



**IN THE HIGH COURT OF KENYA**

**AT NAKURU**

**E.L.C. 175 OF 2012 (FORMERLY HCC 82 OF 06)**

**TAHFA ALI.....1<sup>ST</sup> PLAINTIFF**  
**MUNAWAR ALI.....2<sup>ND</sup> PLAINTIFF**  
**MUNIR ALI.....3<sup>RD</sup> PLAINTIFF**

**VERSUS**

**TRANS NATIONAL BANK LTD.....1<sup>ST</sup> DEFENDANT**  
**BENJAMIN KISOI SILA**  
**T/A LEGACY AUCTIONEERING SERVICES.....2<sup>ND</sup> DEFENDANT**  
**ABDUL JALIL PARKER.....3<sup>RD</sup> DEFENDANT**  
**WONDER FEEDS LIMITED.....4<sup>TH</sup> DEFENDANT**

**RULING**

On the notice of motion dated 22/6/2012, the plaintiffs/applicants seek to amend the plaint in terms of the annexed draft amended plaint and that the annexed amended plaint be deemed as duly filed upon payment of the court filing fees. The applicants contend that their former advocates forgot to include some material facts in the pleadings and this only came to their attention when the current counsel took over the conduct of this case. The application is supported by the affidavit of Munawar Ali, the 2<sup>nd</sup> applicant who urged that the proposed amendment will not prejudice any of the other parties.

It is only Kagucia & Co. Advocates, the counsel for the 3<sup>rd</sup> & 4<sup>th</sup> defendant/respondents who opposed the application by filing grounds of opposition on 29/6/2012, Mr. Ondande appearing for the 1<sup>st</sup> respondent and Mr. Ndolo for the 2<sup>nd</sup> respondent did not file any responses but informed the court that they oppose the application and agree with the grounds of opposition filed by the 3<sup>rd</sup> and 4<sup>th</sup> respondent's counsel. The grounds of opposition are as hereunder:-

1. That the application is misconceived; an abuse of the court process, incompetent and bad in law;
2. That the firm of B.W. Mathenge which purports to represent the applicant is not properly on record;
3. That the pleadings are undated, unsigned;
4. That the amendment seeks to introduce a new cause of action which is barred by **Limitation of Actions Act Cap 22, Laws of Kenya**; and

5. That the respondents will suffer prejudice.”

Mr. Simiyu, counsel for the applicants urged that they are properly on record as they act together with Ogeto & Ogeto Co. Advocates as evidenced by the notice of motion dated 11/6/2012; that they came on record on 13/10/2010 and all counsel on record have been notified; That their notice of appointment was received on 1/11/2010 and they had conduct of the matter before they filed the instant application. As regards undated pleadings counsel urged that the draft pleadings could not be dated till the application is heard. He also explained that they merely added one ground to paragraph 14 of the plaint which alleged fraud and there is no change to the prayers. He denied that any prejudice will be suffered by the respondents.

I have considered the application, the grounds of opposition and counsel’s submissions. I do appreciate that this matter was filed in 2006, over 8 years ago. Under **Order 8 Rule 1(1)** of the **Civil Procedure Rules (2010)** a party is at liberty to amend their pleadings before close of pleadings. Under **Order 8 Rule (3)** of the **Civil Procedure Rules**, the court may at any stage of the proceedings on terms to be imposed, allow an amendment of pleadings in order to meet the ends of justice and not prejudiced to the other parties. In this case when the first witness was testifying, the applicants applied for an adjournment to enable them amend the pleadings.

**Whether the firm of P.W. Mathenge is properly on record:**

Although the firm of Ogeto and Ogeto Advocates filed the case on behalf of the plaintiffs, on 13/10/2010, the firm of H.W. Mathenge filed a notice of appointment and indicated they had been appointed to act for the plaintiff along side the firm of Ogeto & Ogeto. On record is a letter from Ogeto & Ogeto Co. Advocates inviting other parties to take hearing dates, dated 19/10/2010 and 14/3/2011 and both those letters were addressed to all counsel including B.W. Mathenge Advocates who acknowledged receipt. It means that Ogeto & Ogeto Co. Advocates were aware of the presence of B.W. Mathenge Advocates on record and that both appear for the plaintiffs. Infact it is Mr. Simiyu who had started the conduct of proceedings when PW1 was heard. There was no objection to his appearance. I find that the firm of B.W. Mathenge Advocates are properly on record. The plaintiff need not have only one advocate.

**Does amendment amount to introduction of a new cause of action:**

Mr. Kagucia urged that fraud is a tort and under **Section 4(2)** of the **Limitation of Actions Act**, an action based on fraud may not be brought after 3 years and that the amendment purports to bring in such action 6 years after filing of the suit and 7 years after the cause of action arose. I do not agree with the respondent’s view. At paragraph 14 of the plaint, the applicant alleged fraud against the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In the proposed amendment, what is proposed to be added are the grounds of fraud. There is no new cause of action introduced in the proposed amendment. In any case **Order 8 Rule (3)(5)** of the **Civil Procedure Rule, 2010** gives the court the discretion to allow an amendment even if 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 some facts as the cause of action for which relief is sought in the same suit. Since the case is yet to be heard, the respondent will have an opportunity to file a reply if need be and the onus will be on the applicant to prove the fraud at the hearing of the case. The respondents did not demonstrate the kind of prejudice they will suffer if the application is allowed.

**Whether the pleadings are undated or unsigned:**

I have seen the notice of motion. It is dated and signed on 22/6/2012. The affidavit is also signed and dated on 22/6/2012. The draft amended plaint is also dated, though not signed. But failure to sign it, the draft plain cannot render the proposed amended plaint incompetent because once the application is allowed it can be signed.

After considering all the grounds raised by the respondents it is my considered view that the application is merited. The application is hereby granted and the proposed amended plaint be filed and served within 10 days hereof upon the applicants paying the necessary filing fees. The respondents are at liberty to file

amended defence within 14 days of service. The plaintiffs having taken so long to file this application, will be condemned to pay the respondents costs. It is so ordered.

**DATED and DELIVERED this 14<sup>th</sup> day of February, 2014.**

**R.P.V. WENDOH**

**JUDGE**

**PRESENT:**

Mr. Kimathi holding brief for the plaintiffs

Mr. Kagucia for the 3<sup>rd</sup> and 4<sup>th</sup> defendants

N/A for the 1<sup>st</sup> and 2<sup>nd</sup> defendants

Kennedy – Court Assistant