

REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

(MILIMANI COMMERCIAL COURTS)

Civil Case 1361 of 2000

VULCAN LIMITED.....PLAINTIFF

VERSUS

THE ATTORNEY GENERAL.....DEFENDANT

R U L I N G

Delay in preparation and delivery of this ruling has been caused by my recent illness, hospitalization and long recuperation. The same is regretted.

The Plaintiff seeks by chamber summons dated 3rd May, 2004 leave of the court to amend its plaint dated 31st July, 2000. The intended amendment, as can be seen in paragraph 15 of the intended amended plaint annexed to the application, is to introduce a new cause of action based on misrepresentation and fraud pleaded to have arisen in respect to a tender floated by the Defendant in the year 1993/1994. The Plaintiff's present claim is based on various pleaded breaches of contract. The application is brought under Order 6A, rule 3 of the Civil Procedure Rules.

The Defendant has opposed the application (grounds of opposition dated 13th May, 2004) upon two grounds:-

- 1. *That the intended amendment seeks to introduce a new cause of action which is time-barred under the Public Authorities Limitation Act, Cap. 39.***
- 2. *That the new claim sought to be introduced is not related to the Plaintiff's existing claims.***

I have considered the submissions of the learned counsels appearing. The Defendant is the Attorney-General of the Republic of Kenya sued on behalf of the Ministry of Health. Under section 3 (1) of Cap. 39 aforesaid, no proceedings founded on tort shall be brought against the Government or a local authority after the end of twelve months from the date on which the cause of action accrued. Under sub-section (2) of the same section, the period of limitation is three years in respect to proceedings founded on contract.

Whether founded on tort or contract, the new cause of action sought to be introduced by the amendment would be grossly out of time. The court has jurisdiction under sub-rule (2) of rule 3 of Order 6A to permit amendment after any relevant period of limitation current at the date of the filing of the suit has expired, but only in the instances set out in sub-rules (3), (4) and (5) of the same rule. Those instances are, where the amendment is made to correct the name of any party (sub-rule (3)); amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counter-claim) (sub-rule (4)); and where the new cause of action arises out of the same facts or substantially the same facts as a 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.

In the present case the amendment sought is not to correct the name of any party or to alter the capacity in which a party sues. It is also clear that the new cause of action sought to be introduced does not arise out of the same facts or substantially the same facts as the existing claims of the Plaintiff. In these circumstances the leave to amend sought is not merited at all and I hereby refuse to grant it. The

application by chamber summons dated 3rd May, 2004 is therefore dismissed with costs to the Defendant. It is so ordered.

DATED AND SIGNED AT NAIROBI THIS 29TH DAY OF NOVEMBER, 2006.

H.P.G. WAWERU

JUDGE

DELIVERED THIS 1ST DAY OF DECEMBER, 2006.