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

Civil Case 369 of 1998

CAPITAL FISH (KENYA) LIMITED

Formerly FISH PRODUCTS (KENYA) LIMITED.....PLAINTIFF

VERSUS

KENYA POWER AND LIGHTING COMPANY LIMITED....DEFENDANT

RULING

This is an application to amend the Plaint, essentially to include a new cause of action based in **tort**, the original claim having been based on the law of **contract**. The limitation period having long expired, the Defendant has strongly objected to this application, which has been brought some eight years after the suit was filed in this Court.

Indeed, this is an old matter. In the Plaint filed on 18th February, 1998, the Plaintiff, who is a fish exporter, and who has installed sophisticated modern equipment to preserve and process raw fish, claimed damages from the Defendant for breach of contract to supply power at the required voltage level, resulting in huge losses to the Plaintiff.

The Plaintiff now wishes to incorporate a claim also in negligence, although the amount of damages claimed in unaffected. According to the Plaintiff the proposed amendments are necessary to determine the real issues in controversy, and will enable the Court to adjudicate on this matter justly and conclusively.

Arguing the application on behalf of the Applicant, Ms. Migiro acknowledged that the application was delayed, but relied on the cases of ***Mortichand Virpal Shah v. I and M Bank*** (HCCC No. 2335 of 1997) and ***Kam Company v. Shelter Afrique*** (HCCC 49 of 2005) to submit that mere delay was no reason not to allow the amendment. She relied on this Court's decision in ***Kuloba v. Oduol*** (2000) LLR 1703 to argue that 0.6A R.3(2) and (5) of the Civil Procedure Rules allowed amendments outside the period of limitation even where a new cause of action was introduced. She submitted that the Respondent had not explained how the delay had caused any prejudice to the Respondent, who was aware of the nature of the damage caused to the Plaintiff by reason of its breach and negligence.

Mr. Gitonga, Counsel for the Respondent, relied on his Grounds of Opposition dated 6th October, 2006 to argue that the delay of eight years not having been explained, the application should not be allowed. He relied on the case of ***African Banking Corporation v. Mavji Construction*** (2004) EA 1, a Tanzanian decision which stated that failure to explain delay was fatal. He also relied on the case of ***Kyalo v. Bayusuf Bros. Ltd***. (1983) KLR 229 which outlined the reasons when amendments would be allowed.

There are two significant decisions that I have made on the subject of amendment of pleadings after the limitation period has expired, in which I have had occasion to review and consider several other decisions of the High Court and the Court of Appeal. These are ***Kuloba v. Oduol*** (2000) LLR 1703 (HCK), cited to me in this application, and ***Fredrick M. Waweru & Another v. Peter Ngure Kimingi*** (HCCCA No. 171 of 2003). ***Kuloba*** case (supra) is perhaps on all-fours with the matter presently before me, while in the ***Fredrick*** case (supra) the issue was not just the amendment of the Plaint after expiry of the limitation period, but also of "substituting" a party through an amendment application. The other significant difference between the ***Fredrick*** case and the present case is that in the former the original action was founded in **tort**, and a new cause of action based in **contract** was sought to be introduced. That, as the Court of Appeal said in ***Mary Osundwa v. Nzoia Sugar Co.*** (C.A. No. 244 of 2000), cannot be done because Section 27(1) of Limitations of Actions Act allows extention of time **only on actions founded on tort**, **and not contract**. In the suit before this Court, the original action is indeed founded in contract, and the new cause sought to be introduced is founded in tort. That is of course permissible at the discretion of the Court.

I will, therefore, borrow heavily from my previous Judgments in those two cases, and repeat here much of what I said in the ***Kuloba*** case (supra), and a little of what I said in the ***Fredrick*** case (supra), in deciding the application before me.

The general power of this Court in respect of amendment is found in section 100 of the Civil Procedure Act which provides as follows:

"***100. The Court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceedings in a suit; and all such amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings."***

That power is also found in Order VIA of the Rules. That Order deals with amendments which can be done with and without the leave of the Court. Here, we are concerned with amendments which require the leave of the Court. That is dealt with under Order VIA rule 3 of the Rules. Under sub rule 1, the Court is empowered to allow a party to amend his pleading 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". The Rule deals with various situations when amendments can be allowed but our concern here is with subrules (2) and (5). Those subrules provide as follows:

"***(Order VIA rule.3)….***

(2) Where an application to the Court for leave to make an amendment such as is mentioned in subrule (3), (4) or (5) is made after any relevant period of limitation current at the time of filing of the suit has expired, the Court may nevertheless grant such leave in the circumstances mentioned in such subrule if it thinks just so to do.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as the cause of action in respect of which relief has already been claimed in the suit by the party applying for leave to make the amendment."

