REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

CIVIL SUIT NO. 74 OF 2003

CHRISTOPHER LEBO & 331 OTHERS ….. PLAINTIFFS/RESPONDENTS

VERSUS

THE KENYA POWER & LIGHTING

COMPANY LIMITED …..... DEFENDANT/APPLICANT

RULING

Before this court for determination is the Notice of Motion application dated 17th January, 2014 filed by the Defendant. The orders sought are as follows:-

(a) That the order given by the High Court on 6th November, 2013 be and is hereby reviewed.

(b) That the Amended Amended Amended plaint filed herein be and is hereby expunged from the record of these proceedings.

The application is premised on the following grounds;

1. That the Plaintiffs or their Counsel failed to disclose material contents of pre-trial proceedings on record which transpired before the Deputy Registrar.

2. That had the attention of the High Court been properly drawn to the proceedings which took place before the Deputy Registrar, the High Court would have, following the law, established principles applicable and case law, reached a different decision than it did on 6th November, 2013.

3. That the action of the Plaintiff to attempt to reconstruct their case and reintroduce Plaintiffs whom the Court had found absent is an abuse of the court process and a waste of precious judicial time.

4. That failure by Plaintiffs' counsel to disclose material facts on record thereby grossly misleading the court to grant and order further amendments which in effect is a reinvention of the wheels of justice, is an act unbecoming of the advocate and unprofessional of his calling.

5. That the application by the Plaintiff to amend was an unfair surprise attack on the Defendant who stands to suffer legal prejudice in its defence to the suit.

6. That the validity of the Order to amend expired when the Plaintiffs or their counsel

failed to pay further court fees or any at all.

It is further supported by the affidavit of T. J. Kajwang, counsel for the Defendant on 17th January, 2014. The gist of this affidavit is as follows:-

Office of the counsel for the Defendant was served with the application dated 4th October, 2013 together with a hearing notice that the application would be heard on 6th November, 2013. Since Mr. T. J. Kajwang, counsel for the Applicant was to be out of the country on 6th November, 2013, he requested a Mr. Eric Gumbo to hold his brief and request for an adjournment until such a time that Mr. T. J. Kajwang would be back. The Hearing Notice had been received under protest for the obvious reasons that counsel for the Defendant would be away (refer to annexture K.T.J 1).

At the time of service of the application dated 4th October, 2013, the draft amended plaint was not attached – refer to annexture 'KTJ 2' which are emails exchanged between learned counsel Mr. Kajwang and Mr. Gumbo.

On the date of the hearing, counsel for the Plaintiffs failed to disclose to the court that for most part of that year parties had tried to identify the Plaintiffs and the nature of their claims. It was also not brought to the court's attention of the various orders made by the Deputy Registrar respecting the claim for the Plaintiffs and the fact that some Plaintiffs failed to attend court in person.

Further, it is contended that the counsel holding brief for Mr. Kajwang could not object to the adjournment as he was unaware of what had previously transpired. The amendments made sought to correct serious mistakes and omissions of facts to which the Defendant was entitled to discredit in its defence. Those amendments reintroduced facts which had already been dealt with by the Deputy Registrar.

It is further argued that the requisite court fees were not paid as ordered. That also the Plaintiffs' counsel, then on record misrepresented himself as appearing for all Plaintiffs whereas some of them were represented by the law firm of Buluma & Company Advocates.

In opposing the application, the Respondents/Plaintiffs filed a Replying Affidavit sworn by Chrispus K. Sichei on 30th January, 2014 on his behalf and the behalf of all other Respondents.

It is deponed that the application is founded on misrepresentations on record. Firstly, the application and the Hearing Notice were not received under protest. Secondly, the draft amended plaint was annexed to the application dated 4th October, 2013. Thirdly, counsel for both parties were present and the then counsel for the Plaintiffs did not oppose the application. Hence the application is not brought in good faith. Furthermore, under Order 8 Rule 3 (1) a party may amend its pleadings at any stage of the proceedings on such fees as to costs or otherwise as may be just and in such manner as the court may direct. And under Order 8 Rules 3 (1) and (5), an amendment may be allowed notwithstanding that its effect is to substitute a new cause of action which arises from 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. In any case, the defence has a right to seek leave to amend the defence.

In sum, it is deponed that the application is a waste of the court's time, it lacks merit and ought to be dismissed.

The application was canvassed before me on 7th May, 2014 by way of oral submissions.

Mr. Kajwang for the Applicant submitted that the application is premised on the following grounds:-

(a) That counsel for the Plaintiffs did not bring to the attention of the court of the proceedings conducted before the Deputy Registrar from 29th November, 2011 to 29th January, 2013.

(b) The Plaintiffs sought to re-introduce and reconstruct a new case of materials that came before the Deputy Registrar.

