REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

Civil Case 170 of 2002

ASHOK KUMAR PUNJA SHAH:...PLAINTIFF

VERSUS

LIQUIDATION AGENT RELIANCE BANK LTD & 6 OTHERS...................RESPONDENT

<u>RULING</u>

The First Defendant lodged in this court an application to strike out the plaintiff's plaint as against the First Defendant on 8th November,2004 on the following grounds:-

1. The Plaintiff's claim is founded on the torts of negligence and fraud which are alleged to have occurred sometime between 17th July,1998 and August, 17th 1998. For that reason and by virtue of section 4 (2) of the Limitation of Actions Act (Cap 22, Laws of Kenya) the suit is time-barred and may not be entertained before the court.

2. Because the Plaintiff did not lodge a reply to the First Defendant's statement of Defence, he must be deemed to have admitted the allegation borne in the said statement, especially paragraph 7 thereof, which deprives the plaintiff of a claim against the First Defendant.

3. The plaint bears no pleading that enunciates any part the First Defendant played, whether by an overt act or by omission to enable the plaintiff maintain a cause of action against it, or to make it answerable for his claim.

4. The plaintiff's suit in the light of the foregoing discloses no reasonable cause of action.

5. The 1st Defendant shall rely on the ;ruling of the court made on 5th day of November,2004 in support of the grounds in the application.

Before a date could be fixed for the hearing of the said application, the plaintiff filed an application on 7th December,2004 seeking leave to amend the plaint. The plaintiff took a date for his application namely, 23rd February,2004.

It is certain that the application to amend the plaint was prompted by the First Defendant's application to strike out the plaint. This is conceded in effect, by the plaintiff through his grounds of objection dated 6th April, 2005. It is noted that the First Defendant did not serve his application with a date.

The question which has now arisen is which application ought to be heard first. Upon consideration of the submissions by counsel, if a court of law is faced with an application to strike out or one to amend the pleading intended to be struck out, the court ought to take the application for amendment first. In such consideration, the court will tend to be inclined to sustaining a cause of action or suit and for it to be heard on its merits rather than terminating it on grounds of pure law, technicalities or procedure.

It is not a consideration for the court that the intended amendment arose due to a pending application to strike out the pleading. Legal proceedings are not a race to be won by the first person who reaches the tape. It is about determining the rights of parties. If an amendment is able to cure a defect or omission in

a pleading and the court in exercise of its discretion and applying the law gives leave for the amendment to be carried out, that is in order. Such an application will be heard on its merits and the court will decide thereupon. It is to be given preference in priority to an application to strike out the pleading or terminate the case without determination of the entire suit on its merits. The courts will be inclined to sustain a suit than to terminate it.

It is my view that the application for leave to amend ought to be heard first. the First Defendant has filed a Replying Affidavit in opposition thereto. If the application for leave to amend has no merits, the court will appropriately make its decision.

I therefore do order that the plaintiff's application dated 6th December,2005 be heard first. Costs shall be in the cause.

DATED AND DELIVERED AT ELDORET ON THIS 18TH DAY OCTOBER,2006.

M.K.IBRAHIM

JUDGE.