REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (MILIMANI COMMERCIAL COURTS)

Civil Suit 991 of 1999

THE RECEIVER GRAND REGENCY HOTEL….....PLAINTIFF

VERSUS

EMMS ARCHITECTS LIMITED……...….…….DEFENDANT

RULING

In the application dated 18th September 2007 under Order 6A Rules 3(1) and (3), 5(1) and 8 of the Civil Procedure Rules and Section 3A, 63(e) and 100 of the Civil Procedure Act, the plaintiff seeks leave to amend its plaint. It is the alleged that the plaintiff had inadvertently filed suit under the mistaken belief that the defendant was a limited liability company. And it has now come to the knowledge of the plaintiff that the defendant is a business name owned by one **David T. Muraya** who trades under the name and style of **EMMS ARCHITECTS**.

It is the contention of the applicant that the mistake was not deliberate but honest and entirely genuine. And that the said mistake was not misleading or such as to cause any reasonable doubt as to the identity of the person intended to be sued. It is also contended that the proposed amendments are essential for the purpose of determining the real question in controversy. And in any case the defendant does not stand to suffer any prejudice which cannot be compensated by an award of costs.

The defendant has filed grounds of opposition contending that the amendment by the plaintiff is meant to introduce a party beyond the period allowed by the limitation Act. **Mr. Thuita** learned counsel for the defendant submitted that according to section 4 of the Limitation of Action Act, an action founded on a contract shall be brought to court within 6 years from the time, the cause of action arose. That according to the plaint, the cause of action arose on 27th October 1996 and in so far as the amendment seeks to bring an action against **David T. Muraya**, 11 years after the cause of action arose, it should not be allowed.

Mr. Thuita Advocate also submitted that the procedure taken by the plaintiffs is inappropriate, in that the application ought to have been brought under Order I Rule 10 which deals with substitution of parties. He further submitted that there has been an inordinate delay in bringing the application for amendment, since the defence was filed on 1st September, 1999. And since there is no reason to explain for the inordinate delay, equity cannot aid an indolent party.

Let me say that in equity it is fairer and more consonant with justice to allow a claim to be determined on its merits, rather than being defeated by a technicality like limitation of action. There is no indication that the plaint discloses no cause of action against the present defendant or the party intended to be included in the amendment. The issue of limitation of the plaintiff's cause of action cannot be a reason to refuse the amendment sought in the present application. The defendant has the liberty to raise such a defence and the court at the appropriate time would be in a position to determine the same.

A good practice, which has evolved over the years, is that amendments to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party however, negligent, careless and/or late, the proposed amendment may be. And there is no injustice if the other side can be compensated by an award of costs. It is clear that the plaintiff has been accused of laxity and inordinate delay in the way the present amendment is made. However the plaintiff's inaction cannot be a basis to

deprive it of the right to amend its pleadings so as to bring the real question in controversy or correcting a defect or error in a previous pleadings.

In **Standard vs North Metropolitan Transways Company (1886) 16QBD 556 at page 558 Lord Esler** held;

"**The rule of conduct of the court in such a case is that however negligent or careless may have been, the first omission and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side. There is no injustice if the other side can be compensated by costs but if the amendment will put them in such a position that they must be injured, it ought not to be made".**

In my humble view and as is often stated one panacea which heals every sore in litigation is an award of costs to the inconvenienced party. I think the mistake made by the plaintiff in the way it sued the defendant puts its case in a disadvantage position and the fact that the amendment is sought late in the day cannot be a good reason to reject the plea of the plaintiff. I also do not think the intended amendment is meant to overreach or take away a defence acquired by the defendant in respect of the pleadings currently in place.

In conclusion, I think the amendment sought is well merited and it is meant solely for the purposes of determining the real questions in controversy between the parties. It is the case of the plaintiff that it is the intended defendant who is responsible for the loss alleged in the plaint. I therefore think that it is in the interest of justice to allow the amendment subject of this application.

Order: **The application is allowed. Let the plaintiff pay to the defendant a throw away costs of Kshs.5,000/= within the next 14 days. The plaintiff to file and serve its amended plaint within the next 7 days and the defendant is at liberty to file an amended defence within 7 days of service of the amended plaint. I direct the parties to list the suit for hearing on priority basis.**

Dated and delivered at Nairobi this 2nd day of November, 2007.

M. A. WARSAME

JUDGE