REPUBLIC OF KENYA

IN THE HIGH COURT

AT NAIROBI

MILIMANI LAW COURTS

Civil Suit 490 of 2004

DATALOGIX LIMITED……....……. PLAINTIFF

VERSUS

KENYA PIPELINE COMPANY LIMITED …….…….. DEFENDANT

AND

KENYA PIPELINE COMPANY LIMITED ……..……...PLAINTIFF

VERSUS

DATALOGIX LIMTED ……....1ST DEFENDANT

CYBERCOM LIMITED ……..…….. 2ND DEFENDANT

RULING

The Motion for consideration is dated 20th March, 2012 by the 2nd Defendant in the counterclaim Cybercom Ltd (hereinafter "the Applicant"). It is brought under Article 48, 50(1) of the Constitution of Kenya, Sections 1A, 1B of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules. The application seeks leave of court to amend its holding defence a draft of which was exhibited. The application was supported by the Affidavit of Joseph Njenga Njunge a director of Cybercom Ltd sworn on 20th March, 2012.

The Applicant's contention is that it was joined in these proceedings on 6th October, 2006 through an application made by the Plaintiff in the counterclaim, Kenya Pipeline Company Limited (hereinafter "the Kenya Pipeline"), that on being served with that application the applicant applied to have the dispute between it and the Kenya Pipeline referred to arbitration, that the same was dismissed on 31st May, 2007, that on 13th June, 2007 the Applicant filed in the Court of Appeal an application for the stay of

proceedings and that on 6th July, 2007 the Applicant filed a defence under protest and without prejudice to its right of appeal. The Applicant further contended that it is no longer interested in pursuing the proceedings in the Court of Appeal, that it is desirous of amending its Defence in these proceedings and proceed with the trial of this dispute and that the Applicant now seeks to put its claim against the Kenya Pipeline in excess of US Dollars three million.

Mr. Wagara, learned Counsel for the Applicant submitted that, originally the Applicant had opted to apply to stay the proceedings because the contract the subject of the proceedings had an arbitral clause, that the original Defence was filed on a without prejudice so that to safeguard the right of appeal to amend the same later if the application to refer the matter to arbitration was to fail and finally to safeguard against judgment in default being entered, that it is after he came on record that he advised the Applicant to forego the appellate process and pursue this suit.

It was Mr. Wagara's further submission that the amendment being sought was to introduce the claim for US$346,103/83 which is for work done, withholding tax paid and certificate issued. That the same was being brought in good faith, that the same had not been caught up by limitation since time started to run against it from October, 2006 when the applicant was joined in these proceedings. He urged the court to allow the application.

The Kenya Pipeline opposed the application by filing a Replying Affidavit of Flora Okoth sworn on 16th April, 2012 and Grounds of Opposition dated 22nd March, 2012. The Kenya Pipeline contended that the cause of action in respect of the counterclaim sought to be introduced arose in 2003 and was therefore time barred, that the application had been brought with undue delay and it was therefore an abuse of the court process. The Kenya Pipeline narrated the steps the parties had taken ever since the suit was filed until how the suit was finally fixed for trial on 18th April, 2012. It was contended on its behalf that the application was brought to scuttle that hearing of 18th April, 2012.

Mr. Wekesa, learned Counsel for the Kenya Pipeline submitted that the counterclaim was like commencing a new suit, that the cause of action arose in 2003 and that time began to run then. He further submitted that under Order 8 Rule 3(5) of the Civil Procedure Rules the amendment sought could have been allowed if the Applicant had already claimed a relief based on the same facts, that since the Defence filed in 2007 had only prayed for the dismissal of the Kenya Pipeline claim, the Applicant fell out of the said provision of the law. Reliance was put in the case of **Joseph Ochieng & 2 others –vs- First National Bank of Chicago (1995) KLR** by both parties. Counsel urged the court to dismiss the application.

I have considered the Affidavits on record, the Grounds of Opposition of the Plaintiff in the counterclaim, the submissions of Counsel and the authorities relied on.

The principles applicable when considering an application for amendment were settled by the Court of Appeal for Eastern African in the case of **Eastern Bakery –vs- Castelino (1958) EA 461** wherein at page 462 the court held:-

"It would be sufficient for purposes of the present case to say that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs ……. The court will not refuse to allow an amendment simply because it introduces a new case…… …….. The Court will refuse leave to amend where the amendment would change the action into one of a substantially different character …….. or where the amendment would prejudice the rights of the opposite party existing at the date of the amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ ……..

The main principle is that an amendment should not be allowed if it causes injustice to the other side."

In the Kenya Court of Appeal case of **Joseph Ochieng & 2 Others –vs- First National Bank of**

Chicago C.A. No. 149 of 1991 which was relied upon by both parties, Shah J.A (as he then was) held:-

"The ratio that emerges out of what was quoted from the said book is that powers of the court to allow amendment is to determine the true, substantive merits of the case; amendments should be timeously applied for; power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that exact nature of proposed amendment sought ought to be formulated and be submitted to other side and the court; that adjournment should be given to the other side if necessary if an amendment is to be allowed; that if the court is not satisfied as to the truth and substantiality of proposed amendment it ought to be disallowed; that the proposed amendment must not be immaterial or useless or merely technical; that where the Plaintiff's claim as originally framed is unsupportable an amendment which would leave the claim equally unsupportable will not be allowed; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action; that the Plaintiff will not be allowed to reframe his case or his claim if by an amendment of the Plaint the Defendant would be deprived of his right to rely on Limitation Acts but subject however to powers of court to still allow such an amendment notwithstanding the expiry of current period of Limitation; that the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same 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 action by the party applying for leave to seek the amendment.

