REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI COMMERCIAL COURTS)
Civil Case 146 of 1999

ORBIT CHEMICAL INDUSTRIES LTD…….....……
PLAINTIFF

VERSUS

NATIONAL BANK OF KENYA LIMITED…….....…….
DEFENDANT

R U L I N G

This is an application expressed to be brought under the provisions of Sections 3 and 3A of the Civil Procedure Act, Order VIA Rules 3, 5 and 8 of the Civil Procedure Rules and all other enabling provisions of the law. The applicant is the plaintiff and seeks leave to re-amend its plaint.

The grounds for the application are as follows:-

1) That new and important facts substantially relevant to the suit and which were not, with the exercise of due diligence and compence, within the knowledge of the applicant have now been brought to its attention.

2) That the defendant has been guilty of fraudulent concealment of material facts relevant to the applicant's claim and thereby prevented the applicant from bringing out all the pertinent issues in this suit for the Court's determination.

3) That it is in the interests of justice and fairness that the applicant be allowed to present its entire grounds of claim before the Court for determination.

4) That the defendant intends to defeat the applicant's substantial and valid claim on a technicality and which technicality arose as a result of the defendant's fraudulent conduct.

5) That there will be no prejudice suffered by the defendant should the real issues in this suit be brought to the attention of the Court for determination on merits.

6) That it is just and fair that the defendant should not be allowed to defeat the applicant's valid and lawful claim through an illegal act.

7) That the re-amended plaint will enable the court to determine the real issues in controversy between the parties to this suit.

The application is supported by an affidavit sworn by One Ashok Veljibhai Chandaria a director of Solvents (Kenya) Limited which has the plaintiff's authority to conduct all matters legal or otherwise relating to L.R. No.12425 Nairobi.

The application is opposed and there is a replying affidavit sworn by one Leonard Kamweti the defendant's Company Secretary.

The application was canvassed before me on 24.7.2006 by Mr. Koseyo learned counsel for the plaintiff and Mr. Odera Learned counsel for the defendant. Counsel for the plaintiff took me through the affidavits and emphasized that between 1992 and 1998, the parties herein were involved in another suit to wit: HCCC NO.3463 of 1992 and as a result the plaintiff could not file another suit. That earlier suit was by the defendant herein against the plaintiff. The suit was discontinued by the defendant. The present plaintiff then instituted these proceedings in which a defence of limitation has been raised. It is the plaintiff's contention that the defendant acted fraudulently and is the cause of delay in the institution of this suit and should therefore not plead limitation. This application according to the plaintiff is therefore necessary to enable the plaintiff plead fraud concealment of material facts and estoppel.

Reliance was placed upon the case of **Molu & Another –vs- Kenya Railways and Another [2002] 2 KLR 551** for the proposition that where the hearing of a suit has not commenced leave to amend should be freely granted. Further reliance was placed upon Visram J's decision in **Kuloba –vs- Oduol [2001] 1 EA 101** for the proposition that leave to amend should not be declined on the ground that a defence of limitation would be defeated by the amendment. For the same proposition reliance was placed upon the case of **Motokar – vs – Auto Garage Limited and Another (No.2) [1971] E.A 353.** There was also reliance placed upon the case of **Eastern Bakery – vs – Castelino [1958] E.A.** for the well known principle that amendments to pleadings sought before hearing should be freely allowed if they can be made without injustice to the other side and there can be no injustice if the other side can be compensated by costs. The plaintiff also relied upon the case of **Wamuiga –vs – Central Bank of Kenya [2002] 1 E.A 319** in which Mbaluto J stated as follows:-

"**Amendments to pleadings sought before the hearing should be freely allowed if no injustice is caused to the other party however, negligent and careless may have been the first omission and however late the proposed amendment if no injustice is occasioned the amendment should be allowed."**

In response to those submissions, counsel for the defendant argued that in exercise of the wide discretion to grant leave to amend, the court should nevertheless do so judiciously and should act on the material placed before it. On the material availed by the plaintiff in the grounds for the application and in the supporting affidavit counsel submitted that the same did not disclose any new facts as all the facts given have all along been within the knowledge of the plaintiff.

Counsel emphasized that the earlier case Viz: HCCC No. 3463 of 1992, should not be used by the plaintiff to justify its application. In his view the pendency of that case could not prevent the plaintiff from filing suit and in fact the plaintiff in the same suit sought leave of the court to amend its defence to include a counter-claim. That application remained unprosecuted until the action was discontinued. In the premises according to the defendant the plaintiff knew all along that it could have ventilated its concerns in the discontinued suit. The defendant therefore contends that the basis of the plaintiff's application is dishonest as the plaintiff cannot in seriousness allege that the defendant held on to the earlier case to enable it plead limitation in the present case. Counsel referred to a letter dated 5.2.1998 written on behalf of the plaintiff by its advocates addressed to the Attorney General. In that letter all the material now claimed to be new was in the plaintiff's knowledge and the plaintiff was giving a statutory notice to the Attorney General that a suit would be filed based on that material at the expiry of the notice. In counsel's view therefore, the plea that the defendant is guilty of fraud is mischievous and the court's discretion should not be exercised in favour of the plaintiff who has chosen to be less than candid.

I have considered the application, the affidavits filed together with the annextures thereto and the submissions made to me by counsel including the authorities citied. Having done so, I take the following view of this matter. I think it is now settled that leave to amend any pleading is discretionary which discretion like all judicial discretions should be exercised judiciously and not whimsically or capriciously. Each application will be determined according to its own special circumstances. In this application, the plaintiff has made various allegations some of which accuse the defendant of fraud or

fraudulent conduct – very serious charges indeed. The record and the affidavit evidence do not seem to support the allegations and charges.

