



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Suit 237 of 2007

BARCLAYS BANK OF KENYA LIMITED.....PLAINTIFF

VERSUS

MARY WAMAITHA WRIGHT t/a ABUMBA EXPORTERS....1ST DEFENDANT

ABLERT EGAIRE CHANZU.....2ND DEFENDANT

MARGARET WANJA GACHERU.....3RD DEFENDANT

GLADYS KIMANI.....4TH DEFENDANT

WINNIE WAMBUI MUNGAI.....5TH DEFENDANT

ALICE NDUTA MBURU.....6TH DEFENDANT

ALICE NDUTA KIMANI.....7TH DEFENDANT

ANDREW KIBE.....8TH DEFENDANT

JULIET NJERI.....9TH DEFENDANT

FLORENCE WANJIKU KINYANJUI.....10TH DEFENDANT

ANCALO LIMITED.....11TH DEFENDANT

ABRAHAM KAISHA.....12TH DEFENDANT

MBURU KIBWIKA.....13TH DEFENDANT

SYLVANUS OGUTU OKETCH.....14TH DEFENDANT

RULING

The application is dated 8th February, 2008 brought by the 6th, 8th, 9th, 10th and 11th Defendants. The jurisdiction of the court has not been invoked. However, the Plaintiffs did not object and I opted to consider it under the provisos of Order L. Rule 12 of the Civil Procedure Rules. The Applicants seek to have leave of the court to amend their defence and counterclaim dated 18th September, 1986 and to file and serve the same within 14 days of the grant of such leave. The pertinent orders sought are namely:

- 1. THAT the Defendants/Applicants seeks to amend their Defence and Counterclaim to particularize the special damages incurred from the date when a mareva injunction was imposed on their bank accounts in 1986 to the date when such mareva injunction was lifted in 2005.**

2. **THAT such special damages could not be ascertained nor particularized when the Defence and Counterclaim was filed in 1986.**
3. **THAT the Plaintiff/Respondent will not suffer any prejudice from such amendments.**
4. **THAT the amendments will enable the real issues in controversy to be determined.**

The application is supported by two affidavits sworn by the 6th Defendant ALICE MBURU, one dated 8th May, 2008 and the other one dated 26th June, 2008. I have considered the contents of both affidavits together with the annexures thereto.

The Application is opposed. The Plaintiff has filed grounds of position on which five grounds are cited namely:

1. **There has been an inordinate and unexplained delay of over 20 years in making the application when the Defence and Counterclaim was filed in 1986;**
2. **The Plaintiff will be highly prejudiced if the amendments are allowed at this stage in the proceedings;**
3. **No material has been placed before this court to explain the inordinate delay in making the application;**
4. **The substance of the amendments is in any event in contravention of the rules of pleadings as it constitutes evidence;**
5. **The application is an abuse of the Court's process.**

There is also filed a Replying Affidavit sworn by DAVID SWAO a Senior Legal Counsel of the Plaintiff dated 11th June, 2008 which I have also considered together with the annexures.

I have considered submissions by Ms. Kilonzo for the Applicant and Mr. Mogere for the Respondent together with cases relied upon. The cited cases demonstrate that amendments sought before hearing should be allowed. The settled rule in regard to amendment of pleadings has been concisely stated in **Vol. 2, 6th edition** at page 2245 of the **AIR COMMENTARIES ON THE INDIAN CIVIL PROCEDURE CODE** by **Chittaley** and **Rao** in which the learned authors state:

“That a party is allowed to make such amendment as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

I am guided by this general principle. The instant suit was instituted by the Plaintiff Bank in the High Court Central Registry in 1986. That was the time there were no High Court Divisions except the Civil and Criminal Divisions. After the creation of the Commercial Division in 1998, this matter was transferred here in 2007 acquiring a new case file No. 237 of 2007. The amendment is sought to be made to the Statement of Defence and Counterclaim dated 13th November, 1986 and filed in court on the same day. I note that on the face of the application the Applicants indicate that the amendment is sought to be made to the Defence and Counterclaim dated 18th September, 1986. There is in fact no such Defence and Counterclaim filed by the Applicants dated 18th September, 1986. I will consider the giving of the wrong date as an error which is of no material consequence to the application at hand.

