



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI
(MILIMANI LAW COURTS)
CIVIL CASE 5038 OF 1989

MUSHIMIYIMANA AIMABLE PLAINTIFF

VERSUS

JONATHAN LEAKEY LIMITED 1ST DEFENDANT

OBED OMARI MOGERE 2ND DEFENDANT

RULING

The first defendant has moved the court by way of Notice of Motion dated 25th August, 2008. The same is brought under order 6A Rules 3 & 6, Order 7 Rule 1 and Order 14 Rule 2 of the Civil Procedure Rules. The motion is supported by the Affidavit of *Jonathan Harry Erskine Leakey*.

The Motion is seeking for orders that:

- 1. The proceedings against the 1st defendant be struck out.**
- 2. In the alternative the question of Law as to whether the claim is barred by Limitation be decided before any evidence is given or any issue of fact is tried**
- 3. The costs of the application be paid to the Plaintiff.**

On his part the Plaintiff filed grounds of opposition dated 10th November, 2008 as follows:

- 1. The application is of no consequence since leave was granted by the Deputy Registrar and the same has not been challenged and the amendment replaced the original plaint and the amendment effects run from the time the suit was filed and suit is not time barred.**
- 2. There is no need to have Verifying Affidavit after amendment of the plaint.**
- 3. The Application cannot be dealt with until the appeal made against the amendment is determined by the court**

4. **The issue of leave does not arise whatsoever since leave to amend was granted and the Re-Amended Plaintiff file in court on time.**
5. **The fact of raising a Preliminary Objection on the suit being time barred can only be done at the hearing of the suit and not before**
6. **The Re-Amended Plaintiff filed on 6/12/2008 stands and the suit can be heard on this plaintiff.**
7. **The application has no merit whatsoever and should be dismissed.**
8. **That there is no difference between the Amended Plaintiff and Further Amended Plaintiff**

The 1st defendant's case is that the claim against him was barred by limitation under the Limitation of Actions Act Chapter 22 of the Laws of Kenya and was barred by the time leave to amend the plaintiff was granted on the 28th of May, 2008. That the Amended Plaintiff filed by the Plaintiff on 6th June, 2008 departed in substance from the draft Re-amended plaintiff annexed to the application seeking leave to amend. That on 12th June, 2008 the Plaintiff amended the amended plaintiff without leave of court. The Plaintiff took issue with the fact that the Amended Plaintiff of 6th June, 2008 and the **Further Amendment to the Amended Plaintiff** did not comply with Order VII Rule 1 (c) of the Civil Procedure Rules. Lastly the Amended Plaintiff and the **further amendment to the Amended Plaintiff** were not accompanied by a Verifying Affidavit.

In opposition the Plaintiff relied on the grounds of opposition and submitted that the application is of no merit. The Plaintiff's case is that there is an appeal filed raising similar issues as this particular application, and that if the appeal is heard first it will determine the issues before court, therefore the appeal should be heard first.

The Plaintiff's counsel submitted further that the typo graphical errors on the amended plaintiff can be corrected as there is no dispute as to the date of the accident being the 25th August, 1989. He also stated that failure to file a Verifying Affidavit was not fatal. It was further submitted that the Plaintiff can seek leave even if the claim is time barred.

Having read the application, the affidavit in support, the grounds of opposition, submission by counsels for both parties and the authorities cited, I find that there are several issue for determination by the court and I list them as follows:

1. **Whether this application can be dealt with before the appeal is heard.**
2. **Whether the Further amendment to the Amended plaintiff is properly before the court and if so whether the Further amendment to the Amended plaintiff is defective for failure to be accompanied by a Verifying Affidavit.**
3. **Whether the claim against the 1st defendant is barred by the Limitation of Actions Act Chapter 22 of the Laws of Kenya**

I will deal with each issue raised under the separately as follows:

- A. Can the Notice of Motion be dealt with before the appeal is heard?

