



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

Civil Case 189 of 2004

KIAHURIA PROPERTIES LTD.PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LTD1ST DEFENDANT

JAMES KAMAU THIMBA2ND DEFENDANT

RULING

This is an application by way of a Chamber Summons, dated 15th March 2005. It was brought by the 1st defendant pursuant to the provisions of Sections 3A, 63 and 100 of the Civil Procedure Act, as read together with Order 6A rules 3, 5 and 8 of the Civil Procedure Rules.

It is the applicant's prayer that it be granted leave to amend its Defence in accordance with the draft annexed to the affidavit in support of the application.

When prosecuting the application, Mrs. Oduor, advocate for the 1st Defendant, submitted that the amendment sought would, if granted, enable the court to determine the issues in contention. Secondly, the applicant expressed the view that the proposed amendments would not prejudice the plaintiff at all.

The applicant said that the controversy in the suit was over the suit property, which was initially owned by the 2nd Defendant, who charged it to the 1st Defendant in order to secure financial facilities, in 1971.

After receiving the funds from the 1st Defendant, the 2nd Defendant is said to have defaulted in payments, causing the 1st Defendant to sell-off the property, in 1979. That sale sparked off a longstanding dispute in this suit and also in another case, HCCC No. 988/79. The said other case was resolved in 1999.

Meanwhile, the applicant emphasizes that at the centre of the controversy were allegations of fraud and collusion, between the auctioneer and the plaintiff, which led the bank to halt the transfer of the property. According to the applicant, the auctioneer had misled the bank to believe that the highest bid at the auction was Kshs.70,000/-, whilst it was actually Kshs.138,000/-.

This suit is by the person who had been declared the highest bidder at the public auction; and who therefore seeks on order for specific performance of the sale. The said plaintiff was also claiming compensation, amounting to Kshs.26 million.

Having been served with the Plaint and Summons to Enter Appearance, the 1st Defendant filed a Defence on 19th May 2004. The said Defence was filed through the firm of Hala & Company Advocates. Thereafter, the 1st Defendant changed its advocates from M/s Hala & Company Advocates, to M/s Rachuonyo & Rachuonyo Advocates. In that regard, a Notice of Change of Advocates was filed in court on 12th October 2004.

It is the 1st defendant's case that their new lawyers perused their Defence, and found it to be inadequate. It is for that reason that the 1st Defendant now wishes to amend its Defence, so as to assert, inter alia, that the plaintiff did not ever attend the auction of the suit property. Secondly, the 1st Defendant wishes to assert that the Plaintiff was not the highest bidder at the auction. The 1st Defendant also wishes to bring out the fact that there had been previous suits on the subject matter of this case.

Apart from that, the 1st Defendant wishes to assert that it was never issued with a notice of intention to sue; and also that the suit itself was barred by limitation of time. It is further intended to plead, in the new Defence, if the court grants leave that it be filed, that this suit was res judicata.

In the light of those proposed amendments to the Defence, the inevitable question is why the 1st Defendant did not bring this application sooner. That question is pertinent because the applicant readily concedes that the matters which gave rise to the case herein, relate back to 1971. So, what is the applicant's explanation for the delay in bringing this application?

The explanation tendered by the applicant's advocate is that over the last twenty or so years, several things had happened. For instance, the 1st Defendant's branches, which were handling the matter, were closed down. Those branches were said to include the bank's branch at Uchumi House, Nairobi, which closed down in 1982.

Following the closure of that branch, the accounts were randomly transferred to other branches, such as the one at Moi Avenue. But, as if that was not bad enough, the said Moi Avenue Branch of the bank also closed down thereafter.

In the meantime, the suit property is said to have been fraudulently discharged and transferred to a third party. That development saw the bank lodge a complaint with the police, whereupon the 2nd defendant was charged with offences related to fraud. During the criminal trial of the 2nd defendant, the relevant material evidence was presented to the court before which the criminal case was tried. Therefore, the 1st Defendant was unable to have possession of the said evidentiary material, for use in this case.

For those reasons, the 1st Defendant says that it had been unable, for a long period of time, to assemble all the material it needed for purposes of putting together its whole defence.

However, when its new advocates were instructed, they were able to retrieve files from the branches of the 1st Defendant, so that the said defendant was then able to put together its whole defence.

And, as the applicant feels that the proposed amendment would not cause any prejudice to the plaintiff, this court was asked to give leave to the applicant to amend its Defence.

