



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI

MILIMANI COMMERCIAL COURTS

CIVIL CASE NO.526 OF 1999

JOSEPH KIARIE MBUGUA..... PLAINTIFF

VERSUS

JAMES NDUNGU MUCHUGI & ANOTHER..... DEFENDANT

R U L I N G

This Chamber Summons, dated 22.10.2003 under Order 6A rules 3, 5 & 8 of the Civil Procedure Rules, and Section 3A of Cap. 21, Laws of Kenya, seeks the following orders:-

1. Leave to the Plaintiff to amend his plaint.
2. The Draft Amended Plaint annexed hereto be deemed as duly filed and served upon payment of the requisite fees
- . 3. Costs be provided for.

The application is supported by the Affidavit of S. Kimondo Mubea of even date, and is on the grounds that the Intended Amendment is crucial to enable the court to conclusively adjudicate on all the issues pertaining to the Plaintiff's claim between the Plaintiff and the 2nd defendant, and that it is now clear that the Plaintiff's case is against the 2nd Defendant – M/S Mbo-I-Kamiti Farmers Company Limited, not the 1st Defendant, who should be dropped out of these proceedings. In opposition, the Respondents in their grounds of opposition dated 27/10/03 aver that; the application is unmeritorious and bad in law; the intended amendments constitute the introduction of a fresh cause of action that is statute barred; the application is an abuse of the process of this court.

Upon perusal of the pleadings herein, and listening to counsel for both sides, especially the authorities cited by Counsel for the Applicant – Mr. Kimondo – **Pemcloth Enterprises Limited Vs. Patel** (CAEA) 1976. P. 78 at P.80; **Faulkner V. A.D.C.** (1978) C.A. P.49 at P. 51, and **Central Kenya Limited Vs. Trust Bank Limited** – Civil Appeal No. 222 of 1998 at P.6, I have reached the conclusion that there are no grounds upon which this application can be rejected. This conclusion is on the following grounds:

The alleged fraud against the Plaintiff was not, and could not have been, discovered until 1997/1998. That is the time that the limitation period of six years in cases of contract – started to run. Such period would expire some time this year, 2004, and since the Draft Amended Plaint was filed late

2003, the question of limitation of time, and being time barred, does not arise.

But even if the issue of being time barred arose, which is not in the case in the present application, the provisions of Order 6A rule 3 permit this court, in the interest of justice, to grant leave for such an amendment, even to add or substitute a new cause of action if 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.

As was held in *CENTRAL KENYA LIMITED VS. TRUST BANK LIMITED & OTHERS*, Civil Appeal No. 222 of 1998, at P. 6

“The guiding principle in applications for leave to amend is that all amendments should be freely allowed at any stage of the proceedings, provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party....”

I cannot envisage any injustice or prejudice to the Defendant herein through whose fraud the Plaintiff was led to sue the wrong party and on incomplete material facts.

On the basis of the foregoing, the application herein succeeds, and accordingly I grant the following orders:-

- 1. Grant leave to the Plaintiff herein to amend his plaint.***
- 2. Deem the Draft Amended Plaint annexed hereto as duly filed and served upon payment of the requisite fees.***
- 3. Order that the costs of this application be paid by the 2nd Defendant herein.***

DATED and delivered in Nairobi this 2nd Day of December, 2004.

O.K. MUTUNGI

JUDGE