



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS) Civil Case 79 of 2005

STANDARD CHARTERED BANK KENYA LIMITED.....PLAINTIFF

VERSUS

BIG BEE LIMITEDDEFENDANT

RULING

1. The plaintiff instituted this action against the defendant on 10th February 2005. The defence was filed on 7th July 2005, the records indicate that parties took some times sorting out issues of particulars of pleadings which culminated with the ruling of Waweru J dated 10th March 2006. It appears the plaintiff completed discovery by filling a further list of documents on 24th October 2008. On 8th December 2009 the plaintiff filed a chamber summons which is expressed to be brought under the provisions of order VI A rules 3 and 5 of the Civil Procedure Rules. The plaintiff is seeking for leave to amend the Plaintiff as per the attached draft amended Plaintiff.
2. This application is based on the grounds that since filing the suit, the defendant made further payments towards the reduction of the amount claimed in the Plaintiff which was Ksh.60 million but was subsequently reduced. This application is supported by the affidavit of Paul Wanyoike sworn on 7th December 2009. According to the plaintiff, there was an agreement between the plaintiff and the defendant in which the plaintiff as the chargee of the property known LR NO.209/10802, agreed to sell to the defendant the suit property at Ksh. 60,000,000/- according to agreed terms where the defendant was supposed to take possession after paying a deposit of Ksh.6,000,000/- and by paying the balance in equal fortnightly installments of Ksh.5,000,000/-.
3. The defendant defaulted in the payment of the purchase price as a result of which the plaintiff filed the present suit seeking for vacant possession, mesne profits and the shortfall incurred by the plaintiff in the suit premises. After the suit was filed, the defendant paid a sum of Ksh.24,331,481/= towards the liquidation of the outstanding amount. Thus the plaintiff has sought to amend the pleadings to reflect that sum paid.
4. According to counsel for the applicant the amendment will not cause the defendant any prejudice and or an injustice that cannot be compensated for by costs. It was argued that the court has the discretion to allow the amendments of pleadings sought before a

hearing so that all the issues in controversy can be adjudicated upon. The courts have freely allowed the amendments and there is a long line of authorities by the Court of Appeal.

5. This application was opposed by the defendant. Counsel relied on the replying affidavit sworn by Vipin Maganlal Shah sworn on 19th January 2010. According to the defendant, the amendments sought by the plaintiff seeks to introduce a new claim through the back door for reasons that the plaintiff indicated under paragraph 17 of the Plaintiff that the plaintiff had paid a sum of Ksh 27,349,079/- and the balance which was supposed to be due is Ksh.32,650,921/- with interest.
6. However the plaintiff is seeking for vacant possession in the amended plaintiff and another claim which they were well aware of before the suit was filed. There is no reason why the plaintiff failed to factor this information as at the time the action was filed. Counsel made reference to two persuasive decisions in the case of Patel vs. Amini 1988 KLR page 639 where Tanui J. found that an application for amendment made after 5 years after the suit was filed, was a mere afterthought. Moreover, a party who omits to sue in respect of a portion of its claim relinquishes that portion of the claim as per the provisions of order II rule 1(2) of the Civil Procedure Rules.
7. In a similar case, Kuloba vs. Oduor HCCC NO. 1 OF 2000 Visram J (as he then was) held that amendments sought to be made outside the period of limitation may be allowed where they flow from the same set of facts or substantially the same facts within the claim originally pleaded. It was argued that this application was brought after inordinate delay and there is no justifiable reasons shown as to why the applicant who had the information as at the time the original suit was filed did not include all the information
8. I have considered the pleadings and the rival submissions as summarized above. The amendments sought to be introduced are principally meant to reflect a sum of Ksh.24,331,481/- which reduces the original claim of Ksh.60,000,000/-. Amendments are generally allowed under the provisions of order VI of the CPR. The court is given wide powers to grant leave to amend pleadings at any stage of the proceedings and that power is discretionary. It is trite law that the exercise of judicial discretion gives the court flexibility to provide definitions according to the specifics of the case based on facts and the law. Leave is usually granted when it is necessary for the court to identify the real matters in controversy and to ensure that substantial justice is done.
9. The key elements for the courts to bring to bear are well settled in a long line of authorities by the Court of Appeal. Briefly the court should ensure that the amendments will not cause an injustice to the other side that cannot be compensated for with costs. Secondly, the purpose of the amendments is to cure a defect in the pleadings and to bring all the matters in controversy before the court for effectual determination of the matter so as to avoid a multiplicity of suits. The nature of the amendments and how they affect the character of the pleadings is another matter to consider.
10. The defendant's complaints are that the plaintiff waited until it was too late to seek to introduce a new claim which will cause prejudice to the defendant. I am not persuaded that may be so, I have looked at the proposed amendments and I hasten to add that the amendment is acknowledging a payment made by the defendant to the plaintiff on 7th April 2008. It actually reduces the original claim. The amendments sought although made almost two years later, will assist the court to determine the issues in controversy. Any inconvenience cause to the defendant can adequately be compensated for with costs. I accordingly allow the application. The plaintiff is given 14 days within which to amend the plaintiff. The defendant will also have leave to file an amended defence within 14 days of service.
11. The costs of this application will be in the cause.

RULING READ AND SIGNED ON 26TH MARCH 2010 AT NAIROBI.

M.K. KOOME
JUDGE