



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

COMMERCIAL AND TAX DIVISION

HCCC NO. 318 OF 2017

OCEAN FOODS LIMITED.....PLAINTIFF

-VERSUS-

OSOTSPA COMPANY LIMITED.....1ST DEFENDANT

OSOTSPA EUROPE LIMITED.....2ND DEFENDANT

EXTROPICA FOODS LIMITED.....3RD DEFENDANT

RULING

1. This ruling is in respect to two applications dated 12th April 2019 and 8th July 2019.
2. Through the application dated 12th April 2019 the applicant seeks the following orders:
 - i. Leave be granted to the applicant to further amend the Amended Plaint dated 20th December 2017, to file the defence to Counterclaim dated 19th February 2019 out of time and to file a further witness statement and supplementary list and bundle of documents:
 - ii. Further Amended Plaint dated 19th February 2019 and the Defence to Counterclaim dated 19th February 2019 both filed on the same date be deemed as properly filed; and
 - iii. Costs of the application be in the cause.
3. The application is supported by the affidavit of the plaintiff's Director **Mr. Ali Mohammed Sahal** and is premised on the grounds that: -
 1. That the applicant filed an Amended Plaint dated 20th December 2017 seeking the following prayers: -
 - a. A declaration that the plaintiff's acknowledgement of debt and payment plan as agreed between the plaintiff and 1st and 2nd defendants under Clause D of the Addendum of January 2016 was made under mutual mistake by the parties and is in breach of the terms of Clause 10 of the Letters of Understanding of November 2015.
 - b. A declaration that the plaintiff is not indebted to the 1st and 2nd defendants in the sum of EUR 1,488,985.18 or at all.
 - c. Special damages in the sum of \$1500,000.00 for damage of goods.
 - d. Costs of the suit and the interest thereto.
 - e. Any other remedies as the court may deem fit.
 2. That the 1st and 2nd respondents filed an Amended Defence & Counterclaim dated 16th February 2018 and at paragraph

43 of the counterclaim the 1st and 2nd respondents allege that the applicant acknowledged it's indebtedness in the sum of Euros 1,592,000 in the Addendum to the letters of understanding.

3. That the applicant only acceded to Clause D of the Addendum to the letters of understanding, which Addendum was entered into in January 2016, under duress as it was one of the requirements for 1st and 2nd respondents to extend the contract between the parties to December 2020 thus the need to further amend the Amended Plaintiff and incorporate this vital aspect of our claim.

4. That the 1st and 2nd respondents in their counterclaim claim that the applicant failed to make any payments in settlement of the admitted debt.

5. That the payment plan was agreed by the parties under mutual mistake and in breach of Clause 10 of the Letters of Understanding of November 2015.

6. That based on the above allegations and others raised by the 1st and 2nd respondents at paragraphs 45, 46, 47, 48, 50, 51, 52, 53, 54, and 56 of the Counterclaim it's necessary for the applicant to respond to the said allegations.

7. That the applicant further seeks to amend typographical errors on the numbering of some paragraphs as from paragraph 15F of the Amended Plaintiff and dates as indicated at paragraphs 15K and 15L of the Further Amended Plaintiff.

8. That the further amendments made in the Amended Plaintiff with regard to the numbering will in no way prejudice the respondents as the same touch on the structure of the Amended Plaintiff and not the content.

9. That the applicant therefore seeks leave to further amended the Amended Plaintiff.

10. That the proposed amendments as can be gleaned from the further Amended Plaintiff are necessary for this honourable court to make a just determination of the claims of the parties in the suit.

11. That the applicant filed a Defence to Counterclaim dated 19th February 2019 out of time and prays that the same be deemed as properly filed.

12. That the further amendments proposed to the Amended Plaintiff also necessitate that the applicant files a further witness statement and supplementary list and bundle of documents to enable it advance its case before this honourable court.

13. That the respondents will not be prejudiced by the proposed further amendments to the Amended Plaintiff, supplementary witness statement and list and bundle of documents as they will have no opportunity to respond to the same.

14. That the case is yet to be set down for hearing and it is therefore in the interest of justice that this Honourable grants the orders sought herein.

4. The 1st and 2nd defendants did not file any response to the plaintiffs application in the application dated 8th July 2019 (hereinafter "the second application") the 1st and 2nd defendants seek to have the plaintiffs defence to counterclaim dated 19th February 2019 struck out and/or expunged from the court record on the basis that they were file out of time without the leave of the court.

5. The plaintiff opposed the application through its director's affidavit sworn on 24th September 2019.

6. Parties canvassed the applications by way of written submissions which I have carefully considered.

7. The main issue for determination is whether the parties herein have made out a case for the granting of the orders sought in the applications. While 1st application seeks leave to amend the plaintiff and file the defence to counterclaim out of the time, the 2nd application seeks to have the same struck out/expunged from the court record. I note that the 2nd application could as well serve as a response to the first application.

