



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL CASE NO. 33 OF 2011

TIMOTHY MORRIS ALALA..... 1ST PLAINTIFF/RESPONDENT

ELDOBLIZ COMPANY LIMITED..... 2ND PLAINTIFF/RESPONDENT

VERSUS

AFRICAN TOUCH SAFARIS LTD.....1ST DEFENDANT/APPLICANT

MRS. ROSEMARY KAITANY.....2ND DEFENDANT/APPLICANT

RULING

The 1st Respondent/applicant herein filed an application dated 12th January 2018 and filed in court on the same day seeking for the following orders:

- (a) That leave be granted to the applicant/1st defendant to amend the 1st defendant's defence as per the draft amended defence.
- (b) That leave be granted to the applicant/1st defendant to lodge a counterclaim against the 1st plaintiff/respondent.
- (c) That the proposed amended defence and counter-claim be deemed to have been dully filed and served subject to payment of full filing fees.
- (d) That the court do issue any other or further directions, and or orders it may deem fair and just in the interest of justice.
- (e) That the costs be in the cause.

The said application is supported by an affidavit by *Rosemary Kaitany* who deposed that the amendment sought for a counter-claim of KShs.10,000,000/- from the plaintiff and that this would allow the court to determine all the issues in question. The amendment of the amount was due to change in the 1st plaintiff evidence in court on 13th February 2017 which differed from the statement recorded on 30th November 2010. No irreparable damage would be suffered if the application is granted and that it was made in good faith. The draft amended defence was annexed to the application.

The plaintiffs opposed the said application by filing grounds of opposition and a replying affidavit. The 1st plaintiff deposed that he was not aware of any audit done. That after losing the criminal case the 2nd defendant is introducing an alternative version of events. The amendment would lead to filing of a fresh suit which would defeat the defence of limitation of actions. The defendants have not demonstrated that the information they relied on was not available to them at the time of filing their defence.

In addition, the said application was based on a misleading affidavit which failed to disclose all the material facts, it was bad in law and was intended to derail the conclusion of the matter.

1st defendant/applicant's submission

The amendment was occasioned by lack of cooperation of the 1st plaintiff to assist the 2nd defendant to recover its lost money. The law allowed amendment even where time had lapsed as was held in *Barclays Bank D.C.O v Shamsudin (1973) EA 451* where the court stated that in special circumstances, amendment of a plaint will be allowed notwithstanding that the effect will be to defeat a defence of limitation. Further the case had not proceeded to hearing and thus amendment could be done at any stage as was held in *Bosire Ogero v Royal Media (2015) eKLR*. Also a three judge bench in *Institute for social Accountability & Anor v Parliament of Kenya & 3 others (2014) eKLR*. Section 100 of the *Civil Procedure Act* governs the amendment of the pleading together with Order 8 rule 5 of the *Civil Procedure Rules*.

The court was urged to allow the application.

2nd defendant's submission

The issues submitted are similar in addition to some of the cases not referred by the 1st respondent. She fully supported the 2nd defendant application. The 1st defendant/applicant could be ordered to pay costs if the 1st plaintiff could suffer any prejudice as was held in **Okiya Omtatah & Anor v Bidco Africa and 4 others (2018) eKLR** where the court of appeal adopted the same approach in **Central Kenya Ltd v Trust Bank & 4 others, CA NO. 222 of 1998** when it affirmed that the guiding principle in amendment of pleadings and joinder of parties is that, ***“The policy of the law is that amendments to pleadings are to be freely allowed unless by allowing them the opposite side would be prejudiced or suffer injustice which cannot properly be compensated for in costs.”***

Further the court had discretion to allow the amendment application as was held in **AAT HOLDINGS V DIAMOND SHIELDS INTERNATIONAL LTD (2014) eKLR**. The amendment cannot be allowed if it tends to change the cause of action which is not the case in question and the same amendment should be made in good faith.

