



**REPUBLIC OF KENYA**

**High Court at Nairobi (Nairobi Law Courts)**

**Civil Case 248 of 2008**

**MOHAMED BASHIR.....PLAINTIFF**

**-VERSUS-**

**SHAUQAT FAROOQ SHEIKH.....DEFENDANT**

**R U L I N G**

1. Before the Court is a Notice of Motion dated 23<sup>rd</sup> August 2012 and filed in Court on 28<sup>th</sup> August 2012. It is expressed to be brought under Order 8 rule 3 of the Civil Procedure Rules and Sections 3 and 3A of the Civil Procedure Act.
2. The application is seeking for the following orders:-
  - a) **Leave be granted to the Defendant to amend his statement of defence dated 4<sup>th</sup> May 2009 as shown in paragraph 5A of the proposed amended defence annexed to this application.**
  - b) **The amended defence be deemed to have been duly served.**
  - c) **Costs of this application be in the cause.**
3. The application is based on the grounds stated thereof and is supported by the affidavit of **SHAUKAT FAROOQ** sworn on **23<sup>rd</sup> August 2012**.
4. The application is opposed vide the Replying affidavit of the Plaintiff sworn on **7<sup>th</sup> November 2012** under Notary Public.
5. The brief facts of the application are that the Plaintiff filed the instant suit in 2008 against the defendant alleging that he had fraudulently swindled him a sum of **Kshs. 20,000,000/=**. In the said Plaintiff, it was not disclosed when the defendant allegedly swindled the Plaintiff. However, it is stated that the Plaintiff has disclosed at paragraph 12, 13 and 14 of his witness statement that the alleged fraud took place in 1999.
6. According to the defendant, he learnt that the cause of action arose in 1999 on 7<sup>th</sup> June 2012 when his advocate was served with the said witness statement. Therefore, it is the defendant's case that he wishes to amend his defence to plead limitation which he could not plead at the time of filing the defence.
7. In opposing the defendant's application, the Plaintiff averred that the same was not sincere, that it was mischievous and was clearly an afterthought, having been filed after he had travelled to Nairobi and adduced his evidence in Court. He further averred that the application was an abuse of the

Court process as it intended to delay the conclusion of the matter.

**8.** It is also averred by the Plaintiff that the defendant admitted to swindling Kshs. 40,000,000 in April 2003 and further in November 2007. The Plaintiff referred to an email by the defendant (attached to the Plaintiffs bundle of documents dated 31<sup>st</sup> May 2012) apparently admitting the swindle. It is the Plaintiff's case that the limitation period of six years started running from 2003 when the right to recover the money accrued and the Plaintiff filed its suit in 2008. Therefore, the defendant cannot claim that it would like to amend its defence so as to plead limitation as the Plaintiff's suit is not time barred.

**9.** In accordance to **Order 8** of the **Civil Procedure Rules**, amendment of pleadings is at the discretion of the Court.

**10.** The guiding principle in applications for leave to amend is that all amendments should be freely allowed and at any stage of the proceedings, provided that the amendment or joinder as the case may be, will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs. **See: Beoco Ltd v Alfa Laval Co Ltd [1994] 4 All ER 464.**

**11.** The amendment of the defence to plead limitation will not necessarily require the Plaintiff to give *viva voce* evidence. Therefore, I do not see the Plaintiff suffering any prejudice. In the interest of time, the amendment of the defence to be done within 7 days from the date of this ruling. Thereafter, the Plaintiff shall have a right to reply within 7 days as well.

**12.** In the upshot, the Notice of Motion application dated **23<sup>rd</sup> August 2012** is hereby allowed. The costs of this application shall be in the cause.

**DATED, READ AND DELIVERED AT NAIROBI  
THIS 7<sup>TH</sup> DAY OF MARCH 2013**

**E.K.O OGOLA  
JUDGE**

**PRESENT:**

Mwangi for Defendant/Applicant

M/s Githii for Plaintiff/Respondent

Teresia – Court Clerk