



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NYERI

CIVIL CASE NO. 53 OF 2003

BEATRICE MUMBI WAMAHIU..... PLAINTIFF

Versus

MOBIL OIL KENYA LTD.....-DEFENDANT

RULING

The subject matter of this ruling is the summons dated 16th November 2009, in which Beatrice Mumbi Wamahi, the Plaintiff herein sought for the amended defence and counter-claim to be struck out with costs. The summons is supported by the affidavit of Beatrice Mumbi Wamahi sworn on 16th November 2009. Mobil Oil Kenya Ltd, the Defendant herein filed the replying affidavit of Omollo A. Omondi sworn on 3rd February 2010 to oppose the motion.

I have considered the grounds set out on the face of the summons plus the facts deponed for and against the summons. I have further considered the oral submissions of learned counsels from both sides. Mr. Lompo learned advocate for the plaintiff argued two main grounds in support of the summons. First, it is his argument that the counter-claim is statute-barred under Section 4(a) of the Limitation of Actions Act as read together with Section 35 of the same Act. It is also the submission of the Plaintiff that the Defendant filed the amended defence outside the time give by the court. On this issue the Defendant is of the view that the suit by way of counter-claim is not statute barred in that the same relates to the date of filing of the original suit which in this case is on 16th July 2003. The Defendant relied on the provisions of Section 35 of the Limitation of Actions Act.

I have considered the rival submissions argued for and against this ground. Let me begin by looking at the first limb of the ground. Accordingly to the Plaintiff the counter-claim is time barred under Section 4(a) of the Limitation of Actions. Basically the counter-claim is founded on contract. Under Section 4(a) of the Limitations of Actions Act, an action based on contract may not be brought after the end of six years. The cause of action in this case is stated to have arisen on 11th July 2001. The original suit was filed on 8th April 2002. It would appear that the Plaintiff is of the view that the date of filing the counter-claim is 26th August 2009. If that was true then the counter-claim would obviously be time barred hence the preliminary objection would be sustained. A careful consideration of the provisions of section 35 of the Limitation of Actions Act will reveal that a counter-claim will be treated as a separate action and will be treated as having been filed on the same date as the original action which in this case is 8th April 2002. It is therefore obvious that the counter-claim was filed within time hence this ground must fail. The second limb of this ground is to the effect that the amended defence was filed out of time. It is the submission of the plaintiff that the Defendant was given leave to amend the defence and to file a

counter-claim on 29th June 2009. The court deemed the draft amended defence and counter-claim as duly filed and served upon payment of court fees. It is stated that the Defendant took two months to pay the court fees yet it had been given 14 days to do so hence the same was filed out of time. The Defendant on its part has admitted there was a delay to file the amended defence and counter-claim. The explanation for the delay is that it took time for the court fees to be assessed. The Defendant urged this court to regard the objection as a technicality in view of the fact that the court fee has been paid. Both the constitution and the civil Procedure Act enjoin the court not to be guided by procedural technicalities. There is an explanation given by the defence as to why the Defendant failed to pay the fees for the amended defence and counter-claim within the 14 days. That explanation is not controverted hence I will treat it as a genuine explanation. Furthermore the Plaintiff has not shown the prejudice it has or would suffer if those pleadings are allowed to remain. In any case the fees has so far been settled in full. I will not strike out the defence and counter-claim but would instead deem the payment of the court fees as paid out of time with leave of court.

The second substantive ground argued by the Plaintiff is to the effect that since the primary suit has been withdrawn, the amended defence and counter-claim is no longer tenable. The Defendant is of the view that the counter-claim was not affected by the withdrawal of the primary suit. On my part I am persuaded by the Defendant's submissions that the withdrawal of the main suit did not affect the counter-claim. A counter claim is treated as a separate suit under section 35 of the Limitation of Actions Act hence its survival cannot be pegged on the pendency of the primary suit. That ground must therefore fail.

The third ground argued by the Plaintiff in support of the motion is to the effect the Defendant's identity has changed from Mobil Oil (k) Ltd then to Tarmoil Ltd and now Oil Libya. It is the Plaintiff's submission that the Defendant should now sue as Oil Libya as opposed to Mobil Oil (k) Ltd. The Defendant urged this court to reject this as being without merit in view of the provisions of section 20 of the Companies Act. On my part I am of the view that the issue raised by the Plaintiff is taken care of by section 20(4) of the Companies Act. The aforesaid section provides as follows:

“20(4). A change of name by a company under this section shall not affect any rights or obligations of the company or render defective any legal proceedings by or against the company, and any legal proceedings that might have been continued or commenced against it by its former name may be continued or commenced against it by its new name.”

It is obvious that this ground again must fail.

In the end and for the above reasons the motion is dismissed for lack of merit with costs to the Defendant.

Dated and delivered this 23rd day of September 2011.

**J.K. SERGON
JUDGE**

In open court in the presence of Mugambi for Defendant and Macharia h/b for Lompo for Plaintiff.

**J.K. SERGON
JUDGE**