I see no reason why the 1st defendant cannot prosecute this application. The memorandum of appeal is no bar to the 1st defendant's decision to make this application. I agree with my brother Waweru J in his ruling of 21st January, 2009, that there will be no prejudice at all to the Plaintiff if this application is disposed of. In any event the appeal is not yet ready for hearing. This indeed may be a quicker way of determining issues that have been raised in the appeal and in the current application.

B. Whether the Further Amendment to the Amended Plaintiff is properly before the court and whether the Further Amendment to the Amend Plaintiff is defective for failure to be accompanied by a Verifying Affidavit

Since the original plaintiff was accompanied by a verifying affidavit there is no requirement that an amended plaintiff ought to be accompanied by another. Order VII Rule 1(2) only requires a plaintiff to be accompanied by a verifying affidavit order VIA does not place any requirement on amended plaintiff either.

In *STOCKMAN ROSEN KENYA LTD vs. DAGAMA ROSE GROUP OF COMPANIES LTD (2002) IKLR at 572 Mwera J* held inter alia

“Order VII of the Civil Procedure Rules does not require any verifying affidavit to accompany an amended plaintiff or indeed any other pleadings, save the plaintiff originating the action. Once verifying affidavit once filed remains in effect.”

Therefore, it follows that, failure to accompany both Amended plaintiff with and the **Further amendment to the Amended Plaintiff** with a verifying affidavit by itself, does not render the same defective. But is this **Further amendment to the Amended plaintiff** properly before the court?

The genesis of **the Further amendment to the Amended** plaintiff is the draft Re-Amended Plaintiff is the draft Re-Amended Plaintiff annexed to a supplementary affidavit in support of the amendment sought by the Plaintiff herein. On 28th May, 2008 the Deputy Registrar made an order allowing the Plaintiff's application dated 11th December, 2006 to add/enjoin the 1st defendant to the proceedings and leave to amend the plaintiff as per the draft Re-Amended plaintiff. Pursuant to the said order the Plaintiff filed an amended plaintiff dated 2nd June, 2008. On court record there is a **further Amendment to Amended Plaintiff** with remarks (Amended Pursuant to court order made on 28th May, 2008) The court notes that this **further amendment to the amended plaintiff** was indeed not filed pursuant to the order of 25th May, 2008 as it purports, as on the 6th of June, 2008 an Amended Plaintiff was filed. No leave to amend the plaintiff further was obtained after filing the Amended Plaintiff on 6th June, 2008. The question to be addressed is the implication of this new creature dubbed the **“Further Amendment to the amended Plaintiff”** The Plaintiff is silent on this new creature. However in the grounds of opposition the plaintiff states in paragraph 6

“The Re-amended plaintiff filed on 6th December, 2008 stands and the suit can be heard on this plaintiff” is this really the correct position in Law? I think not. As the effect of an amended pleading is to supersede and replace the one it purports to replace, this new creature replaced the amended plaintiff of 6th June, 2008. In which case this is the pleading now to be considered. However as no leave was granted to file the same, it is in my view illegally in court.

MUTUKU & 3 OTHERS vs. UNITED INSURANCE CO. LTD (2002) 1 KLR at 250 Ringera J held –

“(2) Where a pleading has been amended and the same has been struck out, the party affected has simply no valid pleading left on record.

(3) The Effect of an amended defence is to supersede and replace the original defence.

(4) The further amended defence was a nullity as it purports to amend the amended defence which was a nullity.”

The upshot of the matter is that the **Further amendment to the Amended plaintiff** is not properly before the court. Having come to the said conclusion it is therefore inevitable for the court to find that since the said pleading is illegal it must be struck out therefore leaving no valid pleading on record.

