



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO. 306 OF 2011

STEP-UP HOLDINGS LIMITED.....PLAINTIFF/APPLICANT

VERSUS

FAMILY BANK LIMITED.....DEFENDANT /RESPONDENT

RULING

1. The Notice of Motion application by the applicant dated 25th May 2019 prays for orders that leave be granted to amend its plaint and costs be provided for. The same is supported by the sworn affidavit of **Bernard Mwarania** the plaintiff's chairman.
2. The reasons advanced in the said affidavit and the grounds on the face of the application are that there are salient issues which specifically dealt with its frozen accounts by the respondent which involves a sum of about kshs.9.5 million or thereabouts. That the said amount has not been released by the respondent for unexplained reasons hence the need to amend the plaint.
3. He went on to state that the freezing of the said account took place between 2012 and 2014 which caused the overdraft facility to raise from kshs.3.5 to 5.5 or thereabouts. In the premises it is expedient that the plaint be amended as per the draft amended plaint attached to the affidavit.
4. **Kahiga Waitindi** Advocate opposed the application on behalf of the respondent vide his replying affidavit sworn on 24th May 2021. He deponed that the issues raised by the applicant in the intended amendment were novel and contravened Section 4 of the Limitation of Actions Act. That the cause of action does not arise from the same facts as the cause of action already in court and they substantially differ and if allowed shall substitute the entire action.
5. He went on to state that the only recourse is for the applicant to file another new suit altogether. Allowing the application shall greatly prejudice the respondent and in any case it has failed to link the nexus between what took place in 2013 and 2011. He prayed that the same be dismissed with costs.
6. A further affidavit by Bernard Mwarania sworn on 2nd June 2021 in response to advocate Waitindi reply detailed several other suits between the applicant, the respondent and Mount Kenya university. The issues between the applicant and those parties in those suits revolved around the two accounts frozen by the respondent. He went ahead to accused Mr Waitindi of being complicit in the matters herein as he acted for some of the parties.
7. The court directed the parties to file their submissions which they have complied. Without going into the details of the said submissions, it is clear that each of them reiterated what is contained in their affidavits.
8. The applicant in particular submitted that the issues raised were within the already filed suit herein and that amending the plaint was not introducing new matters altogether. It went ahead to state that the law regarding amendment was clear under the provisions of Order 1 rules 9 and 10 of the Civil Procedure Rules among others. It relied on several other authorities to back up its claim and the court has perused them.
9. The respondent on the other hand submitted that the application was made in bad faith and only meant to introduce new issues and or to seal the cap left by the applicant when filing its claim. That by virtue of the Limitation of Action Act the court should not allow the application since allowing it would be allowing a time barred action which the law abhors.
10. That by allowing the application, the same shall prejudice the respondent as it is a whole new action which it may not be able to respond. The respondent as well relied on many authorities which the court has perused.

ANALYSIS AND DETERMINATION.

11. The court in **ST PATRICKS HILL SCHOOL LTD V. BANK OF AFRICA LTD (2018) eKLR** stated the following principles concerning amendments as was enunciated in **OCHIENG & OTHERS V. FIRST NATIONAL BANK OF CHICAGO CIVIL APPEAL NO. 147 OF 1991**(unreported);

“a) the power of the court to allow amendments is intended to determine the true substantive merits of the case;

b) the amendments should be timeously applied for;

c) power to amend can be exercised by the court at any stage of the proceedings;

d) that as a general rule however late the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side;

e) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitations Act subject however to powers of the court to still allow and amendment notwithstanding the expiry of current period of limitation.”

12. Taking cue from the above authority can it be said that the issues raised by the respondent in opposing the amendment plausible.? Are they time barred and therefore run contra to the **Limitation of Action Act Section 4** thereof.?

13. The court has perused the further affidavit by the applicant and it is apparent that there have been and perhaps are still various suits between the parties herein and other third parties. The common denominator are the two accounts held by the applicant namely nos. 019000015726 and 01900001365. There were issues surrounding the freezing of the same by the respondent. The applicant felt aggrieved and filed this suit. It appears that there exist some amount in those accounts which is a subject of contest.

14. The reading of the annexures to the applicant’s further affidavit demonstrate that the issues between them began way back in the year 2011 and they persist to date. For the foregoing reasons it is not therefore possible to entirely determine when the question of limitation ended. This will naturally need further adduction of evidence. To deny the applicant an amendment to its plaint may lock it out yet probably there are germane issues which this court would have gladly determine.

15. All, in my view, is not lost to the respondent. In fact, the issue of limitation can be raised at any time even before trial begins. For now, I do not see any prejudice that will be suffered by the respondent. The court although the amendment has been sought after a long time does not see any reason to deny it as the matter in any case had not formally been heard save for the applications on record.

16. In the premises the application is hereby allowed, the applicant shall file and serve its amended plaint within 14 days from the date herein.

17. Costs to the respondent.

DATED SIGNED AND DELIVERED AT NAKURU VIA VIDEO LINK THIS 18TH DAY OF NOVEMBER, 2021

H K CHEMITEI

JUDGE