held that notwithstanding that limitation period had set in for a claim for special damages, where the claim is based on the same set of facts pleaded by a party as originally filed, the amendment will nevertheless be allowed to enable the court determine the real issues in controversy and that such an amendment will be allowed if it will not prejudice the opposing party in the prosecution of his case.
17. When faced with a similar issue in **Kiahuria Properties Ltd –vs- National Bank of Kenya Limited & another (2006) eKLR** Ochieng J held that:-

“Even as regards the issue about the claim being barred by the provisions of the Limitation Act, the same is a matter of law. It cannot take the Plaintiff by surprise, as the facts upon which the said Defence is said to be founded, were first pleaded by the Plaintiff itself.”

18. In **Amos Kinuthia & Anor Vs Unga Ltd (2006) e KLR** Azangalala J (as he then was) allowed an amendment to include a claim of special damages for Kshs.210,867,082/75 notwithstanding that limitation had set in. He was of the view that such an amendment relates back to the date of the original writ.
19. The foregoing is the variant positions taken by the courts on the issue of amendment of a pleading after limitation has set in. My view of the matter is as follows. Order 8 Rules 3 and 5 of the Civil Procedure Rules gives the court discretion to allow amendments at any stage of the proceedings in order to bring forth all issues in dispute between the parties for exhaustive and conclusive determination. The significant and guiding principle is to do justice between the parties. This can only be achieved by having all issues in dispute being brought forth for the Court to determine them. The law is clear that amendments will be freely allowed at any stage of proceedings provided no injustice is caused to the opposite party.
20. Whilst the Plaintiff’s authorities appear to suggest that once a defence of limitation has set in no amendment can be allowed, from the decisions cited above and relied on by the Defendants, various Kenyan Courts have departed from that notion. On my part, I think a court of law should be very slow to slam the door on a party and refuse amendment on the basis of delay and limitation. In the Court of Appeal case of **Central Kenya Ltd Vs Trust Bank Ltd & 4 others CA No. 222 of 1998** at page 9, it was held:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties likewise, mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs.”

Further in **James Ochieng Oduor T/A Ochieng Oduol & Co. Advocates VS Richard Kuloba (2008) eKLR** the Court of Appeal held at page 3 thereof that:-

“In special circumstances amendment of a plaint may be allowed, notwithstanding that the effect will be to defeat a defence of limitation (Barclays Bank D.C.O Vs Shamsudin (1973) EA 451). However such amendments can only be allowed where peculiar circumstances are

present.

A careful reading of order VIA Rule 3 of the Civil Procedure Rules clearly shows that amendment to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances.”

21. Order 8 Rule 3(2) of the Civil Procedure Rules provides:-

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

From this provision an amendment allowed by subrule 5 of Rule 3 can be made even after the relevant period of limitation, if the court thinks it just to do so. Subrule 5 allows amendments to add or substitute a new cause of action if it arises from the same facts in respect of which relief has been sought.

22. I have looked at the proposed amendments; it is my view that the facts pleaded in the proposed amendments substantially arose out of the same facts that were pleaded by the Plaintiff when the suit was filed. The dispute arose from loan facilities advanced to the 1st Defendant on various dates. The facilities were secured by the suit property, which was sold by the Plaintiff in exercise of its statutory power of sale at Kshs. 613,383/70 which according to the 1st Defendant was grossly undervalued. In my own assessment, the Defendants want to amend their Defence so as to fully lay out their claim against the Plaintiff, that is damages for improper exercise of the statutory power of sale. Though, the relief sought may not have been pleaded, the Defendants are simply trying to seek the same through the counterclaim, which is the basis for the amendment. The case of **CENTRAL KENYA LTD (supra)** buttresses this point where the Judges of Appeal stated that;

“It is also trite law, that as far as possible, a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action ...otherwise, the court will not later permit him to reopen the same subject of litigation...because they have from negligence, inadvertent or accidentally omitted that part of their case. Amendment of pleadings and joinder of parties is meant to obliterate this.”

23. This suit was filed on 17th November, 2000. The Amended Defence was filed on 12th August, 2004. In the amended Defence, the Defendants pleaded in paragraph 10 that the property known as LR No.2787/1420 Nanyuki was sold at an undervalue as the value thereof was Kshs.3,170,000/- . They claimed that because of such sale of the property for an alleged undervalue, the Plaintiff’s claim in excess of Kshs.10million should be dismissed. The amendments sought to be introduced is to claim the said sum of Kshs.3,170,000/- together with interest.

24. In my view, there are certain circumstances in this case that should be regarded as special. Firstly, the facts constituting the cause of action are the same facts pleaded way back in 2004 by which the Defendants prayed that the Plaintiff’s claim for Kshs.10,790,815/40 be dismissed. Secondly, the Defendants are in effect asserting that by disposing off its only security at an undervalue, the Plaintiff is estopped from claiming from the Defendants a whopping sum in excess of Kshs.10million. The Counterclaim in my view, will enable the Defendants offset any loss that may have been caused, if at all proved, by the alleged undersale. Thirdly, this suit has not been heard. The Plaintiff will be entitled to file a defence to the counterclaim and put the Defendants to

- strict proof. There will be a chance at the trial for the Plaintiff to challenge the claim sought to be introduced and I do not therefore think the Plaintiff will be prejudiced or embarrassed in its case.
25. As regards delay, I think the Plaintiff has not satisfactorily established how the delay by the Applicant in bringing the application at this stage will prejudice it in a manner that cannot be compensated by way of costs see **Central Kenya Ltd Vs Trust Bank Ltd (Supra)**. I find the issue raised by the Plaintiff that the Defendants are set to capitalize on failing human memory, lack of witnesses and deteriorating evidence to defeat the Plaintiff's claim unsubstantiated. The Plaintiff instituted this case and it is therefore presumed to be seized with all the facts and evidence in connection to its claim. The application was only filed in March, 2013 yet the suit was filed in 2000. The delay caused by the application is only between March, 2013 and the date of delivery of this ruling.
26. I have taken the foregoing view on the basis that this country is moving deep into the arena of doing substantive justice to parties who approach courts. It should be noted that Sections 1A and 1B of the Civil Procedure Act and Article 159(2) of the Constitution of Kenya have been enacted since the doctrines expressed in Halsburys Laws of England and the English case of **Marshall Vs London Passenger Transport (Supra)** was delivered. As I have stated, our own Court of Appeal in **James Ochieng oduor T/a Ochieng Oduor & Co. Vs Richard Kuloba (supra)** has expressed the view that in special circumstances, a defence of limitation may not bar an amendment. I have already set out what in my view are the special circumstances in this case. For the foregoing, I am convinced that the ends of justice will be met for all parties involved in this matter, and that the real issues in controversy will be properly, fully and conclusively addressed, if the amendments sought are allowed. No prejudice will be caused to the Plaintiff that cannot be compensated by an award of costs.
27. Accordingly, I will allow the application for amendment. The Defendants are hereby granted leave to amend their Amended Defence to include a counterclaim within 14 days of today's date. The Plaintiff is at liberty to file and serve its reply within 14 days of such service. The Plaintiff is awarded thrown away costs assessed at Kshs.20,000/= and shall be paid within 45 days of the date of this ruling. Orders accordingly.

DATED and DELIVERED at Nairobi this 20th day of November, 2013

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A. MABEYA

JUDGE