(c) The amendment was an unfair attack on the Defendant.

He submitted that there was an error apparent on the face of the record. He stated that the proceedings before the Deputy Registrar related to ascertaining the identity of the Plaintiff. That although there are 300 Plaintiffs, only 80 of them were identified. That further, there have been three previous amendments. The initial claim was for a total of Ksh. 4 Billion, then 3 Billion, followed by 2 Billion and currently a claim of Ksh. 6.2 Billion.

He contended that the current claim is barred by the limitation of time.

Mr. Kajwang also stated that the court directed that the Plaintiffs be represented by the law firm of Buluma & Company Advocates, but it is M/s. Gicheru & Co. Advocates who filed the application.

That further the Plaintiffs did not pay the court fees after amending the plaint.

For the above reasons, he urged the court to expunge the Amended Amended Amended plaint from the record and order that the application dated 4th October, 2013 be reinstated for hearing.

The court was referred to the case of **JOSEPH OCHIENG & 2 OTHERS -VS- FIRST NATIONAL BANK OF CHICAGO, C.A. CIVIL APPEAL NO. 149 OF 1991 (NBI)**.

Mr. Omusundi, learned counsel for the Respondents submitted that the pre-trial conference has not been closed and the purpose of conducting a pre-trial must be given its due regard.

He submitted that the Applicant has not demonstrated what prejudice it would suffer due to the amendment. He demonstrated the need for the amendment by stating that there are 332 Plaintiffs. Some of them did not appear on the schedule and were not allowed to do the pre-trial. The amendment has now included all the Plaintiffs in the schedule and their respective claims have been broken down and reflected in the schedule. Further, the pre-trial before the Deputy Registrar cannot comprise evidence before a Judge. After all, cross-examination of the witnesses was done which is not a procedure under a pre-trial.

Mr. Omusundi further submitted that the Applicant was ably represented at the hearing of the application dated 4th October, 2013 and counsel for it did not oppose the application.

He submitted that the Plaintiffs are represented by both the law firm of Buluma & Co. and Gicheru & Co. Advocates. He however came to court on behalf of Buluma & Co. Advocates. He stated that the court should also take into account that the instant application was served upon the law firm of M/s. Gicheru & Co. Advocates.

He urged the court to dismiss the application.

Learned counsel Mr. Aseso, jointly appearing with Mr. Omusundi further added that in the authority referred to by counsel for the Applicant, the court disallowed the amendment because the Applicant sought to introduce a new claim, which is not the case in the instant matter. The figures referred to in the application dated 4th October, 2013 were intended to break up the claim for each respective Plaintiff.

He urged the court to expunge the Supporting Affidavit because contrary to what is deponed to in paragraphs 4, 5 and 8 , counsel for the Applicant did not send Mr. Gumbo to represent him. Service of the application was properly effected and no Replying Affidavit was filed. The issues being canvassed now ought to have arisen at the hearing of the application dated 4th October, 2013.

Mr. Aseso also submitted that there were no discrepancies in the claim that was introduced by the amendment.

He urged the court to find the application as frivolous and an abuse of the court process and dismiss it.

In rejoinder, learned counsel Mr. Kajwang submitted that under Order 45 (5) of the Civil Procedure Rules the court can order the re-hearing of the application dated 4th October, 2013. He stated that if the Amended Amended Amended Plaint stands, the Defendant stands to lose a total of Ksh. 6.2 Billion as opposed to the initial claim of Ksh. 2.2 Billion and that the Defendant will not have an opportunity to plead limitation of time.

I have now considered the application and the respective submissions made and take the following view of the application.

The application is majorly brought under Order 8 Rule 6 and 45 Rules 1, 2 and 3. Order 8 Rule 6 provides:-

"where the court has made an order giving any party leave to amend, unless that party amends within the period specified or, if noperiod is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period."

While Order 45 Rules, 1, 2 & 3 provide:-

"1. (1) Any person considering himself aggrieved-

(a) by a decree or order from which an appeal is allowed, but from which no appeal has been preferred; or

(b) by a decree or order from which no appeal is hereby allowed, and who from the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within his knowledge or could not be produced by him at the time when the decree was passed or the order made, or on account of some mistake or error apparent on the face of the record, or for any other sufficient reason, desires to obtain a review of the decree or order, may apply for a review of judgment to the court which passed the decree or made the order without unreasonable delay.

(2) A party who is not appealing from a decree or order may apply for a review of judgment notwithstanding the pendency of an appeal by some other party except where the ground of such appeal is common to the applicant and the appellant, or when, being respondent, he can present to the appellate court the case on which he applies for the review.

2. (1) An application for review of a decree or order of a court, upon some ground other than the discovery of such new and important matter or evidence as is referred to in rule 1, or the existence of a clerical or arithmetical mistake or error apparent on the face of the decree, shall be made only to the Judge who passed the decree, or made the order sought to be reviewed.

