



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT KISII

CIVIL CASE NO. 37'A' OF 2008

GUDKA WESTEND MOTORS LTD. PLAINTIFF

VERSUS

INDUSTRIAL & COMMERCIAL

DEVELOPMENT CORPORATION DEFENDANT

RULING

1. By a Notice of Motion dated 23rd January 2013, expressed to be brought under **Order 8 Rule 3** of the **Civil Procedure Rules 2010, Sections 1A, 1B, 3, 3A and 63 (e)** of the **Civil Procedure Act** and **Article 159 (2) (d)** of the **Constitution, 2010** the plaintiff/applicant seeks the following orders:-
 1. *That the honourable court be pleased to grant leave and/or liberty to the plaintiff/applicant to amend the plaint dated **14th day of May 2008** and lodged in Court on even date.*
 2. *Consequently prayer (1) hereinabove being granted, the draft Amended Plaint annexed herewith, be deemed as duly filed and served, upon payment of requisite Court fees.*
 3. *Costs of this Application do abide the cause.*
 4. *Such further and/or other orders be made as the court may deem fit and expedient.*
2. The application was grounded on the affidavit of the plaintiff/applicant herein Ashwin Gudka the Managing Director of the plaintiff/applicant. It is deponed that on the 14th May 2008 he instructed and retained the firm of M/s J.O. Soire & Company Advocates to file and lodge a claim against the defendant/respondent, for the recovery of dividends and profits which arose from the declared bonus and rights share issue which sums were quantifiable from the onset and pursuant to his instructions, his former advocate on record proceeded to craft a plaint which was then filed in court on 23rd May 2008.
3. The deponent says that the plaint was duly served upon the defendant/respondents who entered appearance and filed a statement of defence but however, since then the case has never proceeded to hearing. Due to the delay in fixing the instant matter for hearing, he has now instructed the current advocate who upon perusal of the previous pleadings advised him that the plaint as filed did not capture, and/or include all the requisite claims for and on behalf of the plaintiff/
applicant.
4. He further averred that his claims are in the nature of special damage which must be particularly pleaded before same can be proved; that the particulars of his claim were not included in the plaint; that according to the rules of pleadings a party is obliged to plead all the relevant

particulars and requisite reliefs in the plaint before same can be ventilated and thus if the particulars of the claim are not pleaded, the party affected thereby is precluded from tendering any evidence to anchor the non-pleaded claims.

5. Therefore in view of the foregoing, the deponent says it is necessary/imperative that the plaintiff be granted liberty to bring on board all the necessary and consequential reliefs which can only be brought on board pursuant to amendment; hence the instant application.
6. The deponent also avers that the failure to plead all his claims was as a result of the mistake of his previous advocates whose omissions ought not to be visited upon him; that the intended amendments shall be in the interests of all the parties and will obviate the filing of a multiplicity of suits and an application of this nature. The deponent states that an application, like the instant one, when made prior to commencement of hearing ought to be freely allowed as the defendant/respondent would be at liberty to amend the defence where necessary.
7. The application was opposed vide a Replying Affidavit sworn by Lazarus M.O. Odongo, Senior Legal Officer of the defendant/respondent and also by way of Notice of Intention to raise a Preliminary Objection. In their notice of intention to raise a preliminary objection, the defendants/respondents set out the following grounds:-

1. *That the application as canvassed in the plaintiff Notice of Motion dated 23rd January 2013 is fatally and incurably defective in Law and as such cannot stand or be ventilated before this Honourable Court.*
2. *That the suit contravenes mandatory provisions of Law.*
3. *That the suit is fatally and incurably defective and cannot stand in Law.*
4. *That the said application seeks to introduce new grounds and/or cause of action and as such cannot be granted as prayed.*
5. *That the said application is an abuse of the process of this honourable court.*
6. *That the plaintiff's application is misconceived, misdirected and misled and therefore the prayers sought cannot stand in Law.*
7. *That the application dated 23rd January 2013 is an abuse of the process of this court and ought to be dismissed with costs.*

8. The respondent prays that the application be dismissed on grounds that the plaintiff/applicant, by the said application is seeking to introduce a whole new cause of action thereby jeopardizing the respondent's case.

9. When the matter came before me on 28th January 2014, Mr. Ochwangi, counsel for the plaintiff/applicant reiterated the averments contained in the plaintiff's/applicant's supporting affidavit, and the grounds on the face of the application.

10. Mr. Mutua, counsel for the defendant/respondent opposed the above application by submitting that:-

- *What is being sought is not an amendment as such but introduction of an entirely new cause of action since all the old paragraphs are cancelled and replaced with new paragraphs.*
- *The application herein has been brought some 5 years after the filing of the original plaint and that allowing the application would prejudice the respondent.*
- *Some of the prayers in the amended plaint cannot be allowed because the procedure in the Companies Act was not followed.*

11. Mr. Mutua concluded by submitting that the plaintiff/applicant's application was an abuse of court process and has been brought after a long and unexplained delay. Furthermore, that the proposed amendment should not be allowed since it is intended to introduce an entirely new cause of action. He urged the court to dismiss the same.

12. Mr. Ochwangi in reply submitted that the Civil Procedure Rules do not limit the number of paragraphs to be amended; that the purpose of amendment is to bring out pertinent issues for determination by court; the allegation that the amendment introduces a new cause of action is not true; the plaintiff's attempt to amend plaint after 5 years is because of laxity on the part of previous advocates whose mistakes should not be visited upon the applicant.