These are of course the principles upon which the courts act in allowing or disallowing any proposed amendments and our Order VI A Rule 3 sets out all such principles which have been gone into on many previous occasions."

The foregoing are therefore the principles that the courts apply when dealing with an application such as the one under consideration.

Having considered the Affidavit on record, the rival submissions and the authorities, I do not think that the application has been brought in bad faith. This is so because, the applicant has properly explained the steps it has taken, albeit mistakenly, ever since it was joined in these submissions. I am also satisfied that the claim sought to be impleaded in the proposed counterclaim is genuine and has not been plucked from the air. Indeed it has a basis on the contract between the parties and certificates in which withholding tax has been paid.

To my mind, the real issue in contention and on which this court proposes to decide the application is whether the proposed amendments have been caught up by limitation.

The Applicant contends that the amendments have not been time barred for the reason that time against its cause of action started to run upon its being joined to these proceedings in October, 2006 and will therefore run out in October, 2012. The Kenya Pipeline contends otherwise. Mr. Wekesa counsel for Kenya Pipeline was of the view that the claim being under contract, time began to run in 2003 and the amendments are therefore time barred.

It is trite law, that time starts to run against a cause of action from the date a right recognized in law arises. Section 4(1) of the Limitation of Actions Act Chapter 21 Laws of Kenya provides:-

"4. (1) The following actions may not be brought after the end of six years from the date on which the cause of action accrued.

(a) Actions founded on contract.

……."

In order to ascertain Whether or not the proposed amendments are time barred, this court has to establish when the cause of action in respect thereof arose.

Paragraphs 16 and 22 of the proposed counterclaim state: -

"16. By an agreement dated 15th August, 2002, the plaintiff in the 2nd Counterclaim was contracted by Kenya Pipeline Company Limited ("KPC") to provide Information Technology Consultancy and Project Management Services for its Enterprise Transformation Project.

And

22. By a letter dated 5th February, 2003 KPC in clear breach of the terms and conditions of the said contract purportedly suspended the consultancy contract and despite the Plaintiff in the 2nd Counter claim demand the Defendant has refused and ignored to allow the Plaintiff back to the project and has instead awarded the contract to a third party and commenced these proceedings against it."

From the said two paragraphs, I have no doubt in my mind that the cause of action in respect of the counter-claim arose when the Kenya Pipeline breached its contract with the Applicant. This is on the 5th February, 2003. To my mind, that is when a right accrued to the Applicant to make its claim against the Kenya Pipeline under the contract entered into by the parties in August, 2002.

I am not in agreement with the Applicant's contention that its cause of action arose in October, 2006 when it was joined in these proceedings. My understanding of the law is that a cause of action arises when a right to claim against the offending party arises. The right for the Applicant to claim as against the Kenya Pipeline on the Agreement of 15th August, 2002 arose when the Kenya Pipeline breached the same. In my view, the time to bring an action can only be extended in the circumstances set out in Part III of the Limitation of Actions Act. The circumstances set out therein do not include the bringing of an action by the offending party as contended by the Applicant in this application.

Accordingly, I hold that on the material before court, the cause of action sought to be pleaded in the proposed counterclaim arose on 5th February, 2003 and time expired six years later, that is, 4th February, 2009.

Mr. Wagara submitted that the issue of whether limitation has caught up with the Applicant's case or not in a matter for the trial court and not this court at an interlocutory stage. I do not agree with that submission. If that were the case, the Eastern Court of Appeal and the Kenya Court of Appeal in the cases cited above could not have included in the principles to be considered when considering an application for amendment the consideration of whether the matter is caught up by the Limitation Acts. In any event, such a scenario will be against the letter and spirit of Section 1A of the Civil Procedure Act which enjoins the court to uphold the overriding objective of the Act that is of ensuring expeditious and proportionate and affordable resolution of civil disputes. Of what use will it be to allow an amendment of a claim that will be met with a defence of limitation at the trial? Why allow a trial of such a matter? That in my view would be a waste of judicial time. To my mind, that is why one of the grounds to deny an amendment is where such an amendment it will defeat a plea of limitation.

I am in agreement with Mr. Wekesa that the proposed amendment is caught up with limitation and that even under Order 8 Rule 3(5) the same cannot succeed for the reason that the relief which the Applicant sought in the defence filed on 6th July, 2007, was the dismissal of the Kenya Pipeline claim against it.

I am aware that the claim sought is very substantial and refusing the proposed amendment will result in shutting out the Applicant from what may otherwise be a genuine, outright and certified claim. That may be so, but the Applicant has itself to blame for failing to take action when its applications were rejected by Hon. Warsame J on 31st May, 2007 and the Court of Appeal on 17th October, 2008, respectively. Those applications were rejected whilst limitation had not caught up with the Applicant's claim. In any event, having put a holding defence, the Applicant could as well have put a holding counter-claim on a

without prejudice pending the exhaustion of its other available remedies. Sometimes, it is better to let loss fall where it lies.

Accordingly, I am convinced that the application is not meritorious and is hereby dismissed with costs to the Kenya Pipeline.

Dated and delivered at Nairobi this 9th day of May, 2012.

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A. MABEYA
JUDGE