(2) If the Judge who passed the decree or made the order is no longer attached to the court, the application may be heard by any other Judge who is attached to that court at the time the application comes for hearing.

(3) If the Judge who passed the decree or made the order is still attached to the court but is precluded by absence of other cause for a period of 3 months next after the application for review is lodged, the application may be heard by such other Judge as the Chief Justice may designate.

3. (1) Where it appears to the court that there is not sufficient ground for a review, it shall dismiss the application.

(2) Where the court is of opinion that the application for review should be granted, it shall

grant the same:

Provided that no such application shall be granted on the ground of discovery of new matter or evidence which the applicant alleges was not within his knowledge, or could not be adduced by him when the decree or order was passed or made without strict proof of suchallegation."

The main prayer sought is for review of the order given on 6th November, 2013. This order allowed the Plaintiff to amend the Amended Amended Plaint thus giving rise to an Amended Amended Amended plaint.

Under Order 45 rule 1 (b) an order may be reviewed on any of the following grounds;

(i) The discovery of new and important matter which was not within the knowledge of the Applicant.

(ii) Account of some mistake or error apparent on the face of the record.

(iii) For any other sufficient reason.

In the instant case, the Applicant has sought the review on account of some mistake or error apparent on the face of the record. Counsel for the Applicant then went on to explain what he thought constituted the error or mistake on the face of the record. The issues raised were:-

1. His absence in court on the date of the hearing of the application giving rise to the order of the amendment.

2. Service of the draft amendment.

3. The misrepresentation of the advocate for the Plaintiffs (Applicants).

4. The effect of the amendments sought.

5. Plea of limitation.

6. Payment of legal fees.

But before I address the above specific issues it is important to highlight that an error on record sought to be corrected must be evident on the face of it and must not be sought through a jagon of lengthy explanations. See case of **HOUSING FINANCE COMPANY LIMITED -VS- FAITH W. KIMERIAH AND ANOTHER – NAIROBI CIVIL APPEAL (CA) NO. 214 OF 1996** in which the court stated;

"A review may be granted whenever the court considers that it is necessary to correct an error or omission on the part of the court.The error or omission must be evident and should not require an elaborate argument to be established."

Bearing this in mind, I can now consider the issues raised.

COURT ATTENDANCE BY THE APPLICANT'S COUNSEL

The application dated 4th October, 2013 was heard on 6th November, 2013. In attendance were Mr. Omusundi and Aseso for the Plaintiffs. There was no attendance for Mr. Kajwang for the Defendant who had been duly served with a Hearing Notice. The Hearing Notice that was served on 30th October, 2013 was indeed received under protest on account that Mr. Kajwang was to be out of the country.

But according to Mr. Kajwang he had dispatched Mr. Gumbo advocate to represent him. Unfortunately,

Mr. Gumbo did not attend court. As such, the counsel for the Applicant cannot claim his absence as a justification for the granting of the orders sought. He knew of the existence of the matter and all he require to do is to send a diligent lawyer who would attend court and apply for appropriate orders.

SERVICE OF THE DRAFT AMENDMENT

The court record shows that prayer No. (c) of the application was that "***the draft Amended Amended plaint annexed hereto be hereafter deemed to be properly filed and served subject to the payment of the requisite court fees***". That draft was filed on 3rd October, 2013 alongside the Notice of Motion. Even before the court gave the orders that the Amended Amended Amended plaint be deemed as duly filed, it had satisfied itself that the same was filed alongside the Notice of Motion. Besides, there is no prove provided before this court that persuades it to believe that the amendments were not served with the application. If anything, if that were the case, a protest would have been indicated on the Hearing Notice as was done with respect to the non-attendance of the counsel for the Applicant.

MISREPRESENTATION OF THE COUNSEL FOR THE PLAINTIFFS/RESPONDENTS

The contention by the counsel for the Applicant that Mr. Omusundi ought not to have addressed the court is far from the truth. Firstly, Mr. Omusundi and Aseso did not state that they came from the law firm of Gicheru and company. Subsequent proceedings show that he appeared as holding brief for Mr. Buluma for the Plaintiff. Secondly, therefore, if Mr. Aseso was improperly before the court the only proceedings that would be expunged are those he personally made. But again, Mr. Kajwang was not able to demonstrate that both counsel were improperly before the court.

Thirdly, even if the two advocates came from the law firm of M/s. Gicheru & Co., Advocates, the said law firm was not barred by the court from representing the Plaintiffs as claimed by Counsel for the Applicant.

This court was referred to the typed proceedings at page 63. In respect thereof, the court noted;

"Buluma & Co. Advocates shall remain on record as Counsel for the Plaintiffs. The advocates representing the Plaintiffs may proceed as between themselves in terms of their agreement. Costs in the cause. The matter is stood over generally."