But, the plaintiff holds the view that the applicant failed to make out a case to warrant leave to amend its Defence. The main reason for that contention was that by the proposed amendments, the 1st Defendant was seeking to introduce a pleading based on an alleged fraud.

It was the plaintiff's submission that fraud cannot be introduced by way of an amendment. The rationale for that policy, which prohibits the introduction of fraud through amendments, was said to be the fact that fraud was an independent tort, with its own independent remedies.

Furthermore, it was submitted that the introduction of fraud into this suit would not have any beneficial consequences, as it would not assist the court in determining the issues in the case.

When explaining that contention, the plaintiff pointed out that the particulars of the alleged fraud relate to an auction which took place in 1979.

The said auction led to the signing of a Memorandum of Sale, and the transfer of the property, to the plaintiff.

In the circumstances, the plaintiff feels that the applicant should not be allowed to complain about the auctioneer, who was an agent of the applicant. It was submitted that if the applicant had any issues against the auctioneer, the applicant should institute separate litigation against the said auctioneer.

I have perused the Defence and the draft Amended Defence. I note that at paragraph 7 of the Defence, the 1st Defendant asserted that if there was an auction on 4th January 1979, the plaintiff did not attend it, and could therefore not have been declared the highest bidder.

In my understanding the contents of paragraphs 5 (a) and (b) of the draft Amended Defence does no more than provide more particulars of the 1st Defendant's Defence.

I also note that paragraphs 5 (c) and (d) are not inconsistent with any of the pleadings in the original Defence.

As regards the applicant's reference to the HCCC No. 988 of 1979, which it says raises the same or similar or related causes of action, as in this case, I find that the plaintiff itself had cited that suit, in its Plaintiff. Therefore, when the 1st Defendant now asserts that there arises the defence of res judicata, founded on the case which the plaintiff concedes as having been filed previously, I cannot comprehend how such a line of defence could occasion any prejudice to the plaintiff. I say so because the 1st Defendant has not raised any new facts, as a foundation for its defence.

Meanwhile, as regards the contents of paragraph 10 of the draft Amended Defence, the same is not new at all. In the Defence, as it stands at present, the 1st Defendant had made no admission as to paragraph 16 of the Plaintiff. In other words, it did not admit the plaintiff's assertion, to the effect that a demand notice had been served on the applicant, and that, notwithstanding such a demand, the said 1st Defendant had refused to hand over vacant possession of the suit property.

In the draft Amended Defence, the 1st Defendant has made its position more forthright, by an express denial.

Thereafter, paragraphs 12, 13, 14, 15, 16 and 17 of the draft Amended Defence, appear to me to be no more than a detailed recitation of the background to the auction which was allegedly conducted by Macho Kimaru & Company, on 4th January 1979. In my understanding, there does not appear to be any major inconsistencies on the facts as recited by the plaintiff and the 1st Defendant, about the lead-up to the auction.

Then, the 1st Defendant proposes to introduce assertions of fraudulent misrepresentation, at paragraph 18 of the draft Amended Defence. For the first time, the 1st Defendant asserts that the plaintiff, with the connivance of the defendant's officers, employees, servants or agents fraudulently misrepresented to the 1st Defendant that the plaintiff was the highest bidder. Thereafter, the 1st defendant introduces particulars of the alleged fraudulent misrepresentation.

I have given careful consideration to the assertions of the alleged fraudulent misrepresentation. Effectively, they boil down to this; that the plaintiff was not the highest bidder, at Kshs.70,000/-, as the 1st Defendant had been led to believe. The reason for that, as given by the 1st defendant was that the

plaintiff did not, as far as the 1st defendant was concerned, even attend the auction. And, in any event, the 1st Defendant believes that the highest bid at the auction on 4th January 1979, placed a bid of Kshs.138,000/-.

In my understanding, these particulars were no more than additional meat, which the 1st defendant was adding to the skeletal defence that had already been filed.

However, what causes me a lot of concern is the fact that as early as 20th February 1979, the 1st defendant was already aware of the "illegal and fraudulent transaction", but did not seek to amend the Defence sooner, so as to set out the details thereof, as they now propose to do.

