REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT MOMBASA

Civil Suit 187 of 1994

ERES N.V. ……..……... 1ST PLAINTIFF

ERES ENTERPRISES LIMITED ….…..…….……..……. 2ND PLAINTIFF

V E R S U S

PESCHAUD & Cie INTERNATIONAL SA. …..…..…..…..…. 1ST DEFENDANT

CONSOLIDATED LOGISTICS LIMITED ……..……...…….. 2ND DEFENDANT

KENYA LOGISTICS LIMITED ……..……...……....…… 3RD DEFENDANT

COMARCO PROPERTIES LIMITED ……..…… 4TH DEFENDANT

RULING

Comarco Properties Limited, the 4th defendant, seeks under Section 4(i) of the Limitation of Actions Act, Section 3A of the Civil Procedure Act, Order 50 rule 1, Order 6 Rule 13 (i) (c) & (d), and Order 1 Rule 10 (2) of the Civil Procedure Rules the dismissal with costs of the claim herein as against it on the ground that the same is statute barred. A brief statement of the facts in this case will show why the Applicant thinks that an exception should be made in respect of the plaintiffs' claim against it.

The first plaintiff is a foreign limited liability company incorporated in the Kingdom of Belgium. It trades and carries on the specialized business of importation, storage, supply and distribution of bitumen, oil and other liquid products in various parts of Africa. In Kenya and other parts of Eastern Africa it carries on that business through its subsidiary the second plaintiff, a company incorporated in Kenya which it wholly owns.

The first defendant is a foreign company incorporated in Jersey, Channel Islands. It is a subsidiary of the first defendant which owns 65% of its shareholding. The third and fourth defendants are limited liability companies incorporated in Kenya and have their respective registered offices in Mombasa.

In their plaint dated 23rd March 1994 the plaintiffs claim that by an agreement made in Belgium and France between the first plaintiff on the one hand and the first and second defendants on the other in July 1993, the first and second defendants agreed to lease to the first plaintiff 10,000 square metres of space at their base in Mombasa on **Plot Nos. Mombasa/Block XLVII/54 & 65** for a period of ten years from **1st August 1993.** Under the agreement the plaintiffs were to construct at their own cost on those pieces of land two large storage tanks and other ancillary facilities for the storage and handling of bitumen, oil and

other liquid products for their business operations in Kenya and Eastern Africa. It was further agreed that the plaintiffs would berth their vessels at the first and second defendants' jetty and use two pipelines that the plaintiffs would construct through the adjoining piece of land known as **Title No. Mombasa/Block XLVII/148** to pump the products to its said storage tanks.

Pursuant to the said agreement, the plaintiffs claim that they constructed one large storage tank for bitumen, and one small storage tank on the said two pieces of land and a pipeline through the adjourning piece of land. It also bought 160 insulated containerized tanks and 12 tankers for the handling, transportation and distribution of bitumen. Those and other investments in Kenya amounted to USD 3,260,000.00.

After that investment the plaintiffs claim that they concluded business contracts to supply its products to customers in Kenya, Uganda and Tanzania. On 18th November 1993 the plaintiffs landed their first cargo at the port of Mombasa and as agreed berthed the vessel carrying it at the 1st and 2nd defendants jetty. They were, however, unable to discharge the bitumen to their storage tank as the defendants were unable to provide the necessary permits and or licenses from the Kenya Ports Authority. Though the plaintiffs managed on their own to obtain those authorizations from the Kenya Ports Authority they were, however, not lucky with their second and third shipments which arrived on 23rd and 24th January 1994 and 10th April 1994. They had, at enormous cost, to use alternative means to get the cargo of bitumen to their storage facilities.

By reason of the defendants' failure to perform their part of the said contract, the plaintiffs claim that they have suffered enormous losses which they claim in the plaint as well as general damages for beach of contract.

By their application dated 1st October 2003 and field on 28th October 2003 brought under Order 6A Rules 3 (1) & (5) and 8, Order 1 Rule 10 (2) & (4) and 22 of the Civil Procedure Rules the plaintiffs applied for leave of the court to amend their plaint mainly to join the 4th defendant in the suit. The grounds upon which that application was brought revolve around the fact that the 4th defendant was the registered owner of the two pieces of land on which the plaintiffs had constructed storage tanks and also the adjoining piece of land through which they had constructed a pipeline. That being the case, they argued, the 4th defendant was therefore a necessary party who should be brought into the suit for the proper adjudication of the matters in controversy and that the 4th defendant would not suffer any prejudice.

That application was argued before Lady Justice Khaminwa who inspite of the 1st, 2nd and 3rd defendants protestations that the application was an abuse of the process of court and that the claim against the 4th defendant, the party sought to be joined, was statute barred, found that the amendments fell "under the permitted provisions of Order VIA regarding amendments" and allowed it on 17th December 2004. She further ordered that the Respondents were at liberty to file any defence to the amendments within 14 days of service.

