



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT 229 OF 2005

AFROFREIGHT FORWARDERS LIMITEDPLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION1ST DEFENDANT

UGANDA RAILWAYS CORPORATION2ND DEFENDANT

RULING

This is an application by the 1st Defendant, the Kenya Railways Corporation for leave to amend its Defence herein. The Application is made under the provisions of Order VIA 1 Rule 3(1) and Order VI(5) Rule of the Civil Procedure rules. The application is said to be based on the grounds that:-

- 1. The plaintiff filed the suit here on 30th October 2005 or thereabouts claiming inter alia both special and general damages allegedly arising from some demurrage charges and costs of replacing alleged lost containers. The 1st Defendant filed its Defence herein on the 5th December 2005 and/or thereabouts.*
- 2. The plaintiff at the time of filing its suit herein, did neglect and/or failed to disclose in its pleadings the relevant period and/or time when its cause of action arose and more specifically the transactions pursuant to which its claim arose.*
- 3. The 1st Defendant has now established from the plaintiff's documents filed in court on 16th December, 2008 but only served upon it on 24th June 2009, that the plaintiff's suit emanated from a transaction which the parties herein concluded in the year 1999 and/or thereabouts. The plaintiff suit is filed herein is therefore statute barred by virtue of section 87 of the Kenya Railways Corporation Cap 397 Laws of Kenya.*
- 4. The 1st Defendant wishes to amend its Defence to inter alia, specifically plead limitation of actions and to incorporate the element of the plaintiff's claim having*

been overtaken by events.

5. *The proposed amendment will enable the court determine the real dispute between the parties herein and do injustice in the matter.*
6. *The amendment is proposed in good faith and the plaintiff/Respondent will not suffer any prejudice.*
7. *It is in the great interest of justice that the proposed amendments be allowed and the draft Amended Defence be deemed duly filed and served upon payments of the requisite court fees.*

The application is supported by an affidavit sworn by Nduva Muli, the Managing Director of the 1st Defendant.

The Application is opposed by the plaintiff which has filed an affidavit by its Managing Director, Cyrus Waithaka on 28th October 2009 which inter alia states that:-

- It is not true that the matter was filed out of the stipulated time as the action was founded on a contract arising out of transactions entered into between the plaintiff and Defendants on diverse dates between the years 1999 and 2002 for provision of railage services.
- That both Defendants were under a contractual obligation to provide the said services in time to avoid accrual of demurrage breached their contractual obligation by failing to rail the plaintiff's containers to avoid accrual of demurrage as a result of which the plaintiff suffered much loss and damage.
- That as a consequence of their breach thereof, the instant suit was filed in the year 2005, which time, or I am informed by my advocates on record and was within 6 years as stimulated period for such actions founded on contract by virtue of Section 4 of the Limitations of Actions At Cap 22 Laws of Kenya and as such was rightfully filed within time.
- That the plaintiff/respondent has a valid claim against the Defendants/Applicants and it should be allowed to ventilate the same through the court process and that the allegations that the claim herein is overtaken by events and untenable in law is unmerited.
- That the Application is brought in bad faith, is ill-conceived and a delaying tactic calculated to deny the plaintiff/respondent an opportunity to be heard and to prevent the matter from proceeding to full trial as the same is based purely on presumptuous evidence.
- That the intended amendment does not raise any or any serious issues that

will determine the real dispute between the parties herein is alleged.

- That the grant of the orders would greatly prejudice the plaintiff
- (a) as the plaintiff has been and will continue to be delayed for too long from prosecuting this matter as it has never proceeded to full trial, the same having been filed in 2005.
- (b) The Defendants are attempting to evade liability for loss and damage occasioned to the plaintiff and are therefore not entitled to the exercise of this court's discretion in their favour.

I have considered the application, the affidavits and submissions by Counsel.

The Court of Appeal in the **Case of CENTRAL KENYA LIMITED –V- TRUST BANK KENYA LTD (2002) 2 E.A.,365** laid down the principles to be considered in application for amendment of pleadings and joinder of parties. The court held:-

- **The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action.**
- **A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided:-**
 - (i) **There had been no undue delay**
 - (ii) **No new or inconsistent cause of action was introduced,**
 - (iii) **Nor vested interest or accrued legal right was affected and**
 - (iv) **The amendment could be allowed without injustice to the other side.**
- **Accordingly all amendments or joinder should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs – see BEOCO –V- ALFA LAVA CO. LTD (1994) 4 AII E.R. -464 adopted.**
- **Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend.**
- **The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.**

This court is guided by the foregoing principles and considerations.

The suit herein has not proceeded to trial: what the 1st Defendant states is that the Plaintiff in its plaint did not plead or disclose when its cause of action had arisen. I have carefully perused the plaint dated 30th October 2005 and quite glaringly there are no dates or time referred to or mentioned. The plaint is detailed and refers to the contract, the

alleged breaches and subsequent loss and damages. There is no reference to the date of the contract, the dates of breaches, the dates of the losses.

The 1st Defendant said that it came to know of the details of the time of the cause of action doing discovery. The plaintiff filed its List of Documents in court on 16th December 2008. The application was filed on 8th July 2009.

I do find that the 1st Defendant could not have found or determined the dates of Cause of action by reliance on the plaintiff. The plaintiff was certainly deficient in this regard and the 1st Defendant was entitled to apply for further and better particulars of the plaintiff before filing its defence.

The issue of date of the contract and when the cause of action could have arisen or did arise are crucial issues in this dispute. If Limitation arose as a result of Statutory provisions of the law, then the 1st Defendant was entitled to raise the question of limitation in its defences.

If the plaintiff had made full disclosures in the plaintiff then this application for amendment may not have arisen. There is no unreasonable delay from the time the discovery was done when the plaintiff filed its list of documents on 16.12.2008. In any case, any delay if any can be reasonably compensated for costs.

There is no prejudice to the plaintiff as there are no vested interest or accrued legal rights which will be affected by the intended amendments.

In any case, the question as to whether there the action is time-barred or not can only in my view be determined in this case upon the full trial of the case in the circumstances. Even if it was possible for such determination on the pleadings, I think that it is fair and just for the 1st Defendant to prove this head of defence at the trial. It would be prejudicial for the 1st Defendant to apply for dismissal of suit if the amendment is allowed.

I do hold that the amendment herein is necessary to determine all the real question in controversy between the parties.

I do therefore grant prayer (a) of the Chamber summons dated 6.07.2009. The 1st Defendant shall file and serve the Amended Defence within the next 21 days. The plaintiff and the second defendant are granted leave to file their Reply to the Amended Defence and Amended Defence respectively within 21 days of being served. The 1st Defendant shall pay the costs of the application to the Plaintiff.

The leave to amend is granted to the 1st defendant on condition that it shall not apply to strike out or dismiss the plaintiff's suit on grounds of limitation of Actions and the matter shall go for full trial.

Dated and delivered at Mombasa this 12th day of July 2010.

M. K. IBRAHIM
J U D G E