The order of the court implied that, other than M/s Buluma & Co. Advocates, there were other advocates on record for the Plaintiffs. In addition, the court allowed M/s Buluma & Co. Advocates to remain on record. The representation of the Plaintiffs was then to be based on the agreements between the said advocates.

Going by the record, the Law of M/s Gicheru & Co. Advocates were and are still on record for the Plaintiffs. As such, even if any or two of the advocates who submitted in that application came from that law firm, they were still properly on record.

CONTENT OF THE AMENDMENT

Under Order 8 Rule 3(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 the leave to make the amendment"***

In the case of **HIRAM BERE KINUTHIA AND 2 OTHERS -VS- EDICK OMONDI AND 3 OTHERS (2012) @ KLR NO. 160 OF 2011 (NB),** the court observed that;

".....the overriding consideration in an application for leave for amendment ought to be whether the amendments sought are necessary for the determination of the suit and whether the delay in bringing the application for amendment is likely to prejudice the opposite party beyond compensation

in costs....."

The Amended Amended Amended Plaint is intended to articulate the Plaintiffs' claim in an orderly manner by giving accurate tabulations that each party claims. The Applicant contends that the Respondents concealed many figures during the pre-trial, which figures have now given the claim of Kshs 6.2 Billion after the amendment which is prejudicial to the Defendant. However, in my view, what is important is whether the Plaintiffs can prove what they have claimed. The amendment of figures cannot in any way prejudice the defence. After all, the defence has the right to traverse any figures in seeking to amend the defence if it so wishes.

May I also add that under Section 1A, 1B and 3 of the Civil Procedure Act, so as to ensure a just and fair decision is arrived at, it was important that the amendments be effected. I do not find any errors that were presented in the amendments, and again, the pre-trial is an open process. I believe the same can be done over and over again as the need may arise, and particularly now that the amendment has been effected.

PLEA OF LIMITATION

This can only hold if the effect of the amendment was to institute a fresh cause of action. The position in the present case is that the cause of action is the same. The amendments only re-aligned the individual claims so as to facilitate an expeditious and just decision. It will also help the court to make a quick and precise reference of the individual claim during the trial. Thus, the plea on limitation does not constitute an error on the face of the record.

PAYMENT OF COURT FEES

Court procedure demands that requisite court fees be paid for the claims filed unless such payment is exempted. I am also aware that there is a cap on the highest amount of fees that should be paid notwithstanding the claim filed. It is claimed that the initial claim was of Ksh. 2.2 Billion and has now shot to Ksh. 6.2 Billion. I have done an inquiry with the court administration and the maximum legal fees payable for a specific claim is Ksh. 70,000/=. Under this payment the claim must be of Ksh. 1.2 Million and above. I am also informed that legal fees is paid once if the maximum court fees has been reached, which means that after an amendment, if the claim is of an amount for which the maximum legal fees remains payable, no further court filing fees is paid.

Therefore, now that it is alleged that the claims is of Ksh. 6.2 Billion, the legal fees payable is the same as that in a claim of Ksh. 2.2 or 4 Billion which was paid at the initial filing of the claim and no more ought to be paid.

Before I wind up, let me observe that the authority referred to by Counsel of the Applicant, being **NAIROBI COUNTY APPEAL NO. 149 OF 1991 (CA)- JOSEPH OCHIENG & 2 OTHERS&-FIRST NATIONAL BANK OF CHIGAGO** represents different facts from the instant case. In the former, the amendments were disallowed as the court thought they were useless and had been sought too late in the day.

Finally, I note that this application is pegged on the amendments that were allowed. Unless for a very justifiable cause, no amendment should be disallowed. I borrow the words of the then East Africa Court of Appeal sitting in Kampala in **EASTERN BAKERY -VS- CASTELINO (1958) EA, 46** in which that court held;

" Amendments to pleadings sought before the hearing should be freely allowed if they can be made without injustice to the other side, and there is no injustice if the other side can be compensated by costs."

In the present case, the Applicant has not demonstrated what prejudice it suffered or it stands to suffer due to the amendments. And when the orders were issued, the costs were ordered to be in the cause, implying that the losing party shall meet them at the end. More importantly, the Applicant has aptly

failed to demonstrate that there is an error apparent on the face of the record that was occasioned by the issuance of the order allowing the amendment.

Reasons wherefore this application must fail. I dismiss it with costs to the Respondents.

DATED and **DELIVERED** at **ELDORET** this 2nd day of October, 2014.

G. W. NGENYE – MACHARIA

JUDGE

In the presence of:

Mr. Wekesa holding brief for Mr. Kajwang for the Defendant/Applicant

Mr. Mwinamo holding brief for Mr. Buluma and Mr. Onkoba for the Plaintiffs/Respondents