



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
CIVIL CASE 194 OF 2004

NALIN DAYABHAI PATEL..... PLAINTIFF

VERSUS

CITY FINANCE BANK LIMITED.....1ST DEFENDANT

MANESH V. PATEL.....2ND DEFENDANT

RULING

1. Before me is the 2nd Defendant's motion dated 6th July, 2012 brought under Order 8 Rules 3, 5, 7 and 8 of the Civil Procedure Rules and Sections 1A, 1B and 3A of the Civil Procedure Act. The same seeks leave to further amend the Amended Defence filed on 7th May, 2008. The grounds upon which the application is brought has been stated to be that the 2nd Defendant intends to clarify the position in which he acted in the circumstances of the counterclaim and that it is imperative to allow the amendments so that all the issues in dispute between the parties may be resolved with finality.

2. The Plaintiff opposed the application relying on the Grounds of Opposition dated 16th July, 2012. The Plaintiff contended, inter alia, that the proposed amendment was a total contradiction of the previous defence, that the application was misconceived and an abuse of the process of the court, that it would prejudice the Plaintiff and that the same went contrary to the statute of limitation. Mr. Hira for the Plaintiff submitted that the orders of this court made on 6/10/2008, 27/4/2010, 7/12/10, 17/2/12 and 3/4/10 had not been complied with, that the transaction was of 1998 and the suit was filed in 2004, there was inordinate delay and that the claim was time barred by Section 4(1)(a) of the Limitation of Actions Act. Counsel urged that the application should be dismissed.

3. I have considered the Affidavit on record, the Grounds of Opposition and submissions of Counsel. The law on amendments of pleadings was well settled by the Court of Appeal for Eastern Africa in the case of **Eastern Bakery –vs- Castellino 1958 EA** wherein the Court held:-

“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.”

4. From the foregoing, it is clear that amendments may be allowed at any stage of the proceedings provided that the same does not prejudice the other party. I have looked at the orders made on 6/10/2008,

27/4/2010, 7/12/10, 17/2/12 and 3/4/12. Mr. Hira urged that since they had not been complied with, the application should be refused. I do not think that those orders have anything to do with the application before me. The 2nd Defendant may have failed to comply with certain directions given by the Court but I think it is for the Plaintiff to take steps to enforce compliance thereof but the same cannot be a basis of disallowing an application for amendment.

5. Mr. Hira submitted that the proposed amendments will prejudice the Plaintiff, that they are being made too late in the day and that the claim was barred by the limitation period. I have noted from the record that the 2nd Defendants counterclaim was made vide an amendment made on 12th June, 2008. What the current amendments seek to do is only to clarify certain aspects of the Defence and counterclaim. I do not think that it is a new claim which is capable of being barred by the Limitation Statute. I do not also consider the same to be inconsistent with the previous defence as is contended by the Plaintiff. As regards prejudice, the Plaintiff did not demonstrate the prejudice to be suffered. Notwithstanding the inordinate delay in the making of the application, I still do not think that it is a sufficient ground to deny a party from amending its pleading. Order 8 Rule 3 talks of “**at any stage of the proceedings**” an amendment can be sought and allowed. What the Plaintiff will be entitled to is costs for the delay caused by the application.

6. Accordingly, I allow the application and order as follows:-

- a) The Further Amended Defence to be filed and served within 14 days of the date of this ruling.
- b) The Plaintiff to amend its and/or file a Reply, if any, within 14 days of service.
- c) The parties do comply with pre-trial's by the 15th November, 2012 and the matter be mentioned on 16th November, 2012 to confirm compliance.
- d) As regards the costs, since the application has denied the Plaintiff a chance of having its suit heard, I will grant the Plaintiff thrown away costs of Kshs.30,000/- as against the 2nd Defendant payable within 30 days of the date hereof.
- e) In the event the Defendant defaults in any of the foregoing directions, the leave granted shall lapse and execution for the said costs of Kshs.30,000/- shall issue forthwith.

Orders accordingly.

DATED and Delivered at Nairobi this 20th September, 2012.

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A. MABEYA
JUDGE