



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: NAMBUYE, KIAGE & MURGOR, JJA)**

**CIVIL APPEAL NO. 11 OF 2013**

**BETWEEN**

**SANYU INTERNATIONAL LIMITED.....APPELLANT**

**AND**

**ORIENTAL COMMERCIAL BANK LIMITED.....RESPONDENT**

***(Appeal from Ruling and Order of the High Court at Nairobi***

***(Ogola, J.) delivered 16<sup>th</sup> February 2012)***

**in**

**HCC CASE NO. 741 of 1995)**

**\*\*\*\*\***

**JUDGMENT OF THE COURT**

This appeal arises from a dispute between the Sanyu International Limited, the appellant and Oriental Commercial Bank Limited, the respondent where in a plaint dated 6<sup>th</sup> March 1995, Delphis Bank Limited, the plaintiff claimed a sum of Kshs 10,042,934/- from the appellant in respect of sums advanced to it through its branch in Kisumu. Delphis Bank Limited later changed its name to Oriental Bank Limited, and the plaint was subsequently amended on 9<sup>th</sup> October 2007 to reflect amongst other amendments, that change of name.

On 25<sup>th</sup> July 2010 by way of a consent made between the parties, the respondent was granted leave to further amend the plaint. The consent stated as follows;

***“1) The plaintiff be and is hereby allowed to amend the plaint to inter alia conform to the requirement of the CPRs 2010. This is to be done within the next 21 days; the plaintiff to serve witness statement and a revised list of documents within the said period.***

***2) The defendant be at liberty to file an amended defence and list of documents and witness statements within 21 days of service.***

***3) The matter to be mentioned on 22<sup>nd</sup> September, 2011 before the presiding judge for purposes***

***of fixing hearing dates.”***

Pursuant to the consent, on 8<sup>th</sup> August 2011, the respondent filed a further amended plaint, incorporating various extensive amendments.

In response, the appellant filed a defence dated 17<sup>th</sup> May 1995, an amended defence dated 11<sup>th</sup> October 2007, and a Further Amended Defence dated 4<sup>th</sup> September 2011 to respond sequentially to the various amendments made by the respondent.

On 27<sup>th</sup> September 2011, the appellant filed a Notice of Motion seeking to have the further amended plaint struck out for reasons that it did not disclose any reasonable cause of action against the appellant; that it was frivolous and vexatious; and would prejudice and delay the fair trial for the suit.

The grounds of the motion were that the further amended plaint had been filed in excess of the scope of the leave granted to the respondent; that leave to amend was to enable the respondent to comply with the provisions of the Civil Procedure Rules 2010; that the respondent had amended the plaint to purport to commence new causes of action and provide for additional reliefs against the appellant and other entities not parties to the suit; that the purported causes of action concerned alleged agreements between the appellant, the respondent and third parties, which were not supported by consideration made by the respondent to the appellant; that the claims are alleged to be based on the transfer of debts belonging to other third parties to the account of the appellant, namely, New Kisumu Hotel, Everwell Company Limited and other unnamed entities; that no reason had been stated for attempting to merge the appellant's accounts with those of other third parties, no agreements had been executed by the directors of the appellant, and no agreements had been breached as alleged in the further amended plaint. It was finally contended that the claims as pleaded were time barred pursuant to **section 4 (a)** of the ***Limitation of Act Cap 22***.

In response, the respondent filed grounds of opposition and a replying affidavit sworn on 10<sup>th</sup> November 2011, where it was deponed that the further amended plaint was in compliance with the parties' consent, and intended to all matters between the parties before the court, and furthermore the appellant had not demonstrated how it would suffer prejudice or injustice on account of the amendments. It was further deponed that the respondent had no claim against the third parties and that therefore the allegation that such third parties were joined in the suit was unfounded.

Having considered the parties pleadings and submissions, the High Court dismissed the appellant's motion, for reasons that an amendment may be allowed at any time, notwithstanding that its effect could be to add or substitute a new cause of action.

The appellant was aggrieved by that decision and has appealed to this Court on grounds that the learned judge failed to find that the respondent had exceeded the scope envisaged and permitted by the leave granted and the attendant rules; that the learned judge failed to consider the substantive grounds upon which the application was grounded; in failing to find that the further amended plaint was an abuse of the process of the court, in that the plaint being against the appellant could not purport to claim reliefs against non parties to the suit; that no cause of action arose against the directors of the appellant, and, in any event the suit was time barred; and that the agreements were not shown to be supported by any valuable consideration.

