



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 1129 of 1997

RUBINA AHMED.....1ST PLAINTIFF

AHMED AFTAB.....2ND PLAINTIFF

TEXTILE INVESTMENTS LIMITED.....3RD PLAINTIFF

MAVIN M. MEHTA.....4TH PLAINTIFF

VERSUS

FIRST NATIONAL FINANCE BANK LIMITEDDEFENDANT

R U L I N G

1. By way of Notice of Motion dated 26th March 2012 the Plaintiffs (hereinafter referred to as “the Applicants”) seek the leave of the court to enjoin a Company known as UNIVERSAL APPARELS (EPZ) LTD as a Plaintiff in this suit. They also pray that the Defendant herein be substituted with GUARDIAN BANK LIMITED and consequently that the court do grant leave to further amendment of the amended plaint in terms of the draft Further Amended Plaint annexed to the application. The Motion is supported by the Affidavits of Aftab Ahmed, sworn on 27th March, 2012 and 24th May, 2012 respectively,

2. It is the contention of the Applicant that the Universal Apparels (EPZ) Limited is a necessary party in the suit due to the fact that the issues for determination pertain to banking facilities between it and the Defendant, as well as receivership instituted by the Defendant against the aforesaid company. The Applicant also contends that it is vital to substitute the Defendant with Guardian Bank Limited the latter it succeeded the Defendant by way of a merger, thereby taking over both the Defendant’s assets and liabilities. It is further contended that the Plaint needs to be further amended in order to describe the Plaintiffs’ claim against the defendant in a more particularized manner as illustrated in the Draft Further Amended Plaint attached to the Application. The applicant contends that there would be no conceivable to be suffered prejudice by the Defendant should the orders sought be granted by the Court. The Applicant therefore urged that the application be allowed.

3. The Defendant, on its part, vehemently opposed the motion by filing Grounds of Opposition dated 18th April 2012 and the Replying Affidavit of Mary Omullo, the Legal Officer of Guardian Bank Limited the Successor in title to the Defendant, sworn and filed on 27th April, 2012 . The Defendant contended that the application seeks to re-open matters that were already concluded with regard to **HCCC No. 2496 of 1997 First National Finance Bank Limited –vs- Universal Apparels (EPZ) Ltd** and **HCCC No. 874 of 2002 First National Finance Bank Limited –vs- Kenindia Assurance Company Limited**. That the issues sought to be included in the Plaint as evidenced by the Draft Further Amended Plaint are similar to issues that were determined by the Court in the above mentioned cases and cannot therefore form the basis of the current suit as the same would be res judicata and hence embarrass the judicial process. It was

contended by the Defendant that the issues having been determined by a court of competent jurisdiction cannot be re-litigated by this court as such an action would be tantamount to this court sitting on its own appeal. It was further contended that at all material times the Plaintiffs were aware of the existence of Universal Apparels (EPZ) Limited and the above said cases, where it actively participated with the 1st and 2nd Plaintiffs even swearing a number of affidavits on its behalf. Owing to this, the Defendant contended that the Plaintiffs cannot now purport to be ignorant of the same and seek orders without fully disclosing material facts for consideration by this Court. In the Defendant's view, the current application is res judicata and an affront to the legal principle that litigation must come to an end. It is additionally alleged that Universal Apparel (EPZ) Limited is not a necessary party to the suit as claimed by the Plaintiffs and its inclusion would only serve to confuse issues and Court orders made in **HCCC No. 2496 of 1997 First National Finance Bank Limited –vs- Universal Apparels (EPZ) Ltd** and **HCCC No. 874 of 2002 First National Finance Bank Limited –vs- Kenindia Assurance Company Limited.** The Defendant therefore urged that the Plaintiffs' application be dismissed with costs.

4. I have considered the Affidavits on record, the submissions of counsel and authorities relied on. The issues for determination by this court are threefold. First, whether it is necessary to enjoin Universal Apparel (EPZ) Limited as a Plaintiff in this matter; secondly, whether to substitute the Defendant with Guardian Bank Limited and finally, whether to grant leave to the Plaintiffs to further amend the amended plaint .

5. I propose to start with the issue of whether or not to substitute the Defendant herein with Guardian Bank Limited. I note that this issue was not contested and quite rightly so in light of the fact that Guardian Bank Limited has since succeeded the Defendant by way of a merger and takeover. Taking all the facts and the law into consideration, I find that it is necessary for the court to substitute the defendant with Guardian Bank Limited. To this end, I shall allow the prayer by the Plaintiffs to substitute the Defendant with Guardian Bank Limited as the same shall not occasion any prejudice to the parties of this suit.

