REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL AND ADMIRALTY DIVISION

CIVIL SUIT NO. 447 OF 2002

THE DELPHIS BANK LIMITED

(UNDER STATUTORY MANAGEMENT…….....PLAINTIFF

VERSUS

FLYSTAR LIMITED.....DEFENDANT

RULING

1. This is an application for leave to amend the Plaint. The plaintiff contends that the proposed amendment would, if allowed, enable the court to determine the real question in controversy between the parties.

2. Secondly, the plaintiff holds the view that the proposed amendment cannot occasion any prejudice to the defendant.

3. But the defendant expressed the view that if the plaintiff was allowed to amend the Plaint in the manner contemplated, that would be extremely prejudicial to it as the defendant would be deprived of a defence which is currently available to it. The said defence was one which asserted that the claim against the defendant was barred by virtue of the provisions of the Limitation of Actions Act.

4. The first proposed amendment is to the name of the plaintiff.

5. At the time the suit was filed, the plaintiff's name was given as **THE DELPHIS BANK LIMITED.**

6. The plaintiff has exhibited a Notice of Change of Name, which shows that its new name, since 3rd October 2003, was **ORIENTAL COMMERCIAL BANK LIMITED.**

7. The second proposed amendment would introduce the following 3 statements of fact;

> ***"7. The Plaintiff states that as security for the financial guarantee for the sum of US Dollars 122,500 issued in favour of Mr. Kirti Karamshi Shah, the Defendant deposited with the plaintiff its Title over its property L.R. No. 99/232 to secure the said financial accommodation.***
>
> ***8. The Plaintiff states that the Defendant created an equitable/English mortgage in favour of the plaintiff by depositing its Title over L.R. No. 99/232 as security for the financial***

guarantee issued to Mr. Kirti Karamshi Shah.

13. The plaintiff states that it is entitled to realize the Title No. 99/232 in satisfaction of its claim against the defendant?.

8. Based on those proposed amendments on matters of fact, the plaintiff proposed the following 2 reliefs to the plaint;

> ***"c. A declaration that the Defendant created an Equitable/English mortgage over its Title Number L.R. No. 99/232 in favour of the plaintiff by depositing the same with the plaintiff to secure the financial guarantee issued to Kirti Karamshi Shah.***
>
> ***d. A order that the plaintiff be allowed to realize the Title Number 99/232 in satisfaction of the claim herein?.***

9. The defendant's position was that those proposed amendments sought to introduce a totally new case. That submission was premised on the fact that the original claim was based solely upon an alleged Guarantee.

10. Now, the plaintiff wished to introduce the issue of an Equitable Mortgage. Therefore, the defendant perceives that as an attempt to bring up a cause of action whose character was substantially different from that in the original claim.

11. According to the defendant, Section 100 of the Civil Procedure Act specified that amendments were only intended to enable the applicant to amend any defect or error, but not to substitute an entirely new suit.

12. The defendant believes that the facts which the plaintiff sought to incorporate into the amended plaint were always within the knowledge of the plaintiff. Therefore, the defendant believes that the plaintiff was obliged to explain to this court why it had not incorporated into the original plaint, the claim which it wishes to introduce now.

13. Another issue which the defendant emphasized is that pursuant to the provisions of Section 19 of the Limitation of Actions Act, all actions which were based on mortgages should be brought within 12 years from the time the cause of action accrued.

14. As the plaint had indicated that the cause of action accrued in the year 2002, the defendant submitted the claim which the plaintiff sought to introduce now, was already barred by effluxion of time.

15. If a claim was time-barred, the court would have no jurisdiction to entertain it, so submitted the defendant. Why should that be the case? The defendant submitted that such a case would be stale.

16. But the defendant also acknowledged that the court has the discretion to allow amendment of pleadings even after the lapse of the time during when a suit ought to be brought.

17. In this case, however, the defendant sees the proposed amendment as constituting an attempt to circumvent the defence of Limitation which has been available to the defendant.

18. Indeed, the defendant believes that the application was an afterthought, in the nature of a reaction by the plaintiff, to the defendant's formidable defence.

19. In the case of ***DHANESVAR Vs. MEHTA Vs. MANILAL M. SHAH [1965] 1 E.A. 321,*** *Spry J.A. said;*

> ***"I do not think, therefore, that, in principle, it would necessarily be wrong for a court to***

allow an amendment under O.1 R. 10, when the period of limitation for an application under O. 23 r.3 has expired, but I think that amendment should not be allowed unless there is a reason for the delay which would have been sufficient to justify allowing an application under O.23 r.8?.

20. The learned Judge went on to state as follows, at page 328;

"An application for amendment is always in the discretion of the court and in my view the court would not be justified in exercising its discretion in a case where there had been negligence and delay and where the effect of allowing the application would have been, if not to defeat a vested right, at least to defeat a prima facie defence of limitation?.

