



REPUBLIC OF KENYA



Haji & another (Suing as the Administrator of the Estate of Asha Mohammed Heshi) v African Banking Corporation Limited & 6 others; Yusuf (Interested Party) (Commercial Case 327 of 2017) [2024] KEHC 9535 (KLR) (Commercial and Tax) (22 July 2024) (Ruling)

Neutral citation: [2024] KEHC 9535 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI COMMERCIAL COURTS)
COMMERCIAL AND TAX
COMMERCIAL CASE 327 OF 2017**

AA VISRAM, J

JULY 22, 2024

BETWEEN

FATUMA MOHAMED HAJI 1ST PLAINTIFF

ALI ABDULLA MOHAMMED 2ND PLAINTIFF

SUING AS THE ADMINISTRATOR OF THE ESTATE OF ASHA MOHAMMED HESHI

AND

AFRICAN BANKING CORPORATION LIMITED 1ST DEFENDANT

FAST ENERGY LIMITED 2ND DEFENDANT

ALI JAMA ALI 3RD DEFENDANT

HASSAN MOHAMMED YUSUF 4TH DEFENDANT

MOHAMMED JAMA ALI 5TH DEFENDANT

DENIS KIRUI T/A SADAABRI AUCTIONEERS 6TH DEFENDANT

KORE NASIR JILLO 7TH DEFENDANT

AND

HUSSEIN MOHAMMED YUSUF INTERESTED PARTY



RULING

1. I have considered the Notice of Motion application dated 8th April, 2024, together with the affidavit in support sworn on even date; the further affidavit sworn on 28th May, 2024; and the replying affidavit sworn in opposition to the same on 22nd April, 2024; the submissions of the parties; and the applicable law.
2. The application seeks to amend the statement of defence by introducing a counterclaim against the 2nd, 3rd, 4th and 5th Defendants.
3. In support of the application, the Applicant stated that once the charged property was sold, the amount was not sufficient to pay off the debt outstanding.
4. Counsel relied on order 7 rule 8 and stated that it ought to be allowed to claim against a person not a party. He submitted that no prejudice would be occasioned as all parties may amend their pleadings, if they so wish.
5. The 7th Defendant stated that it supports the application and associated itself with the submission of the Applicant.
6. In opposition to the application, counsel for the Respondent submitted that the basis of its opposition was because the Defendant is guilty of laches. The application has been made eight years late, and the right to amendment has never been made prior to the same to articulate its position.
7. Further, that the collateral objective of the application, is to cause delay to an aging litigant, with the objective to unnecessarily prolong the matter to her detriment.
8. Counsel submitted that the amendment introduces a cause of action predicated on a contract after six years from the time the cause of action arose.
9. As regards the amount of money recovered, counsel submitted that this fact came to light over two years ago, and ought to have been raised at that time.
10. Based on the facts, the counterclaim arises out of a cause of action which arose in 2017, being a breach of a loan facility agreement dated 2014 between the parties.
11. Moreover, pursuant to the breach as stated above, the Applicant exercised its statutory power of sale and sold the subject property, from which the counterclaim arises.
12. Additionally, the facts show that the Applicant amended its statement of defence on 23rd February, 2023, but chose not to include the counterclaim at that time.
13. Finally, based on the record before me, it is evident that the facts giving rise to the counterclaim arise out of a cause of action that crystallized over six years ago, and therefore, falls afoul of Section 4 of the *Limitation of Actions Act*.
14. However, I take note that this fact alone does not bar amendment. Order 8 rule 3 (5) provides for situations in which an amendment may be allowed, which are similar to the present matter.



15. In Civil Case No 1 of 2000, Visram, J (as he then was) stated as follows:-

“The general principle stated in that case is that an amendment should not be allowed if it causes injustice to the other side. At the time of the Castelino case, our order VIA rule 3(2) and (5) above had not been enacted...

That rule clearly allows for amendments outside the period of limitation and which introduce a new cause of action in stated situations. It is unclear whether Castelino excludes all amendments outside the period of limitation but I think this is catered for by the new rule. (See also *Motokov v Auto Garage Ltd & others (No 2)* [1971] EA 353). Chanan Singh, J in deciding a similar application in *Barclays Bank DCO v Shamsudin* [1973] EA 451 substantially followed the provisions of order VIA rule 3 at a time when those provisions had not been enacted. What I am trying to bring out is that the Courts had recognized the need for allowing certain amendments which were outside the period of limitation and or which sought to introduce a new cause of action even before order VIA rule 3 of the Rules was enacted. Such amendments are those which flowed from the same facts as the originally pleaded claim. The rationale of allowing such amendments is that they do not cause any prejudice to the other party who is taken to have knowledge of such cause at the time the original pleading is filed (emphasis mine).”

16. The learned, judge goes to question the effect of amendment in the follow terms:-

“So, then, should the proposed amendment be allowed? Does it seek to introduce a new cause of action? What prejudice, if any, will the Defendant suffer if the amendment were allowed? The Defendant has objected to the application on the basis that it seeks to introduce a new cause of action and will prejudice his defence. Is that really so? (emphasis mine).”

17. Guided by the above, I ask myself, will there be prejudice if the amendment is allowed?

18. Looking at the facts in the present matter; based on the record, it has been almost eight years, since the cause of action arose. And, as stated above, the Defendant has already exercised its statutory powers of sale and recovered a significant part of the debt which forms part of the dispute between the parties.

19. Given the said facts, I am of the view that it would be unjust to allow the Defendant, to once again, amend its Statement of Defence, to now include a counterclaim, having already had two bites at the cherry, and given the prolonged delay in applying for the same.

20. The message would be that neither the statute of limitations, nor the doctrine of laches are relevant whatsoever to a Defendant. I do not think that only a Plaintiff ought to be bound to raise its claim in a timely manner, and in compliance with the Statute of Limitations, while a Defendant may be absolved of the need to do so entirely, and in all circumstances, when raising a counterclaim.

21. Such a view would not be proper, or fair, and may open up the floodgates to timeless litigation and prolonged delay; undermining the administration of justice.

22. Based on the reasons set out above, I find that the proposed amendment would be unjust and find the application is without merit.

23. The same is dismissed with costs.

DATED AND DELIVERED VIRTUALLY VIA MICROSOFT TEAMS THIS 22ND DAY OF JULY 2024.



ALEEM VISRAM, FCI Arb

JUDGE

In the presence of;

- For the 1st Plaintiff
- For the 2nd Plaintiff
- For the 1st Defendant/Applicant
- For the 2nd Defendant
- For the 3rd Defendant
- For the 4th Defendant
- For the 5th Defendant
- For the 6th Defendant
- For the 7th Defendant
- For the Interested Party

