



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURTS
CIVIL CASE NO. 330 OF 2010

ULTIMATE ENGINEERING LIMITED.....PLAINTIFF/APPLICANT

VERSUS

**NAIROBI HEART INSTITUTE LIMITED t/a KAREN
HOSPITAL.....DEFENDANT/RESPONDENT**

RULING

By an application dated 26th April, 2011 the plaintiff sought leave to amend its plaint in terms of a draft amended plaint that was annexed to an affidavit sworn by **Paul Karicho Kithumbi**, the plaintiff's Finance Manager, in support of the application. In the intended amendment the plaintiff desires to join **Lalji Meghji Patel & Company Limited** as a 2nd defendant.

In the affidavit in support of the application the plaintiff stated that the proposed 2nd defendant had been sub-contracted by the plaintiff to undertake electrical installation works at the 1st defendant's establishment. In the suit the plaintiff is claiming a sum of **Kshs.6,212,667.68** being the amount due as interest on account of delayed payments by the 1st defendant.

The defendant filed grounds of opposition and stated, *inter alia*, that the plaintiff's application is an abuse of the court process as it seeks to defeat its application dated 6th April, 2011 seeking to strike out the suit altogether. The defendant also stated that the claim against the party sought to be enjoined by the plaintiff is statute barred.

On 22nd November, 2011 it was agreed by consent that the plaintiff's application be disposed of by way of written submissions which had been filed by the parties. I have carefully perused the submissions on record.

The plaintiff's arguments are that the defendant contracted the proposed 2nd defendant to construct a five storey ultra modern hospital and the proposed 2nd defendant sub-contracted the plaintiff to carry out electrical works at the said project. The plaintiff alleges that it was not paid the interest due on late payments and for that reason she instituted this suit to recover the said interest. That is why the plaintiff now intends to join Lalji Meghji Patel & Company Limited as a party to the suit.

On the other hand, the defendant stated in its statement of defence that there was no contract or sub-

contract between the plaintiff and the defendant and that the plaintiff had actually been sub-contracted by the main contractor i.e. Lalji Meghji Patel & Company Limited. The defendant further indicated that it had settled all payments with the said contractor. No reply to the defence was filed by the plaintiff.

The defendant's application dated 6th April, 2011 seeks to have the suit struck out on the ground that there was no privity of contract between the parties. But upon service of the said application the plaintiff filed the current application seeking to amend its pleadings as stated hereinabove. The defendant contends that the application is an abuse of court process in that it is intended to circumvent its aforesaid application. Secondly, the defendant stated that by dint of the provisions of **Section 4 of the Limitation of Actions Act**, the intended claim against the proposed 2nd defendant is statute barred since it is a claim based on contract and cannot be instituted after the end of six years from the date on which the cause of action accrued.

The claim by the plaintiff is for **Kshs.6,212,667.68** being interest as from **5th March, 2004 to 17th March, 2010**. From 5th March, 2004 the period of six years lapsed on 5th March, 2010. In response to the defendant's arguments, the plaintiff stated that no prejudice will be occasioned to the defendant if the proposed amendment of the plaint is allowed. The plaintiff added that the amendment does not raise any new claim. With regard to time limitation, the plaintiff stated that whereas the contract between the plaintiff and the proposed 2nd defendant was executed in 2004 the final account for works done was drawn up on 11th January, 2007. The amounts claimed became due in 2007.

The plaintiff cited the well known Court of Appeal decision of **EASTERN BAKERY vs. CASTELINO [1958] EA 461**, where the principles for amendment of pleadings were well considered and may be summarized as follows:

- (i) Amendments sought before hearing should be freely allowed if they can be made without injustice to the other side.**
- (ii) There is no injustice caused to the other side if it can be compensated with costs.**
- (iii) The court will not refuse an amendment simply because it introduces a new case.**
- (iv) There is no power to enable one distinct cause of action to be substituted for another nor to change, by means of amendment, the subject matter of the suit.**
- (v) The court will refuse leave to amend where the amendment would change the action into one of a substantially different character or where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation.**
- (vi) The principles applicable to amendments of plaints are equally applicable to amendments of written statements of defence.**
- (vii) A judge has discretion to allow amendment to the statement of defence to introduce a counterclaim provided that such an amendment does not transgress any of the aforesaid principles.**

The defendant cited the case of **JAMES OCHIENG' ODUOL vs. RICHARD KULOBA [2008] eKLR**, where the Court of Appeal held as follows:

“The provisions of the Civil Procedure Rules are not meant to aid a negligent pleader, more so where the effect will be to defeat an accrued defence. A careful reading of the rules clearly shows that the amendments to defeat an accrued defence may only be allowed in exceptional and peculiar circumstances, which in our view, is lacking here. In a case as this one where a plaintiff is reacting to a defence raised, the court should be slow in allowing amendments to the plaint which prima facie have the effect of defeating that defence.”

The plaintiff's application was filed nearly two years after the filing of the suit. There is no denial by the plaintiff that the application was necessitated by the defendant's application dated 6th April, 2011 seeking to strike out the suit. The issues raised in that application had been brought out much earlier in the amended statement of defence filed on 29th September, 2010. The plaintiff did not explain why no application for amendment of her plaint was made prior to the filing of the defendant's application aforesaid. I would agree with the defendant that the plaintiff's application is meant to defeat the defendant's defence. In **KASSAM vs. BANK OF BARODA (K) LIMITED [2002] 1 KLR 294**, Kuloba J. held that in exercise of the courts discretion in an application seeking to amend pleadings the following factors must be considered:

- (a) whether the amendment sought embodies a legally valid claim or defence;**
- (b) the reasons why the subject matter of the amendment was not included in the original pleading or offered sooner;**
- (c) delay or disruption of judicial administration; and**
- (d) the extent to which the amendment departs from the original claim or tends to complicate the issues.**

Having taken into consideration all the applicable principles, I am not inclined to exercise my discretion in favour of the plaintiff for the following reasons:

Firstly, the proposed amendment will be prejudicial to the rights of the defendant existing at the date of the proposed amendment in that it will deprive the defendant of the defence of limitation. In a contract, time begins to run from the date of signing of the contract and not when one party reconciles its accounts.

Secondly, the proposed amendment is also intended to circumvent the defendant's defence that there was no privity of contract between the parties. The application is unsustainable and is dismissed with costs to the defendant.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 2ND DAY OF DECEMBER, 2011.

D. MUSINGA
JUDGE

In the presence of:
Muriithi/Kirui – Court Clerks
Miss Othero for Mr. Khasiani for the Plaintiff
No appearance for the Defendant