On behalf of the appellant, learned counsel **Mr. A B Shah** appearing with Mr. Wasuna relied on the written submissions. Whilst highlighting the submissions, counsel asserted that in the ruling dated 16<sup>th</sup> February 2012, the learned judge allowed unnamed directors to be joined in the suit 17 years after the suit was filed by way of an amendment of the plaint which should not have been allowed; that the court should have struck out that part of the claim that was already time barred; that an amendment application is not for the purposes of introducing new matters. Counsel cited ***Fredrick Waweru vs Peter Ngure Kimingi [2007] eKLR*** for the proposition that one cause of action cannot be substituted for another by way of amendment. For this reason, counsel submitted, prayer (ii) in the further amended plaint should be

struck out with costs.

Responding, **Mr. Kimene** learned counsel for the respondent also relied on the written submission which were highlighted. Counsel submitted that leave to amend the plaint was by consent of the parties; that the consent did not limit the scope of the respondent's amendments, and in any event, no new parties were introduced by the amendments; that the amendments merely sought to clarify the relationship between the parties, and the issues to be determined during the hearing.

We have considered the record, the submissions of the parties and the law and in our view consider that the issue for determination is whether the amendment, joined unnamed directors of the appellant to the suit; whether the unnamed directors were in fact joined in the suit and whether the suit against such directors was time barred.

The power of the court being discretionary, the general principles stated in ***Mbogo & Another vs Shah [1968] E A 93*** are applicable in that, an appellate court has no jurisdiction to interfere with exercise of such discretionary power by the trial court unless the court has acted on wrong principles, has misapprehended the law or has acted on no evidence or that the learned judge was plainly wrong in arriving at the decision.

There is no dispute that the parties filed a consent allowing the respondent to further amend its plaint. As the learned judge observed, the consent did not provided any parameters or set out the extent of such amendments. The part of the consent in dispute specifies that, *"The plaintiff be and is hereby allowed to amend the plaint to inter alia conform to the requirement of the CPRs 2010."* The learned judge was of the view that the scope of the consent *"...was so large and would admit any kind of amendment which a court in the exercise of its discretion would allow."*

We would agree. The consent did not spell out the extent of the amendments, nor did it provide for a draft to be made available to the appellant prior to filing. As such the appellant could not be heard to complain about the amendments incorporated yet it had not sought clarification as to the nature of the amendments.

But turning to the main issue, the appellant's argument against the amendments is that as by seeking the joinder of unnamed and unknown directors of the appellant who were not parties to the suit, the amendments did not meet the requirements of **order 1 rule 10 (2)** of the ***Civil Procedure Rules*** and that by allowing the amendments the learned judge had allowed unnamed and unknown parties to be joined as parties to the suit. The appellant further argues that the joinder of such unnamed directors is time barred under **section 4 (1) (a)** of the ***Limitation of Actions Act Cap 22, Laws of Kenya***.

In our view, the issue turns on whether the amendments incorporated in the further amended plaint were in accordance with the requirements of the Civil Procedure Act and the rules, but more particularly whether the amendments were with respect to the joinder of parties under **order 1** or were amendments contemplated under **order 8** of the ***Civil Procedure Rules***.

Beginning with the concept of amendments in general, **order 8 rule 1 (1)** of the ***Civil Procedure Rules*** stipulates that;

***"The court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such manner as it may direct, allow any party to amend his pleadings."***

Under **order 8 rule 5** it is stipulated that;

***"An amendment shall 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 leave to make the amendment"***.

Further, ***Halsbury's Laws of England, 4<sup>th</sup> Edition (re-issue) Vol.36(1) at Paragraph 76*** sets out the

requirements for an amendment thus;

***“...The purpose of the amendment is to facilitate the determination of the real question in controversy between the parties to any proceedings and for this purpose the court may at any stage order the amendment of any document, either on application by any party to the proceedings or of its own motion.”***

In ***Eastern Bakery vs Castelino (1958) EA 461***, Sir Kenneth O’Conner, President of the predecessor of this Court stated that;

***“It will be sufficient ... to say that amendments to pleadings sought before the hearing should be freely allowed, if they can be made without injustice to the other side and that there is no injustice if the other side can be compensated by costs.”***

The appellant’s complaint is that, the amendments seek to introduce new parties to the suit, namely, Everwell Industries Limited and New Kisumu Hotel Limited alleged to be directors of the appellant, and further, to include these companies within the prayers so that any orders attaching to the appellant would similarly apply to them. Of particular concern is, prayer (ii) of the further amended plaintiff which specifies that;

***“In the alternative and without prejudice to the foregoing an order that the Defendant and its directors herein do reimburse the Plaintiff the sum of Kshs. 10,042,943.60 with interest as per agreement until payment in full...”***

Where the words “...and its directors...”, are the main bone of contention. The appellant’s concern is that, in so far as the amendments sought to enjoin other parties to the suit, the respondent ought to have applied under order 1 rule 10 of the Civil Procedure Rules for leave of the court before enjoining the appellant’s directors to the suit, which it did not do, as order 8 of the Civil Procedure Rules did not apply to the circumstances of the case.