The Applicants' contention is that the Plaintiff obtained a mareva injunction against the Applicants' bank accounts in 1986 and that the said injunction was only lifted in 2005. The Applicants contend further that the intended amendments seek to particularize the special damages suffered by the Applicants and that the same could not have been ascertained until 2005 when the injunction was lifted.

I have perused the Defence and counterclaim of the Applicants dated 13th November, 1986. The particulars of special damages pleaded are:

“PARTICULARS OF SPECIAL DAMAGES

The said Defendants have been put to considerable expenses in defending this suit and thereby dispensing legal fees, photocopying charges and the doing of any other incidental and expedient thing in relation thereto and any further

damages pending the hearing of this suit details of which will be produced at the hearing.”

The proposed amendment brings in two Special Damages claims. The first claim seeks interest on sums frozen in the Applicants' Accounts with the Plaintiff in their respective Bank Accounts between 1986 to 21st April, 2005, totaling Kshs.7,244,476/-. The second special damages claim introduced seeks loss of use of two motor vehicles named therein in the sum of Kshs.4.7 million.

The only issue raised by the Plaintiff/Respondent in opposing the application is that there has been inordinate delay in bringing the application between 2005 and 2008. Mr. Mogere for the Respondent submitted that indeed the delay has not been explained by the Applicants.

Ms. Kilonzo for the Applicants urged the court to consider the explanation given in the further affidavit of the 6th Defendant in support of the application and to find that the delay even if inordinate was excusable.

I have considered the further affidavit and find that no explanation was offered for the delay in bringing the application. The only reference to delay is at paragraph 7 and 8 of the affidavit where the deponent avers that if there has been any delay the same was not inordinate and or is excusable. There was no attempt to explain anything.

The period of the delay under consideration is not in dispute. It is the period after the mareva injunction imposed on the Applicants' Bank accounts was lifted and the date the instant application was filed. That is a period of 3 years. I have also considered the nature of the case and the delay to prosecute the case by the Plaintiff, spanning a period of 23 years during which the Plaintiff enjoyed the benefits of the mareva injunction. Even though there has been a delay to bring the application to amend the pleadings, the delay in my view is not inordinate and in any event any prejudice the Plaintiff suffers can easily be compensated by an award of costs.

Regarding the amendment, the court has a duty to ensure that the amendment sought to be made is necessary for determining the real issue in controversy and that no new or inconsistent cause of action is introduced. The Special Damages were pleaded in the initial pleading but no claim in monetary terms was included. I am satisfied that the claim of interest on sums of money in the Applicant's Bank accounts frozen as a result of the imposition of the mareva injunction is necessary. The necessity to amend is to particularize the special damages alleged to have been suffered by the Applicants during the life of the mareva injunction. The amendment is also necessary for determining the real issue in controversy between the parties.

As for the special damages claim for loss of user of vehicle, it is my view that this is a new claim being introduced 28 years after the cause of action arose. Prior to the proposed amended defence and counterclaim, there was no mention of ceased motor vehicles or loss of use of any motor vehicles. To allow the amendment to introduce this claim will deny the Plaintiff the opportunity to rely on limitation as a bar to this claim, which is a right which has accrued in its favour.

In conclusion I will allow the application dated 8th May, 2008 in part in the following terms.

- 1. The 6th, 8th, 9th, 10th and 11th Defendants be and are hereby granted leave to amend their statement of defence and counterclaim.**
- 2. That the amendment allowed is limited to the special damages claim for commercial interest on their frozen Bank accounts from 1986 to 21st April 2005 as pleaded in paragraphs 15.1 to 15.2 and 15.4 both inclusive of the draft amended defence and counterclaim.**
- 3. Leave be and is hereby declined to amend the defence and counterclaim in the manner proposed in paragraph 15.3 of the draft amended defence and counterclaim.**
- 4. The Applicants should file and serve the amended defence and counterclaim within 14 days from date herein.**
- 5. The Applicants to pay thrown away costs to the Plaintiff assessed at Kshs.50,000 and the costs of this application before the next hearing.**

Dated at Nairobi this 31st day of October, 2008.

LESIT, J.

JUDGE

Read, signed and delivered, in the presence of:

Mr. Opija holding brief Mr. K. Kilonzo for Applicant

Mr. Mogere holding brief Mungai for Respondent

Mr. Kabaru for Interested party

LESIIT, J.

JUDGE