C. Is the claim against the 1st Defendant barred by the Limitation of Action?

Although this issue was raised before the Deputy Registrar, in his ruling of 25th May, 2008 he did not address this issue. In the said ruling he stated –

“This leave to amend is not necessarily a leave to amend out of time and the issue of Limitation may be canvassed later -----”

The cause of action herein arose on the 28th of August, 1989, 20 years or so before the application to join the 1st defendant to the suit. S. 4(2) of the Limitation of Action Act Chapter 22 of the Laws of Kenya provides –

“An action founded on tort may not be brought after the end of three years from the date on which the cause of action accrued”

The counsel for the Plaintiff has urged the court that time runs from the date suit was filed. The original plaint was filed in 1989. The 1st Defendant’s counsel on the other hand submits that the claim against the 1st defendant is time barred. In OTIENO Vs. OMORO CIVIL SUIT NO. 52 OF 1976 AT 677 Trainor J. held –

- “1. Where an amendment has the effect of adding a new party that new party should not be prejudiced.**
- 2. Any defence available to the added party will be open to him as if the proceedings had been first instituted at the time of granting of the amendment, in this instance the defence of Limitation.**
- 3. The Limitation period is calculated up to when the proceedings are instituted, in the case of an added party time continues to run until the amendment adding him as a defendant is ordered.**
- 4. The amendment order should be treated as if there has been a fresh suit on the date the orders are made. To permit the proceedings to continue against the new party as if the amendment never took place, would be to allow the amendment to have a retroactive effect to the date the original plaint was filed would be prejudicial to the rights conferred on by the Law of Limitation**
- 5. There is a distinction as laid out in the Civil Procedure Rules between the substitution of a party or addition of a party to proceedings and the amendment of the pleadings, and the position in the instant case is governed by Order 1 Rule 10.**
- 6. At the time the name of the new party was added, the plaintiff had lost the right to sue and the only option available was to obtain leave of the court to institute proceedings out of time as laid out in section 27 of the Limitation of Actions Act Chapter 22 of the Laws of Kenya.”**

The principle as expounded in the above case is similar to what the court adopted in REUBEN ASHIKOLI ASHIKANGA vs. NORMAN LIDIGU & PAN AFRICAN PAPER MILLS LTD CIVIL SUIT NO. 5130 OF 1989 in this case Ringer J (as he then was) held inter alia

“In my Judgment, the doctrine of relation bulk of amendments cannot apply to substitution or addition of a person as a defendant to the suit by way of amendment to the plaint. In such a case the amendment ought to speak from the date when the order granting leave to amend was given. To hold otherwise would, in my view, be to propound a doctrine that the express provisions of section 4(2) of the Limitation period of three years for tort claims can be overcome by the expedient of invoking the discretionary jurisdiction conferred by order 1 Rule 10(2) and Order VIA Rules 3(1) and 5(1) of the Civil Procedure Rules to add a Defendant to a suit and to allow an amendment to that effect at any stage of the proceedings. I decline to be lured to subscribe to such a doctrine which cannot but be subversive of written substantive Law.”

The above 2 cases set out clearly the position in law in regard to the addition of parties to a suit and the available defence of Limitation. The argument that the Deputy Registrar gave leave to join the party, therefore the issue of Limitation cannot be invoked is misplaced. The Deputy Registrar gave an order of adding the 1st defendant as a party necessitating the amendment of the plaint. For some reasons the Deputy Registrar decline to address his mind to the defence of Limitation which is subject of this application. In my view the defendant is legitimately therefore entitled to bring the defence of Limitation. As indeed the Registrar left it open for the issue to be canvassed in future.

It is noteworthy that the Plaintiff did not apply for leave to file suit out of time under section 27 of the Limitation of Action Act. In this case therefore, without leave to file suit out of time the amendment takes effect from the date when the leave to amend was granted. To agree with the Plaintiff's counsel would be to deny the 1st Defendant the right conferred upon him by Provision of S.4 (2) of the Limitation of Actions Act Chapter 22 of the Laws of Kenya. To borrow the words of Ringera J (as he then was) I decline to be lured to subscribe to such a doctrine which cannot but be subversive of written substantive Law.

For the reasons given above on all the issues raised before the court, I uphold the Preliminary Objection and strike out the suit against the 1st defendant with costs.

Dated and delivered 20th May, 2009.

ALI ARONI

JUDGE