Pursuant to that order of amendment the plaintiffs filed an amended plaint on 22nd December 2004 and joined the 4th defendant. In that amended plaint the plaintiffs claim that "At all material times to this suit, the 4th defendant was under the control of the 2nd defendant by virtue of an Agreement dated 12th January 1993 entered into between the 2nd defendant and Consolidated Marine Contractors Limited " and that it is under that agreement that the second defendant was in occupation and use of the two pieces of land on which the plaintiffs had constructed storage facilities. Those pieces of land are registered in the name of the 4th defendant.

It gave the reason why the 4th defendant was under the control of the second defendant as the common shareholders and directors that the two companies had with another company known as Consolidated Marine Contractors Limited (Comarco) the previous owner of the two pieces of land known as **Title Nos. Mombasa/Block XLVII/54 & 65** which had been transferred to the 4th defendant without any

consideration at all.

Finally the plaintiffs pray for a declaration that they are entitled to enter into and remove their assets located on those three pieces of land as the 4th defendant at all material times knew and was aware of the arrangements they had with the 1st and 2nd defendants relating to their investments on those pieces of land.

Upon being served with the amended plaint the 4th defendant filed a defence under protest. In it the 4th defendant pleaded ignorance to most of the averments in the amended plaint and averred that there being no privity of contract between the plaintiffs and the 4th defendant the amended plaint does not disclose a cause of action against it. The 4th defendant further averred that the cause of action having arisen in 1993 and 1994 the plaintiffs' claim, if any, is time barred under the Limitation of Actions Act and that an amendment whether under Order 1 Rule 10(2) and 7 (4) or under Order 6A Rules 3(i), 5 and 8 of the Civil Procedure Rules does not deprive it of that right. It reserved its right to apply to have the claim against it struck out. It subsequently filed the application, which is the subject of this ruling.

I have given this detailed background information so that the issues in this application can be clear.

Leading Mr. Kingi in arguing the application before me Mr. A.B.Shah submitted that in a case like this one the limitation period runs upto the time of amendment. He cited the Court of Appeal decision in **Atieno –Vs- Omoro [1985] KLR 677** as authority for that proposition. He further submitted that the cause of action having arisen on 4th April 1994, notwithstanding the order of amendment the plaintiffs' claim, if any, against the 4th defendant is clearly time barred under section 4 (1) of the Limitation of Actions Act. The application for amendment having been made in the absence of the 4th defendant the issue of *res judicata* as claimed by the plaintiffs does not arise whether or not anybody else urged its case of limitation.

Mr. Shah further submitted that the plaintiffs being defendants in Mombasa HCC.No. 135 of 1997 in which the 4th defendant as the owner of the three said pieces of land sought to evict them therefrom they cannot plead ignorance of the fact that they knew as early as 1997 that the 4th defendant was the owner of those pieces of land.

Citing several authorities including the English case of **Liptons Cash Registers & Another –Vs- Hagin (GB) Ltd & others [1982]1 ALL ER 595** and Justice Visram's decision in **Fredrick M. Waweru & Another –Vs- Peter Ngure Kimingi Nairobi HCCC.No. 171 of 2003 (unreported),** Mr. Shah concluded that it does not matter how one looks at it; whether granted under Order 1 Rule 10 (2) and (4) or Order 6A Rule 3 an amendment under the Civil Procedure Rules cannot deprive a party of right accrued to it under a statute. He urged me to allow the application and save the 4th defendant the trouble and expense of going through a hearing.

For their part the plaintiffs do not see why they should be bothered with a frivolous application such as this. Opposing the application on their behalf Mr.Balala submitted that the first and second defendants having argued during the hearing of the amendment application that the proposed claim against the 4th defendant was time barred, and having been overruled on that by Justice Khaminwa the issue is *res judicata*. He said to allow this application would be tantamount to sitting on appeal from that decision, which I have no jurisdiction to do. Moreover, he further contended, the 4th defendant has not been deprived of its right allegedly accrued under the Limitation of Actions Act. To the contrary it has, in its defence, pleaded limitation and it should therefore hold its horses and urge that point during the hearing of this case. According to him the final determination on the issue can only be made after the case has been fully heard. He said at the hearing the plaintiffs will not only show that the 4th defendant was under the control of the 2nd defendant but also that the two acted together in inflicting loss upon the plaintiffs.

Even if he is overruled on all those arguments Mr. Balala submitted that this application should still be dismissed, as the prayers sought cannot be granted. He contended that Order 1 Rule 10 and Order 6 Rule

13, under which this application is brought, are incompatible. Order 1 Rule 10 allows the striking out of a party but does not allow the dismissal of the claim against it, while Order 6 Rule 13 allows the dismissal of the suit but not the striking out of a party.

In a rather lackadaisical submission Mr. Balala revisited the issue of limitation and raised two points. The first one is that at the time the plaintiffs applied to amend the limitation period had not expired. The second one is that at any rate by the time the 4th defendant was joined the limitation period had not expired as the time started to run from July 2002 when the lease between the plaintiffs and the 1st and 2nd defendants expired.

