



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Case 2983 of 1989

VALENTINOS FOOTWEAR MANUFACTURER LTD.....PLAINTIFF

V E R S U S

DEVELOPMENT FINANCE CO. OF KENYA LTDDEFENDANT

J U D G M E N T

This is an appeal by the Plaintiff under **Order 48, rule 5(2) & (3)** of the **Civil Procedure Rules** (the **Rules**). It was brought by way of **chamber summons dated 19th April, 2007**. It is against the **order of a Deputy Registrar of the court dated 12th April, 2007** by which the Plaintiff's application for leave to amend the plaint was refused.

There are 7 grounds of appeal. All are to the effect that the Deputy Registrar failed to exercise his discretion in accordance with established principles, thereby resulting in gross injustice to the Plaintiff.

I have considered the submissions of the learned counsels appearing, including the authorities cited. I have also read the ruling of the learned Deputy Registrar and the application that gave rise to the ruling. The application was refused upon the main ground of delay. The learned Deputy Registrar held that there was delay that would prejudice the Defendant. Otherwise, the Deputy Registrar had found that no new cause of action would be introduced by the intended amendments and that even if there was, the same would be founded on the same facts as the original claim. The intended amendments were to enable the Plaintiff to plead special damages arising from events that were said to have occurred after institution of the suit.

The suit was filed in 1989. The Deputy Registrar found that the last time the court had been moved in the suit was in 1991. The Deputy Registrar also found that it appeared that since that year the Plaintiff was aware of the actions of the receivers/managers appointed by the Defendant, which actions constituted the cause of action for the special damages that the Plaintiff now wished to claim. The Plaintiff tried to explain the delay by saying that the court file had gone missing at some point. The Deputy Registrar was not impressed by that explanation. He held that there was no shred of evidence that the court file had gone missing.

The Deputy Registrar found that it would greatly prejudice the Defendant to allow it to be confronted by a fresh claim of special damages in the sum of KShs. 358,200,000/00 some 17 years after the suit was filed, after being led to believe, by the Plaintiff's inaction, that it had abandoned any such claim. The Deputy Registrar finally held that the prejudice that would be suffered by the Defendant in allowing the

amendments sought could not be compensated by an award of costs.

The power of the court to grant or refuse leave under **Order 6A, rule 3** of the Rules is an exercise of discretion. An appellate court should not interfere with the exercise of the discretion of a lower court unless it is satisfied that the court misdirected itself in some matter and as a result arrived at a wrong decision, or that it is manifest from the case as a whole that the court was clearly wrong in the exercise of its discretion and that as a result there has been injustice. See the case of **Mbogo & Another –vs- Shah [1968] E.A. 93**, a decision of the **East African Court of Appeal**.

Did the Deputy Registrar misdirect himself in some matter and as a result arrived at a wrong decision? Is it manifest from the case as a whole that the decision of the Deputy Registrar is clearly wrong? Learned counsel for the Plaintiff raised two points. He submitted that delay alone is not a sufficient ground to refuse an application for leave to amend. He relied on **Mulla on the Code of Civil Procedure, Vol. 11 II. Page 1182** where it is said that a delay in making an application for an amendment may be a ground for doubting the genuineness of the amendment sought but not good ground for refusing the application. This may be so, especially considering, as a general rule, that leave to amend ought to be liberally granted, unless there will be prejudice to the other side. Rule 3 of Order 6A of the Rules also does not set a time limit within which an application to amend may be made. The court may, **at any stage of the proceedings**, on such terms as to costs or otherwise as may be just, and in such manner as it may direct, allow any party to amend his pleadings.

Learned counsel for the Plaintiff also argued that there was no evidence of any prejudice suffered by the Defendant. It is to be noted that the learned Deputy Registrar did not refuse the application to amend merely upon the ground of the long delay *per se*, but also upon the further ground that the delay had occasioned the Defendant prejudice, after it was led to believe by the Plaintiff's long inaction that there would be no claim based upon the receiver/manager's possession of the premises.

Here was a plaintiff who sought to raise a claim for special damages of over KShs. 300 million **17 years after** the suit had been filed and 18 years after the cause of action arose. Can it be said that there would be no prejudice to the Defendant? For one thing, the defence of limitation would not be available to it because amended pleadings refer back to the time of the original pleadings. The affidavit sworn in support of the application to amend was sworn by the Plaintiff's advocate. It contains no explanation at all for the very long delay in seeking leave to amend. Even in the further affidavit sworn by one MARTIN WAINAINA KINYANJUI filed on 12th July, 2006 there is no satisfactory explanation for the delay. He simply says at paragraph 13 thereof that he was not informed of the vandalization of the property by the receiver appointed by the Defendant and came to learn of it "**after many years after the filing of suit**".

A litigant who sleeps on his rights does not deserve the discretion of the court. You cannot sleep for 17 years then seek to slap the opposite party with a special claim of over KShs. 300 million yet offer no sufficient explanation why you did not seek amendment sooner, especially where the amendment will deprive the opposite party of his legal defence of limitation.

Having considered all the matters placed before the court, I do not find any misdirection by the Deputy Registrar on any matter that resulted in a wrong decision. It is also not manifest from the record as a whole that the Deputy Registrar was clearly wrong in the exercise of his discretion and that as a result there has been injustice.

This appeal has no merit. It is hereby dismissed with costs to the Defendant.

It is so ordered.

DATED, SIGNED AND DELIVERED AT NAIROBI

THIS 15TH DAY OF APRIL, 2009

H. P. G. WAWERU

JUDGE