REPUBLIC OF KENYA

HIGH COURT OF KENYA AT NAIROBI MILIMANI COMMERCIAL COURTS

Civil Suit 937 of 1986

GEORGE GIKUBU MBUTHIA…………..…………………..………PLAINTIFF

VERSUS

CONSOLIDATED BANK OF KENYA LIMITED.………1ST DEFENDANT

PETER NJERU MUGO……………………….………….2ND DEFENDANT

R U L I N G

This is a Chamber Summons application dated 25th November, 2008 filed by the Plaintiff in this suit, seeking to amend his plaint (allegedly) dated 25th March, 1986. The Plaintiff is acting in person. The application is brought under Order VIA of the Civil Procedure Rules. Eight grounds are cited on the face of the application in its support namely;

1. The Plaintiff filed this suit via the Plaint dated 25th March, 1986 but to date, the suit has never been heard and conclusively determined.

2. Thereafter, the applicant sought leave to amend the plaint and the Honourable Court (Ms Justice Walekwa as she then was) granted such leave and an Amended Plaint was filed on 17th December, 1991.

3. Hitherto, the first defendant had been placed under Statutory Management on 11th August, 1986 by Central Bank of Kenya Ltd, and no leave had been obtained under section 228 of the Companies Act so that the Amended Plaint became a nullity.

4. The subsequent proceedings and orders given by the courts in reliance of the Amended Plaint and the Amended Defences and Counter-Claims were equally a nullity.

5. It is trite law that amendments to pleadings sought before a hearing ought to be freely allowed unless they will cause injustice to the opposite site.

6. It is clear in this case that no injustice will be caused if the amendments are allowed on the primary ground that the contract upon which the defendants relied on in their transactions of 13th February 1986 is a nullity *ab initio* having been ousted by Section 35 (1) and (2) of the Advocates Act.

7. It is trite law that in special circumstances amendments of a plaint will be allowed notwithstanding that the effect will be to defeat a defence of limitation.

8. It is also trite law that the overriding consideration in an application for leave is whether the amendments are necessary for the just determination of the controversy between the parties. Delay is not a ground for declining to grant leave.

The application is supported by the Plaintiff's affidavit of even date and a further affidavit by the Plaintiff dated 2nd March, 2009. I have considered the contents of these affidavits.

The application is opposed. The 1st Defendant has filed grounds of opposition dated 10th March, 2009 in which nine grounds are raised. The grounds form part of the submission by Mr. McCourt for the 1st Defendant and will be considered in due course.

The 2nd Defendant, who is an advocate and acts in person, has also opposed the application. He has filed a replying affidavit dated 15th December, 2008 and a further affidavit dated 2nd March, 2009 which I have considered.

I have considered the application as well as submissions made by the parties in this case. I will summarize the submissions as follows:

The Plaintiff has urged that the amendment sought was necessary since the amendment made to the plaint by the Plaintiff pursuant to the order granted by Judge Walekwa, was a nullity by reason of the fact that the Plaintiff did not first seek leave under section 228 of the Companies Act, to institute the proceedings against the 1st Defendant after the latter was placed under Statutory Management by the Central Bank of Kenya.

There are two objections raised by the 1st Defendant on technicality. The 1st Defendant has urged that the proposed amendment is a further amendment since the Plaintiff amended its plaint on the 29th July, 1998. The second technical point raised is that the amendment contravened Order VIA rule 7(2) and (3). The draft amended plaint is annexed to the application and it is underlined in red. The title of the amended plaint is "Amended Plaint" which is a fatal error because this is not the first time the plaint is being amended. Order VIA rule 7(2) and (3) provides as follows:

"***O.VIA r.7(2) All amendments shall be shown by striking out in red ink all deleted words, but in such a manner as to leave them legible, and by underlining in red ink all added words.***

(3) Colours other than red shall be used for further amendments to the same document."

I have looked at the draft amended plaint annexed to the application and I agree with the 1st Defendant that the pleading contravenes the mandatory provisions of the above rule. There is no indication that this is a further amendment to the plaint. Being a further amendment, the Applicant should have used any other colour to indicate amendment sought to be introduced and red ink to indicate previous amendments. This was not done, which means that the draft amended plaint as it is does not speak for itself. It does not show what is being introduced in the pleading for the first time and what was amended before, or what is being deleted. It is a wrongly drafted pleading which leaves the reader in total confusion and totally unclear as to the changes being sought to be introduced. On this ground alone, the application should be struck down for being defective.