21. Taking over from there, Crabbe JA stated that it has been the policy of courts to lean against stale claims. At page 330 Crabbe JA said;

"The object of any limitation enactment is to prevent a plaintiff from prosecuting stale claims on the one hand, and on the other hand to protect a defendant after he had lost the evidence of his defence, from being disturbed after a long lapse of time?.

22. In that case, the plaintiff had died and the applicant made an application to substitute him. However, the application was made after the suit had abated. In those circumstances if a substitution were to be allowed, the plaintiff would have been aided to circumvent the provision which limited the period within which a deceased plaintiff could be substituted.

23. Taking cue from that case, the defendant submitted that in this case, the law stipulated that a claim founded on mortgage had to be brought within 12 years from the date when the cause of action accrued.

24. And in the opinion of the defendant, the cause of action accrued in 2002. That would mean that as at 2015, when this application was made, more than 12 years had lapsed.

25. But the plaintiff countered that submission by pointing out that the right to foreclose would only accrue after the court had granted a judgement in favour of the plaintiff, finding that the defendant was indebted to the plaintiff.

26. Quoting from "*Blacks law Dictionary?*, the plaintiff noted that "*To Foreclose?* means;

"To terminate a mortgagor's interest in property; to subject the property to foreclosure proceedings?.

27. Bearing that definition in mind, the plaintiff went on to point out the following words as enacted by Section 19 of the Statute of Limitations Act;

"1. An action may not be brought to recover a principal sum of money secured by a mortgage on land or moveable property, or to recover proceeds of the sale of land, after the end of twelve years from the date when the right to recover money accrued.

2. A foreclosure action in respect of a mortgaged property may not be brought after the end of twelve (12) years from the date on which the right to foreclose accrued".

28. The date when a plaintiff dies is specific. It is the date on which he ceases to have life.

29. In similar vein, it would be expected that parties ought not to have any dispute about the date when a cause of action accrued. However, in reality, many parties are unable to agree on the date a cause of action accrued. That is what has happened in this case.

30. In the event, until the court hears the parties on that issue, it is not possible for me, at this stage to

conclude whether or not the cause of action accrued more than 12 years ago.

31. Of course, there is also the contention by the plaintiff that it had already commenced action to recover the money which was lent to Kirti Karamshi Shah, and which was secured by the equitable mortgage.

32. That contention brings into focus yet another issue; as to whether or not the failure to mention the equitable mortgage in the original Plaint could be deemed to constitute the legal proceedings contemplated by Section 19 of the Statute of Limitations Act.

33. The plaintiff's position was that the original plaint already constituted an action to recover the principal money which was secured by the mortgage.

34. However, the defendant's position was that the only security cited in the original plaint was a Guarantee. Therefore, the principal sum in respect to which the original plaint was filed was not indicated, *(in the original plaint)* as having been secured by a mortgage.

35. My take is that unless a plaintiff cites the mortgage as the security for the principal sum, he cannot be deemed to have commenced foreclosure action. I say so because the court cannot be expected to give orders to terminate a mortgagor's interest in a property if the mortgage had not been made an issue in the case which was before the court.

36. However, if the Title document relating to the suit property was in the plaintiff's hands; and if the said Title was placed in the hands of the plaintiff as a security for the money which the plaintiff had loaned out, it may be practically impossible for the defendant to retrieve the Title unless and until the issue of the alleged loan was resolved.

37. If the plaintiff cannot prove that it is owed the money it was claiming from the defendant, the defendant may wish to retrieve his Title. But that would, without doubt, lead to the question as to the circumstances which placed the Title document in the hands of the plaintiff.

38. I have also considered the fact that there is, as yet, no defence which the defendant has raised, on the lines of the claim being time-barred. The defendant cannot have put forward that defence because the claim founded on the mortgage had not yet been made directly.

39. If the said claim had been raised earlier, then the defence could not have arisen.

40. Therefore, the fact that the plaintiff wishes to raise a claim which appears to introduce a new angle to the original claim, cannot be deemed as an attempt to circumvent or to defeat the defence founded on the grounds that the claim was barred by limitation.

41. The introduction of that angle would provide the defendant with an opportunity to put forward the defence of limitation.

42. By allowing the defendant to amend the Plaint, the court is not validating the claim, nor is the court ruling out any defence which is available to the defendant. Therefore, I hold that by granting leave to the plaintiff to amend the plaint, the defendant would not be prejudiced.

43. Accordingly, leave is granted to the plaintiff to amend the plaint in the terms set out in the draft Amended Plaint which was attached to this application.

44. On the issue of costs, I order that the plaintiff will not be entitled to look to the defendant for the same. There is no reason in law or in fact for imposing upon the defendant the costs of the application through which the plaintiff sought leave to amend its own plaint. The need for the amendment did not arise because of a fault attributable to the defendant. Each party will pay its own costs.

DATED, SIGNED and **DELIVERED** at **NAIROBI** this **4th day** of **February** 2016.

FRED A. OCHIENG

JUDGE

Ruling read in open court in the presence of

Mabera for Masese for the Plaintiff

Echesa for the Defendant

Collins Odhiambo – Court clerk.