Case Law and Commentaries

The question of amendment of pleadings has been considered widely by the Courts and been the subject of wide discussion by legal scholars. In ***Eastern Bakery v. Castelino*** (1959) E.A. 461, Sir Kenneth O'connor, P, sitting with Gould J.A. and Sir Owen Corrie, Ag. JA in the former Court of Appeal for Eastern Africa enunciated the following principles as governing the Court in deciding whether or not to allow amendments:

(a) Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side. In this respect, there is no injustice if the other side can be

compensated by costs.

(b) The Court will not refuse to allow amendment simply because it introduces a new case. However, there is no power to enable one distinct cause of action to be substituted for another nor to change by amendment the subject matter of the suit.

The general principle stated in that case is that an amendment should not be allowed if it causes injustice to the other side. At the time of the ***Castelino*** case, our Order VIA rule 3(2) and (5) above had not been enacted. That rule clearly allows for amendments outside the period of limitation and which introduce a new cause of action in stated situations. It is unclear whether ***Castelino*** excludes all amendments outside the period of limitation but I think that is catered for by the new rule. (See also ***Motokov v Auto Garage Ltd & Others*** (No.2) [1971] E.A. 353). Chanan Singh, J. in deciding a similar application in ***Barclays Bank DCO v Shamsudin*** [1973] E.A. 451 substantially followed the provisions of Order VIA Rule 3 at a time when those provisions had not been enacted. What I am trying to bring out is that the Courts had recognized the need for allowing certain amendments which were outside the period of limitation and or which sought to introduce a new cause of action even before Order VIA Rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is taken to have knowledge of such cause at the time the original pleading is filed. In considering similar provisions under the English Rules, the Learned Authors of The Supreme Court Practice 1988 said as follows at page 351:

"…..***if the proceedings had been, from the beginning, properly formulated or constituted in the circumstances specified….the defence of limitation would not have been available to the Defendant, and accordingly, if in its discretion, the Court thinks it just to grant leave to amend the defects in the writ or pleading within the scope of the circumstances specified…so that such defects in the proceedings are treated as having been cured ab initio, the Defendant is not being deprived of the benefit of a defence which he would not have had if the proceedings had been so properly formulated or constituted in the first place. To contend that in the cases specified in these paragraphs., that the Defendant had an existing right which will be prejudiced by the amendment is to argue in a circle, since he only has an existing right if one presupposes that the Court will not use its powers to amend under 0.20 r. 8 and 0. 15 rr 6,7 and 8 (see per Holroyd Pearce, LJ. In Pantin v Wood [1962] 1 Q.B. 594, p. 609; [1962]11 ALL ER 94, 298)."***

Lord Denning in his character said as follows in ***Mitchell v Harris Engineering Co.*** (1967)12 Q.B. 703 at p.718 in this respect:

"***Some of the judges in those cases spoke of the Defendant having a "right" to the benefit of the Statute of Limitations: and said that the "right" should not be taken away from him by amendment of the writ. But I do not think that was quite correct. The Statute of Limitations does not confer any right on the Defendant. It only imposes a time limit on the Plaintiff. Take the statute here in question. It is section 2 of the Limitation Act, 1954. It says that in the case of actions for damages for personal injuries for negligence, nuisance or breach of duty "the action shall not be brought" after the expiration of three years from the date on which the cause of action accrued. In order to satisfy the statute, the Plaintiff must issue his writ within three years from the date of the accident. But there is nothing in the statute which says that the writ must at that time be perfect and free from defects. Even if it is defective, nevertheless the Court may, as a matter of practice, permit him to amend it. Once it is amended, then the writ as amended speaks from the date on which the writ was originally issued and not from the date of the amendment. The defect is cured and the action is brought in time. It is not barred by statute …. In my opinion, whenever a writ has been issued within the permitted time, but is found to be defective, the Defendant has no right to have it remain defective. The Court can permit the defect to be cured by amendment: and whether it should do so depends on the practice of the Court. It is a matter of practice and procedure."***

In the same case Russel, L.J. said as follows at p.721:

"***We were referred to a number of cases in which the Courts have declined to permit amendments which would have the effect of depriving a party of the ability which he would have in any fresh proceedings to take advantage of the Statute of Limitations. It was urged that these were based rather upon an inability in point of substantive law to deprive a person of a right conferred upon him by the Statute of Limitations than upon settled practice….. But I take these cases to have been decided on grounds of settled practice, albeit attributable to the parties position vis-à-vis the Statute of Limitation. So far as I am aware no judge said that it would be outside the jurisdiction of the court to allow the amendment in question: and if it were thought to be of substantive law, this would surely have been the immediate and short answer to the applications to amend."***

I must say once again that the English previsions on the question are materially if not word for word similar with our Order VIA Rules 3(2) and (5) of the Rules.