There are many other grounds urged by the Defendants why this application should not succeed. The 1st Defendant has raised issue challenging the proposed amendments on the grounds that the Plaintiff seeks to introduce new causes of action which are statute barred. It is trite law that in special circumstances, amendments to a plaint will be allowed notwithstanding that the effect will be to defeat a defence of limitation. The Plaintiff has answered this issue with ground 7 on the face of the application where it is stated;

"***It is trite law that in special circumstances amendments of a plaint will be allowed not withstanding***

that the effect will be to defeat a defence of limitation*."*

The Plaintiff has to show special circumstances that warrant the court to grant the prayers sought. There are no special circumstances demonstrated by the Plaintiff. He has been aware of the facts sought to be pleaded in the amendment all along, and they are by no means issues he was unaware of, or those he could not have known had he exercised due diligence. In any event he has not pleaded or alleged that he was not aware of these facts. The Plaintiff has therefore no excuse for his failure to amend the plaint earlier. I think that to apply to amend a pleading 22 years after the suit was filed, on the basis that at the time the earlier amendment was made (which was in 1991, seven years ago) it was a nullity to do so, is not a reasonable or acceptable excuse.

Is it justifiable to allow the amendment even though the effect would be to defeat the defence of limitation? As I have already found the Plaintiff has not shown the existence of any special circumstances to warrant the order sought notwithstanding limitation. The amendments sought are not only introducing new causes of action but in addition are introducing causes of action which are statute barred. Mr. McCourt for the 1st Defendant has sought to rely on the Eastern African Court of Appeal decision of **Eastern Bakery v Castelino [1958] EA 461** for the preposition that an amendment should not be allowed to contravene section 4(1) of the Limitation of Actions Act. At page 462 of the authority the court held:

"***But 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. 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 accrued since the issue of the writ. The main principle is that an amendment should not be allowed if it causes injustice to the other side."***

Counsel also relied on the case of **James Oduol t/a Ochieng Oduol & Co advocate v Richard Kuloba C.A. No 2 of 2002** for the same preposition. These authorities stress that no amendment should be allowed if they cause injustice to the other side.

The 2nd Defendant also raises a further ground that further to the two points urged by the 1st Defendant, the new causes of action being sought to be introduced contravene Order VIA rule 5 of the Civil Procedure Rules. The 2nd Defendant urged that the matters being introduced were subject of decisions by the High Court and the Court of Appeal where the Plaintiff's attempt to introduce the same matters were denied and dismissed. The Plaintiff has not denied that the proposed amendments were subject of the decision of this court and of the court of appeal. All the Plaintiff urged is that special circumstances warranted the orders sought to be made.

It is not enough to allege special circumstances without demonstrating them. The Plaintiff has not brought himself within the exemption to this general rule.

The other issue is whether any injustice will be caused to the Defendants. The 1st and the 2nd Defendants have decried the intended amendments on the grounds they stand to suffer prejudice which cannot be compensated by an award of costs. For this preposition the 1st Defendant has relied on the case of **Omar v Cargo Handling Services Ltd 1985 KLR 837**. In cited case the High Court held that amendments should freely be accepted if no prejudice is caused to the other party.

The Plaintiff on his part has urged that he will suffer injustice if the amendments are not allowed as his house was sold by the 1st Defendant without any contract existing between him and the 1st Defendant. That argument does not explain the inordinate and prolonged delay in bringing this application as the grounds on which it is based were within the knowledge of the Plaintiff all along. In any event, I find that no amount of costs can compensate the Defendants for the loss of the defence of limitation, the costs for the delay in having the matter finalized and for the fact the subject matter of this case has since been

disposed off to parties not parties to this suit.

I have also considered the previous plaint and the ‘amended’ plaint annexed to this application. It is my view that the amendments sought if allowed, will put the Defendants in most invidious position in that the amendments will allow the Plaintiff to change the direction of his case and thrust against the Defendants. This, coming after such a long lapse of time, and after a change in the circumstances of the case as alluded to above, will be unjust to allow the amendment.

I have come to the conclusion that the interests of justice and fairness will not be served if this application is allowed. There are no justifiable circumstances, real or imagined, which could warrant this court to grant the prayers sought in this application for the reasons given. **The only order I can make is therefore to dismiss the application with costs, which I hereby do.**

Dated at Nairobi this 30th day of April 2009.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. George Gikubu Mbuthia in person/Applicant

Mr. Mugo holding brief Mr. McCourt for the 1st Respondent

Mr. Mugo Advocate for self

LESIIT, J.

JUDGE