



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

Civil Case 1361 of 1999

**AFRICAN AIRLINES INTERNATIONAL LIMITED.....
PLAINTIFF**

VERSUS

**THE EASTERN & SOUTHERN AFRICAN TRADE DEVELOPMENT BANKING (P.T.A)...
DEFENDANT**

RULING

This is an application by the plaintiff for leave to amend its plaint. The application is expressed to be brought under the provisions of Order VIA Rules 3, 5, and 8 of the Civil Procedure Rules, Sections 3A and 100 of the Civil Procedure Act and the High Court (Practice and Procedure) Rules. The application is based on the principal grounds that the amendment is to enable the real issues in dispute to be dealt with; that new factors affecting the case have come to light which should be pleaded and that it is in the interests of justice that the application be allowed. The application is supported by an affidavit sworn by one Captain Musa Hassan Bulhan a director of the plaintiff. The affidavit has two annexures one of which is the draft amended plaint.

The application is opposed and there is a replying affidavit sworn by one Lucy Otolu the defendant's Legal Officer.

The application was debated before me on 15.6.2006 by Mr. Mwenesi Learned counsel for the plaintiff and Mr. Nyachoti; Learned counsel for the defendant. The plaintiff's case in a nutshell is that since the filing of this suit there have been changes that now necessitate amendment to its plaint and the proposed amendment will enable the court to finally determine the real issues in dispute between the parties. The plaintiff contends that the proposed amendment will not occasion any prejudice to the defendant who will have the liberty to amend its defence. Reliance was placed upon the decision of Njagi J in **Ladopharma Co. Ltd & 2 Others – vs – National Bank of Kenya Ltd: HCCC No.1031 of 2001 (UR)**. In that case relying on established authorities the Learned Judge held that the guiding principle in applications for leave to amend is that the same should be freely allowed, provided that the amendment will not result in prejudice to the other party which cannot properly be compensated for in costs.

Counsel for the defendant vehemently opposed the application. He argued that because an appeal against an interlocutory ruling in this case is pending before the Court of Appeal the application for leave to amend is incompetent and has in any event been filed rather too late in the day. It was also argued for the defendant that the proposed amendments seek to introduce a different cause of action based on facts unrelated to the plaintiffs claim. It was further argued that the application had not been brought in good faith and was for that reason an abuse of the process of the court. Reliance was placed upon **Bullen & Leake and Jacob's precedents of pleadings 12th Ed. P.123** for the proposition that applications for leave to amend brought too late in the proceedings should not be allowed as it would be unjust to the

other party. The defendant further relied upon Halsbury's Laws of England 4th Edition Vol. 36 paragraph 70 for the proposition that leave to amend should not be allowed if the effect of such amendment will injure the other party which injury cannot be compensated in costs.

The defendant also argued that the effect of the proposed amendments would be to deny the defendant a defence under the Limitation of Actions Act and should therefore not be allowed. For that proposition reliance was placed upon the case of National Provincial Bank Ltd –vs- Gaunt [1942] 2 All ER 112 where it was held inter alia that an amendment which in effect substituted an entirely different cause of action for the original cause of action should not be allowed “because the cause of action which was the subject-matter of the amendment was statute-barred at the date when the amendment was allowed.

I have now considered the application, the affidavits, the annexures, the submissions of counsel and the cases cited. Having done so, I take the following view of this matter. The application raises the following primary issues: Whether a plaintiff should be given leave to amend if the effect of the proposed amendments would be to substitute a different cause of action and where the subject matter of the amendment is statute barred at the time of seeking leave to amend; whether the application for leave has been brought after a prolonged delay; whether the proposed amendments will occasion to the defendant injury which cannot be compensated in costs and whether the application for leave has not been brought in good faith.

I have perused the proposed amended plaint, it has expanded the basis of the plaintiff's claim but the prayers remain the same save for the exclusion of the declaratory relief which is in the existing plaint. Various losses are pleaded based on happenings since the suit was filed. The application was lodged about 6 years since the filing of the suit.

With regard to amendment of pleadings, it is now settled that a party should be allowed to make such amendments as maybe necessary for determining the real question in controversy. **(See Rule 5 (1) of Order VIA of the Civil Procedure Rules)**. It is also trite law that as far as possible a litigant should plead the whole of the claim which he is entitled to make in respect of his cause of action. **(See Central Kenya Ltd – vs - Trust Bank Ltd & 4 others: CA No.222 of 1998 (UR)**. Hence the guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or rejoinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. **(See Central Kenya Ltd – vs – Trust Bank Ltd and 4 others [Supra])**. In my view the proposed amended plaint is clearly intended to consolidate the plaintiff's claim as the plaintiff cannot be allowed later to reopen the same matters pleaded in the proposed amendment in another suit.

With regard to the objection that the proposed amendments raise new and inconsistent claims and that the claims sought to be introduced are statute barred, I am afraid I have not traced or detected any inconsistency with the proposed amendment. With respect to introduction of new claims the same are permitted (See Order VIA rule 3(5) of the Civil Procedure Rules). The rule reads:

“An amendment may be allowed under sub rule (2) notwithstanding that its effect will be to add or substitute a new cause of action if the 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.”

As I have already found the proposed amendment has merely expanded the basis of the plaintiff's claim and now includes various losses based upon happenings since the suit was filed. In my view the proposed amendment is covered by Order VIA rule 3(5) cited above.

With regard to the objection based on the Limitation of Actions Act, it appears to me that Order VIA rule 2 of the Civil Procedure Rules expressly provides for amendments made after the expiry of the period of Limitation. The rule reads:

“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 date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such subrule if it thinks just so to do.”

I have already found that the amendments sought in this application are based on happenings since the filing of the suit. In my view the proposed amendments flow from the same facts or substantially the same facts and the plaintiff is obligated to make the amendments to plead its entire case in this suit.

With regard to the issue of bad faith, I am afraid I have not detected any. Indeed in my view no material has been placed before me to obviate the plaintiff’s argument that the application has been brought in good faith and to enable the court determine the real issues in controversy between the parties.

With regard to delay, I have found that indeed the application has been brought six years since the suit was filed. On a prima facie basis, it would appear that the period of delay is prolonged. But delay alone cannot defeat an application for leave to amend. The delay involved here is not inordinate. In **Central Kenya Ltd. vs. Trust Bank Ltd. and 4 others (supra)** the Court of Appeal observed at page 9 of its judgment as follows:-

“The overriding consideration in applications for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise mere delay is not a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs.”

In the present case the delay to bring this application may be long but it is not such delay as is likely to prejudice the defendant beyond monetary compensation. In any event the hearing of the case has not commenced.

With regard to whether the defendant will otherwise suffer prejudice, injustice or injury if the leave sought is granted, I am afraid, no such prejudice, injustice or injury has been demonstrated by the defendant at least such that the defendant cannot be compensated in costs. In **Eastern Bakery vs. Castellino [1958] EA 461** it was held:-

“... amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and there is no injustice if the other side can be compensated by costs”

In the case at hand the defendant will not be exposed to such injury or prejudice that cannot be compensated in costs if I grant the leave to amend as prayed. The existence of the appeal pending before the Court of Appeal cannot be a consideration in the determination of this application.

In the end I allow the plaintiff’s application dated 25.7.2005 in terms of prayers 3, 4 and 5 thereof. The defendant is granted leave to amend its defence within 14 days of today. The plaintiff may also file a reply to the amended defence if necessary within 7 days of service of the amended defence.

I grant the defendant costs of this application in any event.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 7th day of July, 2006.

F. AZANGALALA

JUDGE

7/2006

Read in the presence of:-