6. The second issue for the determination is whether or not to enjoin another Plaintiff in this matter, that is, Universal Apparels (EPZ) limited. It is the submission of the Plaintiffs' counsel that the company is a necessary party to this suit as the cause of action lies in the unlawful appointment of receivers over its assets and operations. The genesis of this claim is that Universal Apparels (EPZ) Limited obtained Import letters of credit facilities worth USD\$400,000 for a period of one year. The said company also executed a debenture to secure the additional sum of USD\$600,000. Upon default on repayment of the aforementioned facilities, the Defendant instituted a civil claim and further appointed receivers over Universal Apparels (EPZ) Limited, whose activities, the Plaintiffs' alleged, led to the closure of the Company. It is contended, that the closure of the said company led to losses on its part and on the part of the plaintiffs, who were subscribers, directors and guarantors of the said company. It is the contention of the Plaintiffs that Universal Apparels (EPZ) Limited is therefore a central factor and/ or party in this suit. The Defendant however counters this argument by asserting that the Plaintiffs were aware of the existence of Universal Apparel (EPZ) Limited and the role it played in leading the Defendant to file suits against it and its guarantors. Indeed it was pointed out that the claims instituted against the Company by the defendant were based on a contract. That even with this knowledge, the Plaintiffs did not find it prudent to include this Company as a Plaintiff for the last fifteen (15) years. The Defendant further submitted that this inadvertence and delay is unexplained thereby rendering the same mischievous, ill-advised and a blatant attempt to prejudice the Defendant.

7. The Law on joinder of parties is well settled. Rule 10(2) of Order 1 of the Civil Procedure Rules provides that;

“The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added.”(Emphasis supplied)

From the reading of this provision, it is clear that the question of addition of parties is essentially a judicial discretion that shall have to be exercised in the light of the facts and circumstances of each case. The court may be of the opinion that adding a party would be better so as to enable it to effectually and completely adjudicate upon the controversy.

8. The Plaintiffs have indicated that Universal Apparels (EPZ) Limited is a necessary party to this suit by virtue of the fact that it suffered consequential losses out of the Receivership that was sanctioned by the Defendant. That by virtue of the Plaintiffs' being subscribers and shareholders of the aforesaid company, they too suffered losses due to the receivership. This by all means seems to be a credible argument for seeking the addition of Universal Apparels (EPZ) Limited as a Plaintiff. However, having said this, it is not lost to this court that this application has been brought fifteen (15) years after the institution of the suit. The Plaintiffs have not attempted to explain this delay. I note that this court has previously given leave to the Plaintiffs to amend their Plaintiff and even then, they did not move the court on the addition of Universal Apparels (EPZ) Limited as a Plaintiff. Further, it was also denied that it was within the knowledge of the Plaintiffs concerning the litigations between the Universal Apparels (EPZ) Limited in both **HCCC No. 2496 of 1997 First National Finance Bank Limited –vs- Universal Apparels (EPZ) Ltd** and **HCCC No. 874 of 2002 First National Finance Bank Limited –vs- Kenindia Assurance Company Limited** wherein the Plaintiffs are said to have sworn some affidavits on behalf of the said Universal Apparels (EPZ) Limited. That even with this knowledge, the Plaintiffs did not deem it necessary to enjoin the said company to the suit until now- fifteen years later. Given this knowledge, the Plaintiffs ought to have included the Universal Apparels (EPZ) Limited as a Plaintiff at the institution of the case or in the alternative, move this Court to enjoin the Universal Apparels (EPZ) Limited as a Plaintiff at the earliest opportune time. I am aware that order 10 Rule 2 allows an application of this nature to be made at any stage of the proceedings. It has not restricted the time for the bringing of such an application. But to wait for 15 years since the commencement of the suit and seek to invoke that provision in my view is not proper. In addition, the fact that there have been previous proceedings involving that company and the Defendant and decisions have been made therein, of which the Plaintiffs are aware, does not appeal to this court's discretion. To my mind therefore, presenting this application at this juncture is synonymous to requesting the court to aid a negligent pleader. I hold true to the maxim that "*Equity does not aid the indolent*" and that "*delay defeats justice.*"

9. In any event, it was not contended that without the said Universal Apparels (EPZ) Limited the suit cannot be effectively adjudicated upon. I am of the view that the court will be able to adjudicate the claim effectively without necessarily enjoining Universal Apparels (EPZ) Limited to these proceedings. The prayer to enjoin Universal Apparels (EPZ) Limited is therefore denied.

