REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Case 2264 of 1985

NANDO LIMITED……..……..PLAINTIFF

VERSUS

MARIA SARONYA…… 1ST DEFENDANT

GIUSEPPE NATTA……..……..2ND DEFENDANT

MASOLI S.A. ……...……..3RD DEFENDANT

R U L I N G

The Plaintiff has by a Chamber Summons application dated 19th December, 2006 and filed on 10th April, 2007 sought leave to amend its plaint dated 26th July, 1985 in terms of the draft amended plaint annexed to the application. The application is brought under **Order VIA rule 3, 5 and 8** of the Civil Procedure Rules. The ground for the application is that the proposed amendments are necessary for purposes of determining the real issues in controversy between the parties and for the added reason that the amendment sought will not prejudice the parties.

The application is supported by the affidavit of PIUS MBUGUA NGUGI, a director of the Plaintiff Company. The Application was met with stiff opposition. The Respondents have filed grounds of opposition in which the amendments sought are opposed on grounds of delay in bringing the application and on the basis that at the time the agreement, the subject matter of the suit was concluded, the transaction could have been void and/or illegal by reason of the provisions of the Exchange Control Act, and further that the Agreement was not couched in terms of US Dollars and therefore there was no basis to introduce foreign currency into the pleadings.

This application has been brought 23 years after this suit was filed and 22 years after it was adjourned, following hearing before Mr. O. Kapila, Commissioner of Assize, on 18th November, 1986. It is no surprise that the main reason cited by the Defendant for opposing the amendment is the delay in bringing the application, in addition to the complaint that the application has been brought after the hearing of the case had commenced and therefore rather late in the day. Mr. Muthui for the Respondent also laments that at the time the suit was filed, the Applicant could not have made the claim as it was debarred by law.

There is no dispute that the amendment sought seeks to change the currency in which the claim is based from Kenya shillings to US Dollars. The basis for the amendment is also not in dispute. The Applicant relies on two agreements; one dated 6th Match, 2007 and the other 12th April, 2002. Regarding the two agreements, Mr. Muthui urged the court to note that no where do either of them refer to foreign currency. I have confirmed this from the agreements.

Mr. Ramesh spent considerable time laying out the principles to be had in mind when considering an application of this nature for which I have no quarrel. Amendments can be made at any time including during the trial, even where it substitutes the cause of action. Counsel relied on several cases for this preposition; the case of **Faulkner vs. ADC 1978 KLR 49, Pemcloth Enterprises Limited vs. Patel [1976] KLR 78, General Manager EA R & HA vs. Thiersten 1968 EA 354; Kimani vs. Attorney General 1969 EA 29;** and **Central Kenya Limited, vs. Trust bank Limited & 4 others. C.A. No. 222 of 1998** (unreported). In the latter case, the Court of Appeal of Kenya adopted the principles enunciated in Vol. 2 6th Ed. at page 2245 of the AIR Commentaries on the Indian Civil Procedure Code by Chittaley and Rao where it is stated thus:

" '***That a party is allowed to make such amendments 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 view 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.'***

And at page 2248, they continue to say that an amendment merely clarifying the position put forward in the plaint or written statement of defence must be allowed."

I think that the principles set out in the case are mandatory considerations for the purposes of the instant application. The issue then is whether there has been undue delay in bringing this application.

The Applicant attempts to explain the delay in bringing this application by explaining the delay between 2001 when the Agreements were executed and 2006 when the application was filed in court. It is shown that the file went missing during that period. That explanation leaves out a great number of years unexplained. If between 1985 and 2001 the amendment could not have been made, because the basis upon which it is now being sought had not arisen, the other consideration begs for an answer. The second issue, and it flows from the first is, is there a new and or inconsistent cause of action being introduced in the amendment. The ground upon which the amendment is sought, as stated earlier, is not in dispute. It is on the basis of agreements executed by the parties in 2001 and 2002. These agreements arose 18 years after the suit was filed. It is quite obvious that what the Plaintiff is trying to do is to introduce a new claim.

One of Mr. Muthui's grounds of opposition is that the Plaintiff is introducing a claim in the amendment which it could not claim at the time of filing suit. That complaint is not without merit. Not only is the Plaintiff introducing a new claim, which is substantially and materially inconsistent with the existing one, but it is putting forward a claim which, at the time the suit was filed, did not exist and therefore could not have arisen.

The other consideration is whether there are vested interest(s) or accrued legal rights affected by the proposed amendment and whether any injustice may be suffered by the Defendants.

I am well aware that all applications for amendments of pleadings should be freely allowed at any stage of the proceedings. There is however a rider to this, a precondition or a caution to the court to consider. The general principle is that no amendment should be allowed if it will result in prejudice or injustice to the other party which cannot properly be compensated for by an award of costs. The suit is partly heard and the last time it was before the court for hearing was in 1986. Going by the observations above, it is abundantly clear that the need to amend the pleadings were non existent at the time the suit was last heard. It is my considered view that to allow the amendments sought at this stage would result in hardship and injustice to the Defendants which cannot be compensated by an award of costs. That and for the added reason that the intended amendment introduces a totally new claim to the plaint, the amendment ought not to be allowed given the time this case has been pending in court and the lateness of the time and stage at which it is being introduced.

Having carefully considered the Plaintiff's application to amend the plaint as proposed, I am satisfied that, for reasons I have given above, the amendment should not be allowed. The application is accordingly dismissed with costs.

Dated at Nairobi this 17th day of October, 2008.

LESIIT, J.

JUDGE

Read, delivered and signed in presence of:

Mr. Ramesh for the Applicant/Plaintiff

N/A for Mr. Muthui for the Respondent

LESIIT, J.

JUDGE

Mr. Ramesh Manek

I seek for leave to appeal against the ruling

LESIIT, J.

JUDGE

Court:

Leave to appeal against the ruling granted to the Plaintiff/Applicant

LESIIT, J.

JUDGE