



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT KISUMU
CIVIL COMMERCIAL CASE NO. 13 OF 2006

NATIONAL INDUSTRIAL CREDIT BANK.....PLAINTIFF

VERSUS

SAMWEL ORINDO MANANI OMOKAYA.....DEFENDANT

R U L I N G

There is on record an application date 6th day of December 2010. it is brought by way of chamber summons brought under section 1A, 1B, 3A and 110 of the CPA and under order VIA Rule 3 (1) of the CPR. For reliefs have been sought.

- (i) Spent**
- (ii) The plaintiff be granted leave to amend its plaint in the manner and style of the annexed plaint.**
- (iii) The amended plaint be filed within such period as the court may direct.**
- (iv) Costs of this application be provided for.**

The grounds set out in the body of the application as well as the supporting affidavit are the usual ones and these are:-

- That it is just and proper to be granted leave to amend.**
- The amendment is meant to bring out the real issue in controversy between the parties.**
- That the amendment will capture the entire claim by the plaintiff.**
- That as at the time the suit was filed, the plaintiffs had not availed all the required information to their advocates as at the time the suit was initially filed.**
- The defendant/respondent will not suffer prejudice as the proceedings are at their infancy and they will be compensated for by way of costs.**
- That the application has been made in good faith.**

- **The intended amended plaint is annexed.**

In opposition the defendant/respondent filed grounds of opposition date 7th day of December 2010, and filed on the 9th day of December 2010 and these are:-

- (1)The instant chamber summons application is mischievous and otherwise bad in law**
- (2)The instant application has been made too late in the day, with unreasonable and or inordinate delay which is not being explained consequently the plaintiff/applicant is guilty of laches.**
- (3)The intended amendment together with the cause of action sought to be impleaded are barred by the limitation of Actions Act chapter 22 Laws of Kenya.**
- (4)The suit for breach of contract sought to be introduced vide the intended amendment is prohibited by the limitation of Actions Act, chapter 22 Laws of Kenya.**
- (5)The instant application is calculated to delay/and or obstruct the timely expeditious and efficient determination of the subject dispute.**
- (6)The instant application contravenes the provision of section 1A and 1B of the CPA.**
- (7)The instant application otherwise constitute an abuse of the due process of court.**
- (8)The chamber summons application herein, is devoid of merits whatsoever.**

Parties elected to proceed by way of submissions. Those of the plaintiff/applicant are dated 13th April 2011 and filed on the 13th day of April 2011. The following have been stressed:-

- **There has been no delay in the filing of the application for amendment because the matter has never taken off.**
- **The general rule is that amendments to pleadings can be sought and granted at any stage of the proceedings.**
- **Contends that issue of the claims being time barred does not arise without evidence being adduced to confirm the same considering that they had pleaded that the claim were merged and or amalgamated and it is only adduction of evidence which can reveal that the allegation falls outside the time limitation.**
- **The appropriate time for consideration will be the date the default accrued and not when the hire purchase agreement was executed.**
- **There is no demonstration by way of affidavit by the defendant of any prejudice they are likely to suffer.**

The defendants submissions are dated 16th May 2011, and are filed on the same date. A perusal reveals the following highlights:-

- **The plaint sought to be amended is dated the 6th day of September 2006.**
- **The initial suit was based on a hire purchase agreement entered into on the 16th day of May 2002 in respect of motor vehicle KAP 506 N Scania FGU which was to run for a period of 23 months culminating on the 13th day of May 2004.**
- **The intended amendment seeks to introduce another hire purchase agreement entered into on**

the 10th day of December 2001 in respect of motor vehicle KAN 484 Y which was to run until 10th December 2003, and another hire purchase agreement entered into on the 24th day of April 2002 for a Toyota pick up.

- Contends that the default arose on the 13th day of May 2004 and 7th May 2005. The claim on those breaches or defaults were to be commenced by the plaintiff within 6 years and for this reason any claims falling outside the 6 years period should not be sneaked into the current cause of action. They are opposed to its inclusion because it does not flow from the same set of facts.
- The current application to amend has been presented to court four years after the initial plaint was filed without an explanation being given as to why there was no move to amend the pleadings earlier and for this reason the court is invited not to exercise its discretion in their favour.