Leave to further amend plaintiff.

8. The plaintiff submitted that no prejudice will be occasioned to the respondents by the proposed amendments as they mainly see to correct typographical errors on the dates and numbering of some paragraphs so as to enable the court and parties read and understand the claim.

9. On their part, the respondents argued that the plaintiff's application lacks merit as the plaintiff had not explained why it took so long (16 months) to file the defence to their counterclaim despite numerous reminders. It was the respondent's case that the plaintiff's conduct is indicative of disregard for the court process and the rules of procedure which ought not to be rewarded or countenanced by the court. For this argument, the respondents relied on the decision in **Kassam V Bank of Baroda (Kenya) Ltd** [2002] eKLR wherein it was held; -

"The authorities show, that when it is said that amendment may be allowed however late the proposed amendment may be, it does not mean that a party his advocate may unnecessarily delay an amendment. It is of the first importance that an amendment should be applied for immediately it is seen that an amendment is necessary. A late amendment may be done,

but the applicant must show why the application is made late and must satisfy the court that the delay is not deliberate. Late applications for amendment are liable to be rejected, if there has been unexplained delay in making the application. Any delay in applying for amendment is a material factor to be considered by the court before exercise of its discretion.”

10. In support of its application, the plaintiff cited the case of **Central Kenya Ltd vs Trust Bank Ltd & 5 others** where the Court of Appeal held:

“The overriding consideration in application for such leave is whether the amendments are necessary for the just determination of the controversy between the parties. Likewise, mere delay is bit a ground for declining to grant leave. It must be such delay as is likely to prejudice the opposite party beyond monetary compensation in costs. The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudices or suffer injustice which cannot properly be compensated for in costs.”

11. Order 8 Rule 3 of the Civil Procedure Rules stipulates as follows on amendment of pleadings: -

“[Order8, rule 3.] Amendment of pleading with leave.

(1) Subject to Order 1, rules 9 and 10, Order 24, rules 3, 4, 5 and 6 and the following provisions of this rule, the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings.

(2) Where an application to the court for leave to make an amendment such as is mentioned in subrule (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 any such subrule if it thinks just so to do.

(3) An amendment to correct the name of a party may be allowed under subrule (2) notwithstanding that it is alleged that the effect of the amendment will be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

(4) An amendment to alter the capacity in which a party sues (whether as plaintiff or as defendant by counterclaim) may be allowed under subrule (2) if the capacity in which the party will sue is one in which at the date of filing of the plaint or counterclaim, he could have sued.

(5) An amendment may be allowed under subrule (2) notwithstanding that its effect will be 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.”

12. Courts have adopted the position that amendments sought before the hearing of the case should be carefully allowed. This is the position that was adopted in **Eastern Bakery V Castelino** [1958] EA 461 where the Court of Appeal held:

“It will be sufficient to say, for the purposes of the present case, to Say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side, and that there is no injustice if the other side can be compensated by costs.”

13. In the instant case, it was not in dispute that the main suit is yet to be set sown for hearing. I have perused the amended plaint filed by the plaintiff herein and I note that it does not fundamentally alter the cause of action in the suit or prejudice the defendant’s case.

14. The court however notes that, as rightly pointed out by the defendants, there was a long delay, on the part of the plaintiff in not only filing the defence to counter-claim, out of time, but also in filing the instant application. I find that the apparent long delay notwithstanding, this court still has the inherent power under Section 3A of the Civil Procedure Act, to permit the plaintiff to amend its pleadings at any time before judgment.

15. In **J. C. Patel v D. Joshi** [1952] 19 EACA 12, the court held:

“The rule of conduct of this court in such a case is that however negligent or careless may have been the first omission and however late the proposes amendment, the amendment should be made if it can be made without injustice to the other side.”

16. In the present case, the defendants did not demonstrate that any injustice will be caused to them by the proposed amendments.

17. In the circumstances of this case, I am of the humble view that the justice of this case will require that the application dated 12th April 2019 be allowed. I however grant the costs of the application to the defendants owing to the delay on the part of the plaintiff in bringing the said application.

18. Turning to the application dated 8th July 2019, I find that having noted that the said application was ideally a response to the first application and having allowed the first application, I find that the second application is spent as this court cannot expunge/strike out the pleadings whose filing, out of time, it has already allowed.

Dated, signed and delivered via Microsoft Teams at Nairobi this 8th of October 2020 in view of the declaration of measures restricting court operations due to Coved -19 pandemic and in light of the directions issued by his Lordship, the Chief Justice on the 17th April 2020.

W. A. OKWANY

JUDGE

In the presence of

Mr. Kiarie for the 1st and 2nd defendants.

Miss Agwata for Mrs Ahomo for the plaintiff

Court Assistant: Sylvia