REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL COURTS – MILIMANI
CIVIL CASE NO. 1885 OF 2001

NATIONAL FINANCE COMPANY LTD :::::::::::::::::::::::::::: PLAINTIFF

VERSUS

J.H.A. LUIES ::1st DEFENDANT

FRANCIS MBURU ::2nd DEFENDANT

RULING

The 2nd Defendant has lodged this Chamber Summons under Order VI Rules 7 and 13 (1) (b) (c) and (d) of the Civil Procedure Rules, Section 3A of the Civil Procedure Act and all other enabling provisions of the Law. He seeks an order to strike out the amended plaint on the grounds that paragraphs 5A and 5B of the amended plaint offends the Limitation of Actions Act and that the Plaintiff's claim against the 2nd Defendant is frivolous and an abuse of the process of the Court. The Supporting Affidavit sworn by the 2nd Defendant has given further grounds for the Application that the claim is based on past consideration and that the suit is scandalous, frivolous and vexatious.

The Application was opposed and a Replying Affidavit was sworn by one Mwinyi F. Khatib the officer in-charge of the Plaintiff's Remedial Unit. The Plaintiff also filed Grounds of Opposition through its Advocates.

The Application was canvassed before me on 15th March and 12th April, 2005 by Mr. Mulwa for the 2nd Defendant and Ms Bor for the Plaintiff.

The amended Plaint sought to be struck out was filed on 13th July, 1992. The paragraphs attacked by the 2nd Defendant i.e. 5A and 5B introduced a claim based on a guarantee for which consideration was pleaded as the making or continuing advances or otherwise giving credit or granting other financial accommodation to the 1st Defendant. The Plaintiff further averred that, when the 1st Defendant defaulted, the Plaintiff on 27th May 19985 demanded the sums under the guarantee from the 2nd Defendant.

It is the 2nd Defendant's case that the amendment having been made in 1992, the Plaintiff's claim against the 2nd Defendant was already statute barred and remains so to date. In the 2nd Defendant's view the amendment did not revive an already barred claim. The second challenge against the Plaintiff's claim against the 2nd Defendant was that, the alleged guarantee was based on past consideration and was therefore not sustainable.

The Plaintiff's answer to the 2nd Defendant's challenge was simple. It was that, the amendment effected in 1992, replaced the original action and is deemed to have been filed when the original plaint was filed. Regarding the challenge made that the consideration for the guarantee was past consideration it was argued for the Plaintiff that that was not the case as the guarantee related to sums then owing and to be owing which is not past consideration.

I have considered the application, the affidavits, the annextures, the submissions of counsels appearing and the authorities cited. I have also considered the pleadings filed. Having done so, I take the following view of the matter. Order VI A Rule 3 (2) of the Civil Procedure Rules reads:

> ***"(2) where an application to the court for leave to make an amendment, such as is mentioned in sub rule (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 such sub rule if it thinks just so to do."***

In my view the issue of Limitation should have been raised at the time the application for leave to amend the plaint was being considered. Once the amendment was allowed, it is not open to the 2nd Defendant to challenge the Plaintiff's claim in this application on the basis that the cause of action introduced by the amendment was time barred by the time the amended plaint was filed. My finding is not a bar to the 2nd Defendant raising the issue at the trial of the action.

In my view the amendment introduced in 1992, relates back to the date of the original plaint. It would have been of course different if the Learned Judge who granted the leave to amend limited the same. I do not understand the case of **Eastern Radio Service and Another –v- R.J. Patel t/a Tiny Tots and Another (1962) E.A. 818** as setting a different principle. It was not even the ratio decidendi of the case. The case of **Michell –v- Harris Engineers Co. Ltd (1967) 2 QB 703** lends support to my view while the case of **Riches –v- Director of Public Prosecutions (1973) 2 ALL ER** deals with a different scenario.

It is significant that the 2nd Defendant filed his defence on 14th August, 1987. He did not challenge the guarantee. He did not also plead Limitations when the Plaintiff amended the Plaint. The 2nd Defendant did not seek leave to file an amended defence. It is clear that the 2nd Defendant's answer to the amended defence remains the defence he filed on 14th August, 1987.

In the light of the Defendant's defence and looking at the pleading sought to be struck out, I must say I am not persuaded that it should be struck out. I detect no paragraph which can be said to be scandalous within the meaning of the Law. There is nothing irrelevant. There is no imputation of bad motive or any bad faith on the 2nd Defendant. The Plaint cannot therefore be struck out as scandalous.

I have also not found that the Plaintiff's claim as pleaded in the amended plaint lacks seriousness. It is in my view not frivolous or vexatious. I have also found that the amended Plaint may escape the Law of Limitation.

The upshot of the above considerations is that the 2nd Defendant's application dated 14th February, 2005 is without merit and is dismissed with costs.

Orders accordingly.

DATED AND DELIVERED AT NAIROBI THIS 18th DAY OF MAY 2005.

F. AZANGALALA

JUDGE