**Order 1 Rule 10** of the Civil Procedure Rules provides:

***“1) Where a suit has been instituted in the name of the wrong persons as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit.***

***2) The court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.***

This Court in ***Central Kenya Ltd vs Trust Bank & 4 others Civil Appeal No. 222 of 1998***, addressed the underlying principle in amendment of pleadings and joinder of parties to be 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.”***

As to whether the respondent has sought to amend the plaintiff to include the directors of the appellant as parties against whom a decree or order for repayment of sums owed should be made must be discerned from the amendments themselves. In the further amended plaintiff, reference has been made to other parties

for instance, “...various defendant’s group of companies...”, and “... the agreement effecting this transaction was entered in the same year and signed by the defendant’s directors and sealed with the companies seal,” and “... the defendant’s directors voluntarily and in admission of the debt...” and “The personal guarantee of the defender’s directors.,” are some of the examples. No further particulars have been provided as to who the defendant’s directors are, or whether or not Everwell Industries Limited and New Kisumu Hotel Limited are the directors to whom reference is made. No information is provided that is indicative of whether the directors referred to are individual persons or corporate personalities. This is for the reason that, if they are corporate personalities, under the principles set out in Salomon vs Salomon Co. [1897] A.C. 22, their status as separate legal entities, would require that they be enjoined as separate parties to the suit.

If the directors are individual persons, then, it is also true that under the same principles of Salomon vs Salomon (supra), directors cannot be held personally liable for the debts of the company, otherwise, than in the case of a personal guarantee, in which case, the individual directors would be held personally liable under their own personal guarantees.

As aptly explained by this Court in the case of P. K Langat & Another v Raphael M. A Juma Civil Appeal No. 138 of 2001;

***“It is trite that directors are in the eyes of the law, agents of the company for which they act, and the general principles of the law of principal and agent regulate in most respects the relationship of the company and its directors. Hence, where directors make a contract in the name or purporting to bind the company- it is the company as the principal- which is liable on it, not the directors; they are not personally liable unless they undertook personal liability.”***

In both cases, the specific persons or entities referred to as directors in prayer (ii) would require to be joined as separate parties to the suit, before any decree or order can be made against them. To attempt to make orders against persons or entities who are not party to the suit would be tantamount to condemning such persons or parties unheard, as they would not have been afforded an opportunity to defend their case. Simply put, it would be an exercise in futility.

In the case of Mbaki & others vs Macharia & another (2005) 2 EA 206, at page 210, this Court stated as follows:

***“The right to be heard is a valued right. It would offend all notions of justice if the rights of a party were to be prejudiced or affected without the party being afforded an opportunity to be heard.”***

As we understand it, the amendments in question merely seek to contextualize the respondent’s claim as it relates to the various players so as to clarify and bring into clearer focus the issues in contention between the parties, and enable a court reach a determination on the issues in dispute. Such matters are yet to be placed before the trial court, and it is not within our mandate to direct any of the parties as to the manner of conduct or presentation of their case.

The amendments are clear. The respondent has not sought the joinder of any new parties to the suit, either named or unnamed. And without such joinder, the words “...and its directors...” in prayer (ii) are superfluous and incapable of attachment of any orders.

We would add that when we weigh out the contents of the further amended plaintiff against the inclusion of the words “...and its directors...” as enumerated above, we do not consider them sufficient to warrant the striking out of the further amended plaintiff in its entirety as prayed by the appellant, both in the High Court and in this Court. From the bar, Mr. Shah requested us to strike out prayer (ii) in its entirety, but again, for the reasons expressed above, we do not consider that anything fundamental turns on it.

Having found as we have that the further amended plaintiff does not disclose any new parties to the suit, we find that the issue of limitation does not arise.

Accordingly, there is no reason to interfere with the decision of the High Court of 16<sup>th</sup> February 2012, we find that the appeal is without merit, and is dismissed with costs to the respondent.

*It is so ordered.*

*Dated and delivered at Nairobi this 19<sup>th</sup> day of October, 2017.*

**R.N. NAMBUYE**

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**JUDGE OF APPEAL**

**P.O. KIAGE**

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**JUDGE OF APPEAL**

**A. K. MURGOR**

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**JUDGE OF APPEAL**

**I certify that this is a true copy of the original.**

**Deputy Registrar.**