REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO. 1721 OF 1999

SIRAJI ENTERPRISES LIMITED…….1ST PLAINTIFF

HUSSEIN A. AWALE……..2ND PLAINTIFF

VERSUS

NDERITU WACHIRA – RECEIVER &

MANAGER OF BULLEYS TANNERIES

LIMITED (under receivership)…….……..DEFENDANTS

R U L I N G

The plaintiffs seek leave to further amend their Amended Plaint.

It is said that the main reason for the intended further amendment is to challenge the actions of the receiver managers and the directors of Bulleys Tanneries Limited and Bulleys Trading (1988) Company Limited. In order to bring out the relevant facts which form the basis of the cause of action against the said persons, the plaintiffs say that there was need to enjoin four (4) more defendants to the suit.

It is the plaintiffs' case that in July 2004, Bulleys Trading (1988) Company Limited drew a debenture of KShs. 60 million, over the assets and property of Bulleys Tanneries Limited.

A month after the said debenture was drawn up, Bulleys Tanneries Limited was placed under receivership.

That development has caused the plaintiffs to form the opinion that the debenture had only been created with the intention of defeating the plaintiffs' claim.

Indeed, the plaintiffs did file an application for an injunction to restrain the receivers. But the said application was unsuccessful. Despite the said failure of the injunction application, the plaintiffs still feel that the receivership should be challenged. The reason for the desire to challenge the receivership is that the plaintiffs believe that there was fraud in the exercise through which the receivers were appointed.

Therefore, the plaintiffs believe that they should be granted leave to further amend the Plaint, so as to

give rise to the new and serious issues, which the court would need to adjudicate on.

In answer to the application, the proposed 2nd, 3rd, 4th and 5th defendants pointed out that some of the matters which had been stated by the plaintiffs' advocate, when he was prosecuting the application, were statements from the bar. The respondents said that there was no mention, in the affidavit in support of the application, of either the debenture or the sum of KShs. 60 million, about which the plaintiffs have laid emphasis. Indeed, the respondents say that the affidavit did not even allege the likelihood of fraud, or that the intended defendants had had any complicity in the alleged fraud.

In the circumstances, the respondents feel that there was no material before the court, upon which the court could make a determination as to whether or not the proposed defendants should be enjoined to the suit.

It is the respondents case that the proposed defendants were not necessary parties, as the proposed 3rd, 4th and 5th defendants were all directors of Bulleys Trading (1988) Co. Ltd, the proposed 2nd defendants. In effect, the proposed 3rd, 4th and 5th defendants were all agents of a disclosed principal, and the debenture-holder.

By seeking to enjoin the directors of the company alongside the company itself, the plaintiffs are said to be trying to lift the corporate lid of the company without satisfying the normal criteria for that process.

The respondents also point out that inasmuch as the cause of action accrued between 1995 and 1998, the claims would be time-barred, in any event, as the claims were founded on the contracts

for the supply and sale of goods. The plaintiffs are said to want to be paid for the goods which they had supplied at the material time. In the alternative, the plaintiffs are said to want the defendant and the proposed defendants to return such of the goods as had not been paid for.

In the respondents' understanding, both the claim for payment and the alternative claim for the return of the goods, expired some six years from the date when the goods were supplied by the plaintiff.

Therefore, as paragraph 6 of the Plaint asserted that the goods had been supplied between 1995 and 1998, the respondents submit that the cause of action had expired.

As this application seeks leave to enjoin parties to the suit on the basis of causes of action which had expired, the respondents submit that the application ought to be dismissed, as the proposed amendment would not achieve anything meaningful.

Another issue which the respondents have raised is that the application is caught up with laches. In that regard, the court was reminded that the suit herein was originally instituted in 1999. In the year 2002, the trial commenced before the Hon. Ringera J. (as he then was).

Then in 2005, the plaintiffs sought leave to enjoin the receivers to the suit. On 19th July 2005, the Hon. Waweru J. granted leave to the plaintiffs to continue the suit against Bulleys Tanneries Limited (In Receivership), through the receiver/manager, Nderitu Wachira.

In the circumstances, the respondents feel that if the plaintiffs had intended to enjoin other defendants, they should have done so at the same time as when they successfully sought to enjoin the receiver.

By not bringing this application simultaneously with the earlier one, the plaintiffs are said to be guilty of delay, which the respondents believe should be reason enough to dismiss the current application. In support of that contention, the respondents cited **KYALO V BAYUSUF BROTHERS LTD [1983] KLR 229,** in which the holding numbered 1, at page 229, reads as follows;

"**Applications for amendment of pleadings should only be allowed if they are brought within**

reasonable time because to allow a late amendment would amount to an abuse of the court process. In this case the amendment came six years late."