Plaintiff's submission

It was their submission that the proposed amendment was made out of time and the cause of action is on a contract which can only be pursued after 6 years thus the limitation of time applies. The defendants would be introducing a new cause of action. The case was filed in 2011 but the defendants are amending at this time with no reasonable explanation. They relied on **JOHN MULWA KANG'AATU V PAN AFRICAN INSURANCE CO. LTD (2015) Eklr** where the applicants were introducing a new cause of action and therefore the court declined to allow the application.

Determination

The application herein is for amendment of defence dated 17.3.2011 filed in court on 17th March 2011. The general power to amend is governed by Section 100 of the Civil Procedure Rules which states as follows;

“the court may at any time, and on such terms as to costs or otherwise as it may think fit, amend any defect or error in any proceeding in a suit; and all necessary amendments shall be made for the purpose of determining the real question or issue raised by or depending on the proceedings.”

Also Order 8 rule 3 governs amendments. The order provides as below,

3(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 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 any such sub rule if it thinks just so to do.

The plaintiffs have opposed the application citing that the defendants are time barred and it shall amount to a new cause of action. As per the foregoing legal provisions, the amendment may be allowed at any stage. The suit was filed way back in 2011 and to date this case is yet to be heard. The plaintiff was not keen to prosecute his case and at one point the 1st defendant made an application dated 14th May 2017 and filed in court on 17/5/2017 for dismissal of suit for want of prosecution.

Section 100 above gives the principles under which the court should grant the orders sought especially on determining the real question. The defendants aver that they seek for a refund of Kshs. 10,000,000/- which had been lost by the 1st plaintiff. This came to their knowledge when the 1st plaintiff in his testimony between the 8th – 13th of February 2017 failed to cooperate with the defendants towards recovery of the same.

In **John Mulwa Kang'aatu v Pan Africa Insurance (supra)** the court found that such an application for amendment cannot be allowed if it is to change a cause of action. The 1st plaintiff in his plaint had particularized illegalities and fraud against the defendants.

Clause 13(c) in particular read as follows, ***“obtaining the plaintiffs cheques book by misrepresentation and returning the cheque book after fraudulently withdrawing over Kshs. 12 million using the cheque.”***. A look at this shows that this was more of money claim which arose out of many allegations by both parties. Further, one of the prayers the plaintiffs sought read as follows, ***“restriction of monies to the plaintiffs equal to the sum of all funds removed from the Eldoret account without the plaintiffs' authority.”*** The introduction of the new counterclaim in the defence won't change the cause of action as alleged by the plaintiffs.

The court is guided by the Court of Appeal decision in **Central Kenya Ltd v Trust Bank Ltd and 5 others (2000) eKLR** where the court set out the principles on amendment of pleadings;

- i. That are necessary for determining the real questions in controversy.
- ii. To avoid multiplicity of suits provided there has been no undue delay.

iii. Only where no new or inconsistent cause of action is introduced ie if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.

iv. That no vested interest or accrued legal rights is affected.

v. So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.

The court finds that the plaintiffs can be adequately compensated by costs considering that this matter has not taken off.

In addition, the plaintiffs had argued that the application was time barred. Order 8 rule 3 as quoted above gives the court discretion to allow the application. In *AAT Holdings Limited v Diamond Shields International Ltd (2014) eKLR* it was held as follows,

“The law on amendment of pleadings is tempered with discretion so that a court of law, properly guided by principles of law, should be able to allow an amendment for purposes of determining real question or issue in controversy, which is what adjudication of cases and effectual dispensation of substantive justice to parties under Article 159 of the Constitution.”

This court therefore finds the application merited and is allowed as prayed. Costs in the cause.

S. M GITHINJI

JUDGE

DATED, SIGNED and DELIVERED at ELDORET this 5th day of April, 2019.

In the absence of:-

The plaintiff/applicant

The defendant/Respondent

And in the presence of Mr. Mwelem - Court clerk