



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

HCCC NO. 51 OF 1999

VISHVA BUILDERS

LIMITED.....PLAINTIFF

=VERSUS=

MOI UNIVERSITY.....DEFENDANT

RULING

This is an application by the plaintiff for leave to further amend its amended-amended plaint. The application is expressed to be brought under sections **1A, 1B, 3, 3A of the Civil Procedure Act and Order VI A Rules 3, 5 and 8 of the Civil Procedure Rules**. The application is grounded on the affidavit of the plaintiff's director **Samji Vekeria** which is annexed thereto.

The applicant's case is that the amended-amended plaint on record does not sufficiently set out the particulars giving rise to the cause of action in the matter and that the same should be further amended to plead further and better particulars of facts giving rise to the applicant's cause of action. The proposed amendments are, according to the plaintiff, also necessary for a proper adjudication of the real questions in controversy between it and the defendant.

The application is opposed on the basis of Grounds of Opposition filed by the defendant's advocates. The main grounds of objection are that the plaintiff by the proposed amendments seek to introduce an action which is statute barred and that the application itself has been brought rather late in the day.

The application was canvassed before me on 18th January 2011 when counsel reiterated the stand-points taken by their clients in their aforesaid filed papers.

I have considered the application, the affidavit in support, the Grounds of Opposition and the submissions of Counsel. Having done so, I take the following view of the matter. With regard to delay, the plaintiff has explained that it could not move the court earlier because it had obtained summary judgment against the defendant which judgment was set aside on appeal on 18/2/2010. The judgment of court of Appeal is exhibited to buttress the explanation. I have perused the same and agree that the applicant could not have sought leave to further amend the amended-amended plaint when it was the beneficiary of a summary judgment. The delay involved is therefore of about five months. I note that the suit is yet to move beyond pre-trial formalities. Evidence is yet to be taken from any witness. In the premises, I find and hold that the plaintiff is not guilty of inordinate delay. With regard to the objection that the plaintiff proposes to introduce an action barred by statute, I need only refer the defendant to the provisions of **Order VI A Rule 3(1), (2)** of the Civil Procedure Rules which reads as follows:-

3(1) **“Subject to Order 1 Rules 9 and 10, Order 24, Rules 3,4,5, and 6 and the following provisions of this Rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct allow any party to amend his pleadings.**

(2) Where an application to the court for leave to make an amendment such as is mentioned in sub-rule 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 sub-rule if it thinks just so to do”.

So the main concern of the court is to do justice to the parties. The defendant did not file any affidavit to indicate what injustice would be visited upon it if the proposed amendments are allowed. As both counsel agreed the court has a wide discretion to allow a party to amend his pleadings. That discretion is a judicial one and like all judicial discretions, it should be exercised rationally and not whimsically or idiosyncratically. The discretion is exercised on well settled principles . In **Eastern Bakery –vrs- Castelino [1958] EA 461**, the Court of Appeal held as follows:-

1. **“Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect there is no injustice if the other side can be compensated by costs.**
2. **The court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.”**

Our **Rules 3(2) and (5) of Order VI A of the Civil Procedure Rules** however, allow amendments outside the period of limitation and which introduces a new cause of action. The rules were introduced into our Rule book after the **Castelino case**.

As the defendant did not offer any affidavit evidence, it did not demonstrate that it would be prejudiced by the proposed amendment beyond what is compensable by an award of costs.

In the end, there is no basis for refusing the plaintiff’s application. I grant the plaintiff leave to further amend the amended-amended plaint as prayed in paragraphs 1 of its application. I also grant orders in terms of paragraphs 2 and 3 thereof.

I grant the defendant the costs of this application in any event.

Orders accordingly.

DATED AT ELDORET THIS 9TH DAY OF FEBRUARY 2011.

F. AZANGALALA

JUDGE

Read in the presence of:-

1. Mr. **Havi** for the plaintiff and
2. Mr. **Nyarotso** holding brief for **Nyairo** for the respondent.

F. AZANGALALA

JUDGE