



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 103 of 2004

AVANTI COMPANY LIMITED.....PLAINTIFF

-VERSUS-

BARCLAYS BANK OF KENYA  
LIMITED.....DEFENDANT

The application before the Court is brought by a Chamber Summons dated 10<sup>th</sup> March, 2010. It is made under **Order VIA Rules 3 and 5** of the **Civil Procedure Rules, Sections 3A, 63(e)** and **100** of the **Civil Procedure Act (Cap 21 Laws of Kenya)** and all other enabling Provisions of Law. The Applicant seeks from the Court orders that –

1. **This Honourable Court be pleased to grant leave to the Plaintiff to amend its Plaint dated 23<sup>rd</sup> of February, 2004 in order to clearly reflect the issues in controversy.**
2. **That the annexed Amended Plaint be deemed filed on payment of the requisite Court fees.**
3. **That this Honourable Court be pleased to grant any such other or further order(s) it may deem just and expedient for the ends of justice and fair trial.**
4. **That the costs of this application be in the cause.**

The application is supported by the annexed affidavit of KIGURU NJENGA, the Managing Director of the Plaintiff Company. It is based on the grounds that –

- (a) **The proposed amendment is vital and expedient in the determination of the substantive matters in the suit.**
- (b) **The proposed amendment is made for the purposes of determining the real questions or issues in controversy between the parties.**
- (c) **The proposed amendment shall not prejudice the rights position and interests of the other parties to this suit.**
- (d) **The proposed amendment is for the interest of justice and fair trial.**
- (e) **The omission of the real issues in controversy in the Plaint was inadvertent and not mala fide.**

Opposing the application the Defendant filed a statement of grounds of opposition to the effect that-

- (i) **The prayers sought in the amended plaint are illegal as they are in breach of the law of Limitation of Actions.**
- (ii) **The prayers sought in the amended plaint are illegal as they seek reliefs that cannot be issued.**
- (iii) **The said application is an afterthought and an abuse of the Court process.**
- (iv) **The said application is intended to delay the full hearing of this matter.**
- (v) **The said application is most prejudicial to the Respondent.**
- (vi) **The said application should be dismissed with costs.**

During the oral canvassing of the application, Mrs. Kiama appeared for the Applicant while Mr. Karungo appeared for the Respondent. Mrs. Kiama submitted that the application dated 10<sup>th</sup> March, 2010 seeks to amend the plaint dated 23<sup>rd</sup> March, 2004. She argued that the proposed amendment would make matters in dispute clearer and relied on the court's discretion to allow the amendment. She argued that the intended amendment clarifies the special damages suffered by the Applicant as a result of the Respondent's breach. She further argued that the amendment will not prejudice the Respondent in any way and that the application is not made in bad faith or to vex the Respondent. Counsel submitted that the original suit filed by Oraro & Rachier, Advocates, was dismissed, and that they applied for reinstatement which was granted. She argued that the filed application was not intended to delay the case in any manner. She referred to **Order VIA Rule 3(5)** which allows a new cause of action to be introduced. She argued that in this case, no new cause of action had been introduced, and that the most important consideration was not to prejudice the Respondent or to bring an application in bad faith which was not the case. She submitted that the application was not an afterthought, and it is also not mischievous. She finally argued that there was no issue of limitation of actions and no new cause of action, and thereupon urged the court to allow the amendment with leave to the Respondent to amend its defence.

On his part, Mr. Karungo for the Respondent relied on the grounds of opposition. He argued that some of the proposed amendments would be in breach of the Limitation of Actions Act. He further argued that since the action was filed in 2004, many issues would by now be time barred. It was further his case that payments were sought to be made to third parties.

In her reply, Mrs. Kiama submitted that Counsel for the Respondent was discussing matters of fact without a replying affidavit, and that parties should be given time to ventilate all issues between them. She urged that the application be allowed.

After considering the pleadings, the submissions and authorities cited by counsel, I take the view that the only issue for determination is whether the application for leave to amend the plaint ought to be allowed.

**Order 8 Rule 5 (1) of the Civil Procedure Rules** states that –

***“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just.”***

In the case of **PATEL v. JOSHI (1952) 19 EACA 42**, Sir Barclay Nihill said of amendments –

***“Amendments are allowed as a concession to human liability or error, not to enable a litigant to play fast and loose with his opponent and the Court.”***

Furthermore, in the 12<sup>th</sup> Edition of “Precedents of Pleadings” by Bullen & Leake & Jacob, the learned authors say at page 124 –

***“The guiding principle of cardinal importance on the question of amendments is that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings. The rule of conduct of the Court is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”***

Even if the original pleadings were faulty owing to the negligence or carelessness in drafting, it is excusable provided that the amendment can be made without injustice to the other side, and there is no injustice where the other side can be compensated by costs.

**Order 8 Rule 3 (2) of the Civil Procedure Rules** provides –

***“Where an application to the Court for leave to make an amendment in sub-rules (3), (4) or (5) is made after any relevant period of limitation current at the date of filing the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it feels just so to do.”***

In **KULOBA v ODUOL [2001] KLR 647** in which it was held that the periods of limitation do not confer any right to a Defendant but only impose an obligation on the part of the plaintiff to bring his claim within the stipulated period. Once the claim is brought within the period, amendments can be allowed even outside the period of limitation in a specified situation. Amendments outside the period of limitation may therefore be allowed in cases where they flow from the same set of facts or substantially the same facts with the claim originally pleaded.

Although the Respondent contends that the amendment will be prejudicial to it, it has failed to show the prejudice alluded to or how the amendment would cause injustice. In the circumstances, I find that the amendments sought in this application arise out of substantially the same facts with the claim as originally pleaded, and therefore, it is just to grant the leave sought for amendment. For these reasons, I make the following orders –

- 1. The Plaintiff is hereby granted leave to amend the plaint herein as per the draft amended plaint annexed to the application as prayed.**
- 2. The said draft plaint shall be deemed as duly filed upon payment of the requisite filing fees within 14 days from today, and the same to be served upon the Defendants within 7 days of filing.**
- 3. The Defendants shall be at liberty to file and serve an amended defence thereto within 7 days of service.**
- 4. The Plaintiff be at liberty to file and serve a reply to the amended defence if it so wishes.**
- 5. The Plaintiff will bear the Defendant’s costs of this application in any event.**

**L. NJAGI**

**JUDGE**

**DATED and DELIVERED at NAIROBI this 21<sup>st</sup> day of November, 2012**

**MUTAVA  
JUDGE**