However, upon a further consideration of the issues set out in paragraph 24 of the draft Amended Plaintiff, it became clear to me that the 2nd Defendant had instituted proceedings in HCCC No. 988/1979, and that in early 1979, an injunction was issued by the court to prevent the transfer of the suit property. Apparently, that suit was only concluded on 18th May 1999.

If the statement of the 1st defendant are reflective of the correct factual position, it was only after 18th May 1999 that the said defendant learnt that the suit property had been transferred to a third party, by the plaintiff herein.

In my understanding, if any court of law is to be in a position to determine whether or not an order for specific performance ought to be made in favour of the plaintiff, the court will need to delve into the history of the transactions which gave rise to this case. For instance, could the plaintiff have been responsible for some of the actions which might make it impossible for there to be specific performance, as asserted by the 1st Defendant?

To my mind, by introducing into these proceedings matters which will enable the trial court establish where responsibility lay for the omissions and commissions cited in this matter, the 1st defendant would have actually placed the court in a position from which it could determine the substantive issues, decisively and effectively.

Even as regards the issue about the claim being barred by the provisions of the Limitation of Actions Act, the same is a matter of law. It cannot take the plaintiff by surprise, as the facts upon which the said Defence is said to be founded, were first pleaded by the plaintiff itself.

But, I also appreciate the plaintiff's contention that the 1st defendant knew, all along, what was happening. Indeed, the plaintiff asserts that the 1st defendant is estopped from challenging matters which it had not only participated in, but also blessed.

If that be the case, I believe that it would form an appropriate basis for a Reply To Defence. So also the plaintiff's assertion that the plea of frustration of the contract of sale, arising out of the auction dated 4th January 1979; if the plaintiff is able to later demonstrate that the issue was already determined in the earlier suit, that too would be a good line to take in the plaintiff's Reply to Defence.

Indeed, I understood the plaintiff to be saying that the court did, in the earlier case, decline to reinstate the suit in which the 1st defendant had made allegations of frustration of the Contract. If that be true, it would not prejudice the plaintiff at all. If anything, such a fact would assist the plaintiff to dispose of the 1st Defendant's defence. Therefore, I cannot understand how the draft proposed amendments would, if allowed, cause the plaintiff to suffer untold injustice, as suggested by the plaintiff.

Moving on to consider the legal authorities, I have noted "MULLA, THE CODE OF CIVIL PROCEDURE" states at page 1847, that no amendment should be allowed which would introduce a totally new and different case. It is for that reason that I have, in the course of this ruling, been analysing both the Defence and the proposed amendments, with a view to ascertaining whether or not the applicant

wished to introduce a totally new line of defence.

As was clear from my said analysis, I was satisfied that the proposed amendments did not constitute a totally new and different line of defence.

I am also in agreement with the pronouncement by the HON. RINGERA J. in the cases of MACHARIA –VS- GUARDIAN BANK LTD & ANOTHER [2003] KLR 271; and NATIONAL INDUSTRIAL CREDIT BANK LIMITED –VS- ISAAK KONDURU GITURU, HCCC NO. 1509 OF 2000. In both cases, emphasis was laid on the importance of allowing the amendment of pleadings freely, if the same were sought before the hearing, provided that the amendments could be made without injustice to the other side. And in determining the question as to whether or not prejudice or injustice could be caused to the other party, the court should consider the fact that there would be no injustice if the prejudice to the adverse party can be compensated by an order for costs.

In this case, I have already come to the conclusion that the proposed amendments cannot occasion an injustice to the plaintiff, which cannot be compensated with an award of costs.

Meanwhile, I have also held that the proposed amendments do not introduce any new line of defence. But, even if the said proposed amendments were to be deemed to have introduced fraud as a new line of defence, which in my view is not so, that alone would not be reason enough to reject the application.

In the case of KULOBA –VS- ODUOL [2001] 1 EA 101 at p. 110, the HON. VISRAM J. held as follows;

"Even if the amendment seeks to set up a new cause of action which is outside the limitation period, I am of the view that it is an amendment which is permissible under Order VIA, rule 3 of the Rules, as it is a claim emanating from the same set of facts."

Again, I have, during my analysis of the facts in this case demonstrated that the allegations of fraudulent misrepresentation emanate from the same set of facts as spelt out in the Plaintiff and the Defence, in its original form.