13. He further submitted that the respondent neither fixed the suit for hearing nor applied for its

dismissal as per the rules; the defendant/respondent has not shown the court the prejudice they will suffer if application is allowed; whether or not the prayers sought in amended plaint can or cannot be granted is a matter for the trial court not for the respondent's counsel to decide. He also submitted that the application has been brought within reasonable time.

14. It is to be noted that by the Notice of Motion dated 30th December 2008, the defendant/respondent applied to have the suit dismissed for want of prosecution. The suit was fixed for dismissal on 16th November 2010 but on that date, counsel for the plaintiff informed the court that parties were negotiating a settlement and that if no agreement was reached, he would take further steps, whereupon the court ordered as follows:- **“Let the case be fixed for hearing within the next one month failing which it will stand dismissed.”** On 15th December 2010, the case was fixed for hearing on 21st March 2011 but on that date Mr. Soire again informed the court that parties were still negotiating. It was then fixed for mention on 27th May 2011 for settlement. On 27th May 2011, neither the plaintiff nor the defendant was present in court, and until the instant application was filed no other action was taken on the file. The defendant/respondent who filed a replying affidavit seems to have given up its right to pursue that application to its logical conclusion.
15. After reading through the application, the replying papers and after hearing the rival submissions by learned counsel, the only issue to be determined by this court basically is whether the plaintiff/applicant is entitled to the orders sought.
16. In **AAJ Holdings Limited –vs- Diamond Shields International Ltd [2014] e KLR** J. Gikonyo persuasively held on an application for amendment that:-

“The general power of the court to amend pleadings draws from Section 100 of the Civil Procedure Act (hereinafter CPR). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute for it is dependent upon the discretion of the court. I agree with counsel for the defendant that the discretion should be exercised judicially. Section 100 of the Civil Procedure Act and Order 8 Rule 3 of the Civil Procedure Rules provide a broad criteria which should guide the court in the exercise of discretion that: 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in Central Kenya limited – Appeal No.222 of 1998 as shown below:-

- i. **To avoid multiplicity of suits provided there has been no undue delay.**
- ii. **Only where no new or inconsistent cause of action is introduced i.e if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.**
- iii. **That no vested interest or accrued legal right is affected; and**
- iv. **So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.”**

17. In the instant case, the plaintiff's/applicant's amendment on plaint has been attacked by the defendant on grounds that it raises a new cause of action, and that if allowed it will prejudice the defendant/respondent. The defendant/respondent also contends that the prayers in the plaint cannot be allowed because the procedure stipulated in the Companies Act was not followed.
18. On perusal of the amended plaint as proposed by the plaintiff's/applicant's vis-à-vis the original plaint, it does not seem to me that the plaintiff/applicant has introduced a new cause of action. Both plaints basically deal with the fact that the plaintiff/applicant is seeking payment of his dividends on shares allegedly held by the defendant/respondent in trust for the plaintiff/applicant. In addition, what the amended plaint seeks to do is to add meaning to what the earlier plaint had addressed in terms of particulars or percentages the plaintiff/applicant held in shares; the particulars of breach of trustee duty by the defendant and particulars of both general and special damages. Therefore the amended plaint in my considered view does not introduce a new cause of action but rather brings out clearly the issues in dispute to avoid multiplicity of suits.

19. Secondly, the defendant has contended that he will suffer prejudice should the proposed amendments be allowed. I do not think so because first of all it is worthy noting that since the institution of the suit in 2008 by the previous advocate representing the plaintiff/applicant it has never proceeded for hearing inter partes. If anything, this moment would be the best time to amend the plaint since once leave is granted to the plaintiff/applicant to amend, leave will also be granted to the defendant/respondent to amend his defence where he finds it necessary.
20. Thirdly, I think that to attack the application on the ground that it took too long for the plaintiff/applicant to amend its plaint; the plaintiff/applicant has explained the circumstances leading to the delay. Furthermore, as correctly submitted by counsel for the plaintiff/applicant, it was within the defendant's/respondent's right to apply for dismissal of suit under **Order 17 Rule 2** but he did not do so. Even the earlier opportunity to have the suit dismissed vide the Notice of Motion dated 30th December 2008 was not taken advantage.
21. Fourthly, the defendant/respondent's preliminary objection on the plaintiff's/applicant's notice of motion must be seen in the eyes of the principle set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd. -vs- West End Distributors Ltd. [1969] EA 696** where it was held that a preliminary objection must be on a pure point of law and cannot be raised if any fact has to be ascertained. A quick glance at the grounds of notice of preliminary objection filed by the defendant/respondent shows that the preliminary objection attacks the application on the ground that the provisions of the Companies Act were not complied with. During submissions, no details of the sections of the Companies Act which were not complied with were given.
22. Lastly, the law is clear that amendment of pleadings can be made at any time during proceedings and before judgment subject only to the principles set out by the Court of Appeal in the **Central Kenya Limited Case** (above). I am satisfied that the instant application falls on all fours within those principles, and that no prejudice shall be suffered by the defendant/respondent. In any event in the circumstances of this case, the 5 years are not an unreasonable delay.
23. For the foregoing reasons, the notice of motion dated 23rd January 2013 is allowed in terms of prayers 1, 2 and 3 thereof. The plaintiff/applicant shall file and serve the amended plaint within the next 14 days from today. Thereafter, the defendant/respondent shall have 14 days from date of service to file and serve its amended defence. Costs of the application to the respondent.
24. Orders accordingly.

Dated and delivered at Kisii this 5th day of June, 2014

R.N. SITATI

JUDGE.

In the presence of:-

Mr. Ochwnagi (present) for Plaintiff/Applicant

M/s Kithi Advocates (absent) for Defendant/Respondent

Mr. Bibu - Court Assistant