On case law, the plaintiff referred the court to the case of Suleiman

VS- Karasha [1989] KLR 201 where it was held *inter alia* that:-

(1) Under the Civil Procedure Rules the parties can amend their pleadings with the leave of court at any time before judgment.

(2) It does not matter if the hearing has been concluded but the court has to consider the application for amendment and give effect to it as may deem just.

The defendant on the other hand referred the court to the case of Kyalo –VS- Bayusuf Brothers Ltd [1983] KLR 229. A court of appeal decision where it was held *inter alia* that:-

(1) Application for amendment of pleadings should only be allowed if they are brought within reasonable time because to allow a late amendment would amount to an abuse of the due process. In this case the amendment came 6 years late.

(2) Amendments that contain allegations completely inconsistent with the previous pleadings in the same suit cannot be allowed late as they would delay fair trial and prejudice the other party.

(3) The learned judge exercised his discretion rightly and judiciously in refusing to grant leave to amend and there was no reason to interfere with the principles applicable as they were rightly applied.

The case of Shah –VS- Aperit Investments S.A & Another [2002] 1 KLR 150 also a court of appeal decision where the court held *inter alia* that:-

(1) It is trite law that a plaintiff will not be allowed to amend his arguments so as to introduce a new cause of action or to revive an action which is barred by statute at the time of the attempted amendment.

This court has given due consideration to the afore said rival pleadings and the same considered in the light of principles of law relied upon by either side and the court proceeds to make the following findings on the same:-

(1) There is jurisdiction to allow a party to amend its pleadings at any stage of the proceedings with the only caveat being that the leave to so amend at any stage of the proceedings is within the discretion of the court which discretion is now trite that it has to be exercised judiciously, with a reason, not capriciously and solely for purpose of doing justice to the parties.

(2) It is this same exercise of the court's discretion that the applicant seeks to avail itself of the reasons advanced are on the record but in a summary form and for purposes of reasoning and assessment these are that:-

(a)The trial has not commenced

(b)The issues sought to be introduced were discovered at the pre-trial conference.

(c)They intend to bring the real issues in controversy on board.

(d)The issue of limitation does not arise because the contracts were amalgamated and for this reason the plaintiff will suffer prejudice if the amendments not allowed.

(e)That the contracts are inter connected.

(3)The defendant/respondent chose to put forward grounds of opposition but in their submissions they have mentioned hire purchase agreements which are sought to be introduced which were allegedly defaulted upon earlier in time, that the agreement on the basis of which the plaintiff moved to court in the first instance. It is however clear that these allegations were not brought to the attention of the court by way of affidavits to enable the court and scrutinize them. For this reason the respondents reference to them holds no water as the same is a statement from the bar. It therefore follows that besides the factual position put forward by the applicant, there is no factual position from the defendant/respondent to controvert it.

(4)The reason stressed by the applicant has been the issue of amalgamation of the contracts to be introduced in the pleadings. There has been no deponment from the defendant to controvert the issue of amalgamation of contracts.

(5)It is evident that the main reason for resisting the amendment with regard to the introduction of the earlier hire purchase agreement was on the basis of them being time barred. Their default clauses having matured earlier. But there is silence on the issue of amalgamation. This silence gives the court an impression that indeed there was amalgamation and this being the case there is no need to deny the plaintiff a chance to be heard on the issue of amalgamation.

(6)It is evident that although it is 4 years since the filing of the suit to the time of seeking leave to amend, there has been not much mention of any prejudice to be suffered by the defendant considering that the suit has not taken off and there is room to compensate the defendant with costs and leave to amend their defence as well as leave to apply to strike out the suit on the same grounds of being statutorily barred which can best be brought on board by a pleading introduced by an amended defence on the basis of which an objection on limitation can be anchored and argued.

For the reasons given in the assessment and

(1)For the reasons given above, prayer 2 of the applicants application dated 6-12-2010 be and is hereby allowed.

(2)The amended plaint to be filed and served within 30 days from the date of the reading of this ruling.

(3)Leave to amend the defence granted to the defendant if they deem fit to do so.

(4)Time frame within which to move and amend the defence if need be is the time frame provided for within the rules.

(5)The defendant will have costs of the application.

Dated, read and delivered at Kisumu this 23rd day of September 2011.

**ROSELYN N. NAMBUYE
JUDGE**

RNN/va