To my mind, that holding needs to be placed within perspective, for it to be fully appreciated. It would therefore help to note the following words, in the holding numbered 2;

"**Amendments that contain allegations completely inconsistent with the previous pleadings in the same suit cannot be allowed, especially if they are late, as they would delay fair trial and prejudice the other party."**

In my understanding, the decision by the Court of Appeal, when they upheld the High Court's decision to disallow the amendment of the Defence, was largely influenced by the fact that the intended amendment was going to introduce a new line of Defence, which was inconsistent with the original line of defence. I say so because at page 232, the Hon. MADAN J.A. (as he then was) held as follows;

"**The application to amend was very late. To grant leave to amend the defence which proposes to make a complete somersault from the original one would be both unfair and cause heavy prejudice to the respondent who is entitled, nearly six years after the accident, to hold the appellants to the admissions made by them originally. I would not open the door to possible pleas of limitation against the respondent."**

On the same page, the Hon. LAW J.A. expressed himself thus;

"**The learned judge exercised his discretion against the appellants and dismissed their application, noting that the proposed amended defence was in contradiction of the original defence and that the reasons for taking such a different stand had not been persuasive. In my respectful submission, the learned judge exercised his discretion rightly and judicially, and I see no reason to interfere with that exercise of discretion."**

I have set out the aforegoing citations at length, as they help illustrate my understanding of the decision in that case. In other words, I think that mere delay, in terms of the length of time as between the original pleading and the application for amendment, may not be the most significant determinant in applications for leave to amend. I believe that the real rationale for the requirement that leave to amend pleadings should be sought without undue delay is that the courts are concerned about the possible prejudice to the other party, and also about the resultant delays in the trial, if pleadings were amended late.

In this case, the two issues which the respondents had asserted as having been omitted from the affidavit which was filed in support of the application, are both to be found in the draft "**Further Amended Plaint**". At paragraph 16 of the said draft, the plaintiffs have mentioned both the debenture created by Bulleys Trading (1988) Ltd, on or about July 2004; as well as the fact that it was for KShs 60 million. Furthermore, the issue of fraud appears to have been exhaustively pleaded in the draft Further Amended Plaint. Therefore, the omission of those two issues from the affidavit in support of the application is of no consequence, in my considered view.

Secondly, the respondents readily conceded that directors of companies could be personally liable if they were involved in fraudulent conduct. Therefore, as the plaintiffs have indicated that they wish to sue the directors, not because they were directors, but because the said directors were said to have been

involved in fraud, it would appear that the respondents should not have sought to deprive the plaintiffs the opportunity to try and have a forum from which to lead evidence of fraud against those persons.

As to the issue of the defence of limitation, I hold the view that the respondents appear to have got hold of the wrong end of the stick, insofar as the proposed defendants were concerned. I say so because at paragraph 16 of the draft Further Amended Plaint, it is expressly stated that the debenture over Bulleys Tanneries Limited was created on or about July 2004.

It is the action of creating that debenture which the plaintiffs assert, gives rise to the claims of fraud, as perpetuated by the defendants. Therefore, in my understanding, the years between 1995 and 1998, when the plaintiffs made deliveries to the Bulleys Tanneries Limited, would have no bearing on the claims founded on the debenture created in 2004.

And in the event that more persons were enjoined to the suit, as defendants, I failed to appreciate how that would prejudice either the current defendant or the proposed defendants.

The respondents are right to say that the plaintiff may have sought leave to enjoin the proposed defendants as at the date when they filed the application dated 31st May 2005. However, it appears that the plaintiffs had, at the time, only concentrated their attention on the fact that Bulleys Tanneries Limited had been placed under receivership, a fact which they believed necessitated the incorporation of the receiver into the proceedings.

The plaintiffs can be justifiably criticised for not having had a wider perspective at the time. However, the failure of the plaintiffs to embrace a wider perspective, as at May to July 2005, cannot of itself be a bar to the current application.

In conclusion, I am satisfied that the issues which the plaintiffs propose to raise will facilitate the determination of the real issues at the core of the suit herein. In arriving at that conclusion, I have taken into account the comments of the Hon. Waweru J., in his ruling dated 16th May 2006, wherein he observed that as at that date,

"**the plaintiffs have never challenged the appointment of the Receiver/Manager or the debenture under which he was appointed in any proceedings."**

This application was most probably brought, partly, in response to those remarks.

In my consider view, the grant of the orders sought would not be prejudicial to the defendant or the proposed defendants. Each of them would have the opportunity to respond to the plaintiffs case, as best they can. In so saying, I believe that the grant of the prayers sought herein cannot constitute the lifting of a corporate veil.

It must be recalled that averments in pleadings were no more than allegations, at that stage. Therefore, if the plaintiffs later wanted to lift the corporate veil, they would have to meet the requisite requirements. And in response, the proposed defendants will have every opportunity to disprove the plaintiffs' allegations.

By going through that process, the parties will have provided to the court, such material as they believe would assist the court in arriving at a comprehensive determination of the dispute.

In the final analysis, I am satisfied that the plaintiffs have made out a case to justify the grant of leave to further amend the Plaint. Accordingly, leave is hereby granted to the plaintiffs to further amend the Plaint, in terms of the draft annexed to the application dated 31st July 2006. The Further Amended Plaint is to be filed within the next TEN (10) DAYS.

As regards the costs of the application, the same shall be in the cause. I so order because I believe that it is only upon final determination of the suit, that it will be possible for the court to ascertain if the proposed defendants were or were not necessary parties to the suit. Also, it is only at that stage that the court would be able to ascertain if the allegations made against the proposed defendants were warranted or not.

Dated and Delivered at Nairobi, this 27th day of November 2006.

FRED A. OCHIENG

JUDGE