I have considered these rival submissions and the circumstances of this case as a whole. Starting with Mr. Balala's last submission all I need to say on that is that the determining point in limitation matters of this nature is not the time an application to amend is brought or even when the order allowing the amendment is granted. It is when the actual amendment is made. And in cases based on a lease there are normally no problems when the parties perform their respective parts of the contract and the same is allowed to run to the end. Problems arise when there are infractions and that is when causes of action arise. In this case the infractions are alleged to have occurred in late 1993 and early 1994. That is when the cause of action arose and not at the expiry of the lease as contended by Mr.Balala.

As regards the other submissions I need, at the outset, to point out that as correctly observed by Mr. Balala, I am not sitting on appeal on the decision of Lady Justice Khaminwa that allowed the amendment giving rise to this application. Being a judge of co-ordinate jurisdiction as hers I cannot do that. I have also not been asked to review or set aside that decision. What I am dealing with here is an application by the 4th defendant seeking that its name be struck out of this suit and the claim against it be dismissed on the ground that the same is time barred.

Before I decide on whether or not the application has merit I need to say something about the issue of *res judicata* raised by Mr. Balala.

One of the cardinal criterion for determining whether or not a matter is *res judicata* is when the matter in the former suit in which it is contended it was determined was between the same parties. Section 7 of the Civil Procedure Act makes that quite clear and I need not bother with authorities on that. Admittedly the 4th defendant was not a party to the amendment application. The issue of *res judciata* does not therefore arise. The fact that the 1st and 2nd defendants may have raised the issue of limitation on the 4th defendant's behalf is of no consequences.

Having not been a party to the amendment application the 4th defendant cannot be shut out from raising in its defence, the issue of limitation. An amendment introducing a new party into a suit does not deprive that party of a right that may have accrued to it under the Limitation of Actions Act. That party is perfectly entitled to raise, as the 4th defendant in this case has done, the defence of limitation and even to bring an application such as this one to have the claim against it struck out or dismissed. This is because at the end of the day the court will have to determine if the claim is indeed time barred and if it is clear right from the word go that it is, then I cannot see why the 4th defendant can be debarred from seeking to dismiss the claim at this stage.

Turning now to the merits of the application itself, as I have already found cause of action in his case arose in April 1994. The plaintiffs' claim against the 4th defendant should therefore have been brought by April 2000. In **Motokov –Vs- Auto Garage ([No.2] [1971] EA 33** Biron J quoted with approval a passage from the judgment of Lord Denning Mr. **In Mitchell –Vs- Harris Engineering Co. Ltd. [1967] 2 ALL ER 682** in which the latter held that once amended a pleading speaks form the date the same was originally filed and not from the date of amendment. That is a correct statement of law and I concur with it. But that is as regards the parties to the suit when it was originally filed. That cannot apply to parties who are added later as a pleading cannot speak of or concerning non-parties to the suit. As regards the added parties a pleading speaks of or concerning them from the date of filing the amendment.

In this case the amended plaint was filed on 2nd December 2004 by which time the claim against the 4th defendant was hopelessly out of time. The argument that at the time of the plaintiffs' entered into a lease contract with the first and second defendants the 4th defendant was under the control of the second defendant or knew of the contract does not avail the plaintiffs. Whether or not they had common shareholders and directors there is no escaping the fact that the second and 4th defendants are separate legal entities. The plaintiffs should have known who to contract with. It is surprising that it could enter into such a long lease and invest such a colossal sum of money on pieces of land whose ownership it had not bothered to ascertain. In the circumstances I find that the plaintiffs' claim against the 4th defendant is an abuse of the process of court.

In so finding I have not reversed the judge's said decision as contended by Mr. Balala. To accede to such contention as I have already said would itself be tantamount to saying that even if I later hear this case fully I will not dismiss the claim as being time barred even if l find it to be so because that would be reversing that decision. That would of course be absurd.

Having found that the plaintiffs' claim against the 4th defendant is an abuse of the process of court should I nonetheless dismiss the application and ask the 4th defendant to await the final determination of this case as contended by Mr. Balala? I cannot see any legal justification for that. Why should the 4th defendant be made to wait for years with a claim hanging over its neck like the sword of Damocles if it can get it disposed of immediately?

Whether the amendment bringing the 4th defendant into this suit was made under Order 1 Rule 10 or under Order 6A Rule 3 there is also no escaping the fact that the claim against the 4th defendant is time barred. In the circumstances I allow this application and dismiss with costs the plaintiffs' claim as against the 4th defendant.

DATED and delivered this 25th day of May 2007.

D.K. MARAGA

JUDGE

25.5.2007

Before Maraga Judge

Njeru for Applicant

Swaleh for Respondent

Court clerk – Mitoto

Court – Ruling delivered in open court.

D.K. MARAGA

JUDGE