



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 404 of 2003
KENYA COMMERCIAL BANK LTD. PLAINTIFF

VERSUS

OSIEBO TRADING CO. LTD.
& 2 OTHERS DEFENDANTS

RULING

This application is brought by a Chamber Summons dated 15th September, 2009 and taken out under **Order VI A Rules 3, 5 and 8 of the Civil Procedure Rules, Section 3A of the Civil Procedure Act**, and all other enabling provisions of the law. The Plaintiff/Applicant seeks the following orders from the Court –

1. *That this honourable court be pleased to grant leave to the Plaintiff to amend the plaint herein as per the draft amended plaint annexed to the application.*
2. *That the said draft plaint be deemed as duly filed upon payment of the requisite fees.*
3. *That the costs of this application be costs in the cause.*

The application is supported by the annexed affidavit of Jamila Mohammed, the Plaintiff's Advocate, and is based on the grounds that –

- (a) *The plaint herein contains several inadvertent errors which need to be corrected to properly plead the plaintiff's case and enable this Court appreciate the real issues between the parties.*
- (b) *It is necessary to amend the plaint to enable this honourable court adjudicate on all and the real questions in controversy between the parties.*
- (c) *The Defendants shall not suffer any prejudice if leave to amend is granted.*
- (d) *The application has been brought expeditiously and without any reasonable delay once the need to amend was noted.*

In opposition to the application, the Defendants' Advocates filed the following grounds of opposition –

- (i) *That the amendments seek to introduce a new cause of action.*
- (ii) *That the proposed amendments introduce a claim for higher figures and a claim on a separate property which claims are time-barred.*
- (iii) *That the claims sought to be introduced are time-barred by the statute of limitation.*
- (iv) *That to allow the amendments would be to deny the Defendants legitimate defences of limitation.*

Each party filed written submissions and adopted the same without any additions. After considering the pleadings and those submissions, I find that there are essentially four issues that arise for determination. These are (a) whether the proposed amendments introduce a new cause of action; (b) whether the proposed amendments introduce a claim for higher figures and a claim for separate property which claims are time-barred; (c) Whether the claims sought to be introduced are time-barred; and (d) whether to allow the amendments would be tantamount to denying the Defendants legitimate defences of limitation.

A quick perusal of proposed draft plaint reveals that the alleged new cause of action is two-pronged. Firstly, it is based on the grounds that the initial plaint sought recovery of Kshs.4,274,412.78 while the proposed amended plaint pleads the sum of Kshs.4,280,141.68 as at 30th April, 2002 rather than 23rd April, 2002. Secondly, while in the original plaint the Plaintiff was claiming a lien over the 2nd Defendant's property known as L.R. 13872, Karen, the draft amended plaint shows that the Land Reference Number is **13827** and not **13872**. **Order VI A Rule 3 (5) of the Civil Procedure Rules** provides that –

“An amendment may be allowed under subrule (2) (referred to hereinafter) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in a suit by the party applying for leave to make the amendment”.

It is clear from the proposed amendment that there is no new cause of action. The only change is with regard to a figure, which does not change the cause of action. Even if the new figure were to be construed as constituting a new cause of action, such a cause would still be curable as it arises out of the same facts as the cause of action in respect of which relief has already been claimed by the Plaintiff.

Secondly, the change in the description of the property relates only to a change from L.R. No. 13872 to 13827. Whereas, prima facie, these two numbers refer to separate pieces or parcels of land, one notes that the first 3 digits in both numbers are the same, and that the change affects only the last two digits to read 13827 instead of 13872. I am persuaded by the Plaintiff's submissions that the purpose of this alteration was to describe the correct property, and that reference to No. 13872 as appears in the original plaint was a typographical error which is being corrected to reflect the correct Land Reference Number. In the case of **PATEL v. JOSHI (1952) 19 EACA 42**, Sir Barclay Nihill said of amendments –

“Amendments are allowed as a concession to human liability or error, not to enable a litigant to play fast and loose with his opponent and the Court.”

Furthermore, in the 12th Edition of “Precedents of Pleadings”, by Bullen & Leake & Jacob, the learned authors say at page 124 -

“The guiding principle of cardinal importance on the question of amendment is that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings. The rule of conduct of the Court is that, however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”

Even if the original pleadings were faulty owing to the negligence or carelessness in drafting, it is excusable provided that the amendment can be made without injustice to the other side, and there is no injustice where the other side can be compensated by costs.

The 2nd, 3rd and 4th grounds of opposition can be taken together as they all relate to limitation of actions. **Order VI A Rule 3 (2) of the Civil Procedure Rules (referred to hereinabove)** states –

“Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is

made after any relevant period of limitation current at the date of filing the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it feels just so to do.”

This subrule arose for consideration in the case of **KULOBA v. ODUOL [2001] KLR 647** in which it held that the periods of limitation do not confer any right to a Defendant but only impose an obligation on the part of the Plaintiff to bring his claim within the stipulated period. Once the claim is brought within the period, amendments can be allowed even outside the period of limitation in a specified situation. Amendments outside the period of limitation may therefore be allowed in cases where they flow from the same set of facts or substantially the same facts with the claim originally pleaded. It is my considered view that the amendments sought in this application arise out of substantially the same facts with the claim as originally pleaded and therefore, I find it just to grant the leave sought for amendment.

For the above reasons I make the following orders –

- 1. The Plaintiff is hereby granted leave to amend the plaint herein as per the draft amended plaint annexed to the application as prayed.*
- 2. The said draft plaint shall be deemed as duly filed upon payment of the requisite fees within 14 days from today. The same to be served upon the Defendants within 7 days of filing.*
- 3. The Defendants shall be at liberty to file and serve an amended defence thereto within 7 days of service if it so wishes.*
- 4. The Plaintiff to be at liberty to file and serve a reply to the amended defence if it so wishes.*
- 5. The Plaintiff will bear the Defendants’ costs of this application in any event.*

Dated and delivered at Nairobi this 6th day of May, 2010.

L. NJAGI

JUDGE