



**REPUBLIC OF KENYA**

**High Court at Mombasa**

**Civil Suit 128 of 2006**

**W. E. TILLEY (MUTHAIGA) LTD.....PLAINTIFF/APPLICANT**

**V E R S U S**

**DEVJI MEGHJI & BROTHERS LTD..1<sup>ST</sup> DEFENDANT/RESPONDENT**

**ELDORET PACKERS LTD ..... 2<sup>ND</sup> DEFENDANT/RESPONDENT**

**KENYE REVENUE AUTHORITY .... 3<sup>RD</sup> DEFENDANT/RESPONDENT**

**RULING**

The Notice of Motion application dated 11<sup>th</sup> February 2013 is expressed to be brought under Section 1A, 1B and 3A and Order 8 rule 3 Civil Procedure Act and Rules.

Its import is to seek leave to amend the plaint as shown in the draft amended plaint which is attached to the application.

The grounds are that while in the course of preparation for the hearing of the suit, it was discovered that the amount sued for was underestimated and the claim only ran to the year 2006.

It was deemed therefore necessary for the amount claimed to be adjusted in line with the fish volumes handled by the Plaintiff from year to year.

It is further contended that the details of the calculation of the loss are to be found in the Plaintiffs statement dated 7<sup>th</sup> February 2013 together with a list of bundles.

It is further contended that no new claim is sought to be introduced in the suit as the amendment is merely factored on correcting the initial mistake made while calculating the daily loss.

Special damages ought to be specifically pleaded and proved and the damages were not known when the suit was filed as the daily average loss differs from year to year.

This application for amendment is not opposed by the third Defendant but the 1<sup>st</sup> and 2<sup>nd</sup> Defendants are.

The 1<sup>st</sup> Defendant has filed a Notice of Preliminary Objection. The grounds of which are that the Plaintiffs application is bad in law as it introduces new and extraneous matters which were within the Plaintiffs knowledge at the time of filing the suit.

Secondly, that it would be unfair for the Court to make orders without the full record being availed.

It is also contended that the Plaintiffs amended plaint relies on inadmissible evidence. That there is no legal basis for exaggerating the purported claim.

The 1<sup>st</sup> Defendant has also filed statement of grounds of opposition which in the main are that the purported amendment is meant to circumvent the limitation period in a contractual matter.

Further that it would be unjust to grant the orders sought by the Applicant at this late stage in the case.

In the replying affidavit sworn by Mr. Bowry Advocate for the second Defendant, he contends that the Plaintiff has not disclosed to the Court that on 30<sup>th</sup> July 2007 the suit was withdrawn against the 2<sup>nd</sup> Defendant and the Plaintiff ordered to pay costs of the suit and for the application dated 16<sup>th</sup> June 2006.

That the Plaintiff's intention to amend the pleadings is to shut out the second Defendant without complying with an existing Court order. It is also the contention of the 2<sup>nd</sup> Defendant that there is unreasonable delay of more than six years and there is no explanation for that delay.

The 2<sup>nd</sup> Defendant's Counsel has enumerated instances which allegedly go to show that the Plaintiff is not keen to prosecute his case but instead is bent on muddling up the case by filling interlocutory applications.

Is there a new cause of action? The main reason for the amendment of the plaint in question is to adjust the amount claimed which was upto year 2006 and to make it uptodate showing the loss in tonnage from year to year.

The contention by the Plaintiff that its not introducing a new claim and that its merely correcting an initial mistake made while doing calculation on the daily losses has not to my mind been proved to the contrary.

As regards the 2<sup>nd</sup> Defendants opposition captured in the affidavit of Pravin Bowry it is instructive to note that the suit against it was wholly withdrawn and in the amended plaint there are no orders sought against the 2<sup>nd</sup> Defendant.

On 7<sup>th</sup> day of March 2013 Judge Mwongo did address the issue of 2<sup>nd</sup> Defendants fears by instructing the Plaintiff to file an affidavit amending the application for amendment of plaint to the effect that the 2<sup>nd</sup> Defendants name shall not be struck off the amended plaint.

The Deputy Registrar of the Court/Taxing Master was also ordered to expedite the taxation of the bill of costs so as to enable the suit to proceed expeditiously.

I am of the view that the amendments sought will not prejudice the rights of the 2<sup>nd</sup> Defendant in relation to the withdrawn suit.

That there has been a delay in this suit for close to seven years is not in doubt going by the history given in the replying affidavit of Pravin Bowry Advocate for the 2<sup>nd</sup> Defendant but shout this be sufficient reason to decline and shut out the applicant from amending its pleadings.

It is noted that the original file has gone missing. It has not yet been ascertained who to ascribe blame, orders have been made for reconstruction of the file as the Deputy Registrar engages the machinery of searching for the original one. To reject the application for amendment merely because the original one is missing would not be prudent and reasonable.

The Respondents in this application have cited the authority of **James Ochieng Oduol –Vs- Richard**

**Kuloba (2008)eKLR Civil Appeal No. 2 of 2002** which dealt with the issue of amendments to defeat an accrued defence which is not the case here.

It is noted that the amendments will increase the amount claimed substantially. Whether there is exaggeration of the amounts or not is an issue to be determined by the Court during the hearing. Special damages must be specifically pleaded and proved.

It is also contended that the evidence to be contained in the amendments is not admissible. That also is an issue to be canvassed at the stage of hearing. As to whether the proposed amendments will deprive the Defendants their legal defence of limitation, I find nothing to bar them from raising that defence.

I find the application for amendment of the plaint has merit. Leave to amend is granted in terms of the draft amended plaint attached to the application.

The amended plaint is duly deemed to be duly filed and served. The Defendants are at liberty to file and serve their amended defence, if any within 21 days from today.

Costs in the cause.

**Ruling read and delivered in open Court this 10<sup>th</sup> day of May, 2013.**

**M. MUYA**

**JUDGE**

**In the presence of:-**

**Mr. Pravin Bowry holding brief for Kinyanjui for the 1<sup>st</sup> Defendant and appearing for the 2<sup>nd</sup> Defendant**

**Miss Muyaa for the Plaintiff/Applicant – present**

**3<sup>rd</sup> Defendant – absent**

**Court clerk – Mr. Musundi**