The first ground for the application for leave to amend is that new and important facts substantially relevant to this suit have now been brought to the plaintiff's attention. Those facts are alleged not to have been within the knowledge of the plaintiff despite the exercise of due diligence and competence. The plaintiff does not identify the new and important facts. Indeed all the facts disclosed appear to have been within the knowledge of the plaintiff even before the institution of this suit.

The pith and marrow of this application is in my view the plaintiff's charge that the defendant has been guilty of fraudulent concealment of material facts which concealment prevented the plaintiff from bringing out all pertinent issues in this suit. The foundation of that charge is that the defendant instituted HCCC No.3463 of 1992 against the plaintiff claiming back the suit piece of land and during its pendency the plaintiff could not institute another suit relating to the same subject matter. Section 6 of the Civil Procedure Act is invoked as authority for not instituting another suit. That argument is in my view not sound in law, logic or fact. Section 6 of the Civil Procedure Act does not prevent the filing of a suit in respect of a matter which is in issue or substantially in issue in an existing suit between the same parties. What the section does is to stay proceeding with the subsequent suit. The suit is otherwise competent. In any event the section does not bar the lodging of a counter claim in the same suit. The defendant has deponed that indeed the plaintiff in the earlier suit filed an application for leave to amend its defence in order to include a counter claim. The complaints proposed to be included in the amended plaint were made in the affidavit in support of the application for leave to amend the defence and in the draft defence and counter claim. The defendant has also exhibited exhibit "**D"** which is a notice dated 5.2.1998 addressed on behalf of the plaintiff to the Attorney General. The same concerns were made by the plaintiff in that notice to the Attorney General. In the face of those facts, the plaintiff cannot be stating the correct position when it blames the defendant for being responsible for the delay in bringing this application. The plaintiff is also not being candid in stating that new and important facts substantially relevant to this suit and which were not, with the exercise of due diligence and competence within its knowledge have been brought to its attention. In the premises the deposition that the defendant's conduct of pleading the defence of limitation is dishonest **mala fide** and amounts to perpetration of grave fraud against the plaintiff would appear to be without basis. I say so because the "**dragging"** of the case in court for 7 years could not as stated above prevent the plaintiff from making the proposed claims. In any event the pace of progress of a case is never in the control of only one party. For the same reasons it does not appear correct to state that the defendant is guilty of fraudulent concealment of material facts on the basis that it filed HCCC No.3463 of 1992 for the sole reason of denying the plaintiff the opportunity to file another suit during the pendency of the earlier suit.

I find and hold that the plaintiff has been economical with the truth. The supporting affidavit in my view discloses complete lack of candour on the part of the plaintiff. The court would frown upon exercising its discretion in favour of such a party.

As stated above, each application should be determined according to its own special facts. I agree that the authorities citied by the plaintiff applied correct principles of law with respect to applications for leave to amend. However, the decisions in those case suited the peculiar circumstances of each case. The primary principle that runs through those cases can be stated as follows in the words of the Court of Appeal in **Central Kenya Ltd – vs - Trust Bank Ltd (Supra):**

"**The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the pleadings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs."**

In **Kyalo – vs – Bayusung Brothers Ltd [1983]** the Court of Appeal held that applications for amendment of pleadings should only be allowed if they are brought within a reasonable time because to allow a late amendment would amount to an abuse of the court process. In that case the amendment came six years late. In the case at hand the application has come seven years later:

In Eastern **Bakery – vs – Castelino (Supra)**, the predecessor of the Court of Appeal at page 462 observed as follows:

"**It will be sufficient for purposes of the present case, to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs."**

The court further cited with approval the English case of **Weldon – vs – Neal(6) [1887] 19 Q.B.D. 394** where it was held:

"**The court will refuse leave to amend where the amendment would prejudice the rights of the opposite party existing at the date of the proposed amendment, e.g. by depriving him of a defence of limitation accrued since the issue of the writ."**

Our rule (3) (2) of Order VIA of the Civil Procedure Rules would seem to allow such an amendment. The rule reads as follows:

"**(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 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."**

Underlining mine. It is clear at once that amendments outside the limitation period may be allowed if the court thinks it is just to do so. The court's main concern is therefore justice.

In the case at hand the defendant has deponed that the proposed amendments are not bona fide and are meant to defeat the defendant's reliance on the plea that the action is statute barred. The defendant has further deponed that the delay in bringing the application has been unexplained and that it will be adversely prejudiced should the application be granted.

I have already found that the justification for the delay offered by the plaintiff does not sound in law logic and fact. I have also found that the plaintiff has not been candid. My above findings coupled with the fact that the basic transaction giving rise to the dispute between the parties herein occurred way back in the year 1987, a period of nearly 20 years, I am inclined to find that it would be unjust to grant the leave sought as in my view the application has been made too late and if allowed it would occasion the defendant serious prejudice not compensatable by costs.

In the result while I am alive to the fact that leave to amend pleadings should normally be freely allowed, in the peculiar circumstances of this case I decline to do so. This application is dismissed with costs.

Orders accordingly.

DATED and DELIVERED at NAIROBI this 25TH day of SEPTEMBER, 2006.

F. AZANGALALA

JUDGE

25/9/2006

Read in the presence of:-