10. On the issue of granting the Plaintiffs leave to further amend the Plaintiff in terms of the Draft Further Amended Plaintiff, I find that the issues raised by the Defendant merit my attention. The Defendant alleges that the amendments sought by the Plaintiffs have striking similarities to issues raised in both **HCCC No. 2496 of 1997 First National Finance Bank Limited –vs- Universal Apparels (EPZ) Ltd** and **HCCC No. 874 of 2002 First National Finance Bank Limited –vs- Kenindia Assurance Company Limited**, and that allowing the amendments sought, the court would in essence be re-litigating issues that have already been decided earlier by this court and of which no appeal has been preferred. I have read the pleadings supplied by both parties in context to the aforesaid cases. I have also read the Draft Further Amended Plaintiff more specifically paragraphs 8-21. The granting or refusal of leave to amend any pleading is a matter that is within the discretion of the court but such discretion should be exercised rationally as illustrated in the case of **ALPHA KNITS LIMITED-v-KENINDIA ASSURANCE COMPANY LTD & ANOTHER (2007) eKLR** where Azangalala J held that:-

"It is now settled that the overriding consideration in applications for leave to amend is whether the amendments sought are necessary for the just determination of the controversy between the parties. The policy of the law being that amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side (see Eastern Bakery –vs-Castelino (1958) E.A 461)." (Emphasis supplied)

11. In the matter at hand, the Defendant's primary concern is that the Plaintiffs by their proposed

amendments raise matters that are res judicata and the court will be asked to sit on appeal against decisions already made on the same issues by the courts of same jurisdiction. The Defendant submits that it shall be prejudiced if the court exercises its discretion and allows the amendments sought, as it stands to suffer irreparable loss given that enjoyment of the proceeds of the settled cases will be opened to litigation and challenge. The grounds of opposition by the Defendant point to the fact that the intended amendments are sought by the Plaintiffs in bad faith and are merely intended to frustrate and prejudice its rights and interests. However, it is in my view that the question of res judicata should not be considered at this stage as the defendant will have the chance to respond to the issues raised in the proposed Further Amended Plaintiff. Additionally, the Defendant will be at liberty to make such an application raising the issue of res judicata at the appropriate time for consideration. I am guided by the decision in **Alpha Knits Limited (supra)** where the court held that:-

“...at this stage it is immaterial that the defendant may have a water tight answer to the proposed amendments. That is not a consideration at this stage I therefore refrain from considering whether or not the proposed amendments will raise matters that are res judicata or that have been comprised in a previous consent. I do so because arguments on the same matters may still be raised should the Defendant be so minded in its response once leave is granted.”

12. Having stated the above, the question then arises is whether the Plaintiffs have satisfied the requirements set out by a plethora of cases that deal with leave to amend pleadings. The case of **Central Kenya Limited –v- Trust Bank Limited (2000) EALR 365** proves instructive as the learned Court of Appeal Judges held that;

“The Amendment of Pleadings is aimed at allowing a litigant to plead the whole of the claim he is entitled to make in respect of his cause of action. A party would be allowed to make such amendments of pleadings as are necessary for determining the real issues in controversy or avoiding a multiplicity of suits provided (i) there has been no delay, (ii) no new or inconsistent cause of action is introduced, (iii) no vested interest or accrued legal right is affected, and (iv) the amendment can be allowed without injustice to the other side.....The overriding considerations are, whether the amendments are necessary for the determination of the suit and whether the delay is likely to prejudice the opposing party beyond compensation in costs.”

13. As indicated earlier in this ruling, I note that this matter has been ongoing since 1997. The only activity that took place between that time and now was in 2002 when the Firm of Rachier & Co. Advocates took over the Plaintiffs’ case through a Notice of Change dated 9th December 2002. Leave had in the past also been granted to the Plaintiffs to amend the Plaintiff which they did in 1997. The proposed further amendments are now being sought fifteen years after the institution of the case. Surely, I must say, fifteen years goes beyond the phrase “mere delay”. The Plaintiffs herein have been in a deep slumber and this court cannot and shall not aid such indolence. I am inclined to agree with the Defendant’s arguments that it will be prejudiced as the issues that are now sought to be added happened several years ago and the Defendant shall be hard pressed to trace some witnesses or even find vital evidence in respect thereof. I find that such a prejudice cannot be compensated by way of costs. In the **Central Kenya Limited Case(supra)** the learned judges did state;

“...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. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”

In the case at hand, not only the application is being brought after a long delay, but there is also the issue of the possible prejudice by the Defendant on the rights that have been enured to it by virtue of the decision already made in its favour. Further, it was not disclosed in the Affidavits filed in support of the application when the particulars sought to be pleaded came to the knowledge of the Plaintiff. This court cannot speculate on that. I am therefore of the view that the amendments sought are not made in good faith, and that if they are allowed they will be prejudicial to the Defendant which prejudice cannot be compensated by way of costs.

14. Accordingly, I dismiss prayers 1 and 3 of the Notice of Motion dated 26th March, 2012. However, I allow the application to the extent that the Defendant herein shall be substituted with Guardian Bank Limited in terms of prayer 2 of the Motion. The plaint should be amended to that extent and served upon the Defendant within fourteen (14) days. Costs of this application shall be in the cause.

DATED and DELIVERED in Nairobi this **28th** day of **November, 2012**.

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A. MABEYA

JUDGE