The Learned Author of The Code of Civil Procedure (V. Prakash and M. Siraj Salt (1995) Professional Book Publishers, New Delhi) and Mulla, The Code of Civil Procedure (Abridged Edition) (12th Ed.) (P.M. Bakshi, N.M. Tripathi Private Ltd. Bombay) also discussed the matter and agree that amendments that do not cause injustice to the other side should be allowed. In The Code of Civil Procedure, it is stated at page 281 "one cause of action cannot be substituted by another cause by way of amendment ….[No] amendment can be allowed when the effect of the amendment is to take away from the other side a valuable right accrued to it by the lapse of time." Mulla has similar statements. However, it appears that the Indian position is slightly differently in view of the express provisions of our Order VI Rule 3 of the Rules and may not provide a clear guide on this question.

Briefly, those are the principles of law to be applied in deciding this application. It is common ground that leave in these matters is a discretionary power: a power that is wide provided that if the Court decides to allow an amendment it should do so upon such terms as are just. Now, the question is whether, looking at the circumstances of this case, it is fair and just to allow the amendment sought. Is it one of the amendments contemplated under Order VIA Rule 3 of the Rules? Does the Defendant stand to suffer any prejudice that cannot be compensated by costs?

As I indicated before, the suit in the matter before me is founded on **contract** between the two parties. The Plaintiff says that the Defendant breached its obligation to supply steady power at the agreed voltage resulting in damage to sophisticated freezing equipment, and to business generally. The details of the damage, its nature, extent and cause has been supplied. The Defendant has had early opportunity to do its own assessment, and to defend itself. Now, the Plaintiff is alleging **negligence** on the part of the Defendant, to explain further how and why that damage happened. The following three proposed paragraphs in the Amended Plaint (paragraphs 4e to 4g) captures the essence of the Plaintiff's allegations:

"***4e. In 1993, the Defendant sanctioned an additional 35 kVA connection to the Plaintiff for the use by the factory thus bringing the authorized After Diversity Maximum Demand (ADMD) to 350 kVA.***

4f. The Defendant however, negligently or by design never thought it technically prudent to uprate their 315 KVA transformer in order to cater for the added load.

4g. The Plaintiff contends that this negligent and/or technical omission on the part of the Defendant jeopardized its equipment and indeed damaged several of its equipment arising from under voltages due to the overloaded transformer and the Plaintiff claims damages."

Then, the Plaintiff goes on to incorporate events that happened after the filing of the Plaint in 1998, and more recently in 2004, which also give rise to further negligence on the part of the Defendant. Here is what the proposed new paragraphs 4h to 4k allege:

"***4h. On 20th April 2004, the Plaintiff applied for additional power supply to which the Defendant acceded and on 26th May 1994, the Defendant wrote to the Plaintiff detailing the terms and conditions for the provision of the required additional 600 kVA.***

4i The terms and conditions for the provision of the additional supply inter alia were: the payment by the Plaintiff of the sum of Kshs.1,805,575 as capital contribution and accounts deposit, which terms the Plaintiff complied with.

4j Together with the initial supply of 350 kVA the total authorized demand would be 950 kVA to be met by the Defendant.

4k The Plaintiff contends that inspite of the above agreed demand of 950 kVA authorized by the Defendant, the Defendant instead negligently installed a 603 KVA transformer which was extremely inadequate for the Plaintiff's demand thereby damaging the Plaintiff's electrical and refrigeration equipment thereby occasioning the Plaintiff immense loss and damage."

I am satisfied that all these proposed amendments, even though its effect is to add a new cause of action, arise out of the same facts, or substantially the same facts giving rise to the original cause of action, and are necessary for the proper and just resolution of the dispute between the parties. They are permissible under 0.6A R.3 of the Civil Procedure Rules. I do not believe this would cause any prejudice to the Defendant – at least, none has been demonstrated before this Court. Indeed there is no replying affidavit to suggest what prejudice, if any, the Defendant is likely to suffer. Delay, alone, is no reason to deny the amendments that I believe are fair, justified and submitted in good faith.

Accordingly, I allow this application as prayed. Costs shall be in the cause.

Dated and delivered at Nairobi this 13th day of March, 2007.

ALNASHIR VISRAM

JUDGE