Having given due consideration to the substance of the application, the court now has to give consideration to two other issues which were raised by the plaintiff. First, it was submitted that the applicant was wrong to have moved the court by way of a Chamber Summons. As far as the plaintiff was concerned, the application ought to have been brought by way of a Notice of Motion. The reason for that contention is that at the head of the application, there were cited Sections 3A, 63 and 100 of the Civil Procedure Act.

To my mind, the primary foundation for this application is Order 6A of the Civil Procedure Rules, which is clearly headed "**Amendment of Pleadings.**" And by virtue of O. 6A rule 8, applications under that Order are to be made by summons. Therefore, I cannot understand why the applicant should be faulted for moving this court in the manner prescribed.

In any event, it is now well settled that the court cannot be moved pursuant to Section 3A of the Civil Procedure Act.

And, as regards Section 63 (e), this court is empowered to make such interlocutory orders as may appear to the court to be just and convenient, in order to prevent the ends of justice from being defeated. Therefore, when the specific interlocutory orders sought are for an amendment to pleadings, as in this case, the court is to be guided by the spirit of dispensing justice. However, the procedure under which the court is to be moved, in my considered view, must remain Order 6A rules 3, 5 and 8 of the Civil Procedure Rules.

Similarly, Section 100 of the Civil Procedure Act merely stipulates that the court may at any time, amend any defect or error in any proceeding in a suit. The purpose of making all the necessary amendments shall be the need for determination of the real question or issue raised by or depending on the

proceedings. That provision is in generalised terms, and relates to amendments of defects or errors in any proceedings.

Now, whether or not that Section is vast enough to also cover amendments to pleadings, my view is that a party wishing to obtain leave to amend his pleadings, needs to be specifically guided by Order VIA.

In effect, I find nothing wrong in the fact that this application was brought by way of a Chamber Summons.

Finally, the plaintiff drew attention to the fact that the deponent of the affidavit in support of the application, offends the provisions of Order 18 rule 4 of the Civil Procedure Rules. That rule provides that every affidavit shall state the description, true place of abode and postal address of the deponent, and if the deponent is a minor shall state his age.

In this case, the deponent failed to state his true place of abode. He only specified his postal address. Therefore, the plaintiff submits that that omission rendered the affidavit incurably defective.

In the circumstances, the court was invited to hold that the application should collapse alongside the supporting affidavit.

But the applicant relies on Order 18 rule 7 as providing an answer to the plaintiff's contentions. Pursuant to that rule, the court may receive any affidavit sworn for the purpose of being used in any suit, notwithstanding any defect by misdescription of the parties or otherwise in the title or other irregularities in the form thereof.

In SUDHIR K. SHAH & 17 OTHERS –VS- SHEETAL KAPILA & 11 OTHERS, HCCC NO. 728 OF 2003, the HON. EMUKULE J. declined to strike out a verifying affidavit in which the deponent had not specified his usual place of abode. He held that such a defect was curable under Order 18 rule 7.

And in ROBERT MBEVI MALUKI –VS- KENRUB INDUSTRIES LTD., CIVIL APPEAL NO. 253 OF 2003, the HON. A. VISRAM J. held as follows, when discussing verifying affidavits;

"For me, I believe that the primary function of a court of law is to do substantive justice in all cases where it has jurisdiction. That function is aided by rules of procedure but at no time should the rules be applied to stultify the principal function. Procedural irregularities that do not go to the jurisdiction of the court and which do not occasion prejudice to the other side may be ignored or remedied but they should not be allowed to deny a party his day in court."

In this case, I find that the failure to state the deponent's place of abode does not occasion any prejudice to the plaintiff. On the other hand, given the fact that the issue was raised at the tail-end of the application herein, if it were upheld, it would shut out the 1st defendant, at a stage when it may become difficult, if not impossible, to salvage the application. Yet, the issue does not go to jurisdiction.

In the circumstances, I decline the plaintiff's invitation to strike out the affidavit which it has allowed the applicant to rely upon when canvassing its application. If I were to strike out the affidavit, I believe that I might become guilty of elevating the rules of procedure, to become mistresses of justice, instead of seeing them as maidens of justice. I decline to do so.

In the final analysis, I do now grant leave to the 1st defendant to amend its Defence, in terms of the draft dated 15th March 2005. However, the applicant will bear the costs of the application in any event, as the plaintiff is not to be faulted at all, for the applicant's failure to put together its Defence earlier.

Dated and Delivered at Nairobi this 19th day of June 2006.

FRED A. OCHIENG

JUDGE