



REPUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA  
AT MOMBASA  
CIVIL SUIT 229 OF 2005

AFROFREIGHT FORWARDERS LIMITED ..... PLAINTIFF

VERSUS

KENYA RAILWAYS CORPORATION ..... 1<sup>ST</sup> DEFENDANT

UGANDA RAILWAYS CORPORATION ..... 2<sup>ND</sup> DEFENDANT

CALLING

This is an application by the 1<sup>st</sup> Defendant, the Kenya Railways Corporation for leave to amend its Defence herein. The Application is made under the provisions of Order 15A (1) Rule 3(1) and Order 15(B) Rule of the Civil Procedure rules. The application is said to be based on the grounds that:

*or thereabouts claiming inter alia  
30<sup>th</sup> October 2005  
both special and general damages allegedly arising from some demurrage charges and  
The plaintiff filed the suit here on  
1. costs of replacing alleged lost containers. The 1<sup>st</sup> Defendant filed its Defence herein  
and/or thereabouts.  
the 5<sup>th</sup> December 2005  
on*

2. *The plaintiff at the time of filing its suit herein, did neglect and/or failed to disclose in its pleadings the relevant period and/or time when its cause of action arose and more specifically the transactions pursuant to which its claim arose.*

3. *The 1<sup>st</sup> Defendant has now established from the plaintiff's documents filed in court on 16<sup>th</sup> December, 2008 but only served upon it on 24<sup>th</sup> June 2009, that the plaintiff's suit emanated from a transaction which the parties herein concluded in the year 1999 and/or thereabouts. The plaintiff suit is filed herein is therefore statute barred by virtue of section 87 of the Kenya Railways Corporation Cap 397 Laws of Kenya.*

4. *The 1<sup>st</sup> Defendant wishes to amend its Defence to inter alia, specifically plead limitation of actions and to incorporate the element of the plaintiff's claim having been overtaken by events.*

5. *The proposed amendment will enable the court determine the real dispute between the parties herein and do injustice in the matter.*

6. *The amendment is proposed in good faith and the plaintiff/Respondent will not suffer any prejudice.*

7. *It is in the great interest of justice that the proposed amendments be allowed and the draft Amended Defence be deemed duly filed and served upon payments of the requisite court fees.*

The application is supported by an affidavit sworn by Nibrick Muthi, the Managing Director of the 1<sup>st</sup> Defendant.

The Application is supported by the plaintiff which has filed an affidavit by its Managing Director, Cyrus Wairaka on 20<sup>th</sup> October 2009 which inter alia states that:

- It is not true that the matter was filed out of the stipulated time as the action was founded on a contract arising out of transactions entered into between the plaintiff and Defendants on diverse dates between the years 1999 and 2002 for provision of railage services.

- That both Defendants were under a contractual obligation to provide the said services in time to avoid accrual of demurrage breached their contractual obligation by failing to rail the plaintiff's containers to avoid accrual of demurrage as a result of which the plaintiff suffered much loss and damage.
  - That as a consequence of their breach thereof, the instant suit was filed in the year 2005, which time, or I am informed by my advocates on record and was within 6 years as stimulated period for such actions founded on contract by virtue of Section 4 of the Limitations of Actions At Cap 22 Laws of Kenya and as such was rightfully filed within time.
  - That the plaintiff/respondent has a valid claim against the Defendants/Applicants and it should be allowed to ventilate the same through the court process and that the allegations that the claim herein is overtaken by events and untenable in law is unmerited.
  - That the Application is brought in bad faith, is ill-conceived and a delaying tactic calculated to deny the plaintiff/respondent an opportunity to be heard and to prevent the matter from proceeding to full trial as the same is based purely on presumptuous evidence.
    - That the intended amendment does not raise any or any serious issues that will determine the real dispute between the parties herein is alleged.
      - That the grant of the orders would greatly prejudice the plaintiff
- (a) as the plaintiff has been and will continue to be delayed for too long from prosecuting this matter as it has never proceeded to full trial, the same having been filed in 2005.
- (b) The Defendants are attempting to evade liability for loss and damage occasioned to the plaintiff and are therefore not entitled to the exercise of this court's discretion in their favour.

I have considered the application, the affidavits and submissions by

Claret

The Court of Appeal in the case of AFROFREIGHT FORWARDERS LIMITED v KENYA RAILWAYS CORPORATION & ANOTHER [2010] 2 K.A.M had done the principles to be considered in application for amendment of pleadings and joinder of parties. The court held:

- **The amendment of pleadings and joinder of parties was aimed at allowing a litigant to plead the whole of the claim he was entitled to make in respect of his cause of action.**
  
- **A party would be allowed to make such amendments of pleadings as were necessary for determining the real issue in controversy or avoiding a multiplicity of suits provided:-**
  - (i) **There had been no undue delay**
  
  - (ii) **No new or inconsistent cause of action was introduced,**
  
  - (iii) **Nor vested interest or accrued legal right was affected and**
  
  - (iv) **The amendment could be allowed without injustice to the other side.**
  
- **Accordingly all amendments or joinder should be freely allowed at any stage of the proceedings provided that the amendment or joinder did not result in prejudice or injustice to the other party that could not be properly compensated for in costs – see BEOCO –V- ALFA LAVA CO. LTD (1994) adopted. 4 AII E.R. -464**
  
- **Neither the length of the proposed amendments nor mere delay were sufficient grounds for declining leave to amend.**
  
- **The overriding considerations were whether the amendments were necessary for the determination of the suit and whether the delay was likely to prejudice the opposing party beyond compensation in costs.**

The court is guided by the foregoing principles and considerations.

The suit herein has not proceeded to trial: what the 1<sup>st</sup> Defendant states is that the Plaintiff in its plaint did not plead or disclose when its cause of action had arisen. I have carefully perused the plaint dated 30<sup>th</sup> October 2005 and quite glaringly there are no dates

or time referred to or mentioned. The plaint is detailed and refers to the contract, the alleged breaches and subsequent loss and damages. There is no reference to the date of the contract, the dates of breaches, the dates of the losses.

The 1<sup>st</sup> Defendant said that it came to know of the details of the time of the cause of action doing discovery. The plaintiff filed its List of Documents in court on 16<sup>th</sup> December 2008. The application was filed on 8<sup>th</sup> July 2009.

I do find that the 1<sup>st</sup> Defendant could not have known or determined the date of Cause of action by reliance on the plaint. The plaint was certainly deficient in this regard and the 1<sup>st</sup> Defendant was entitled to apply for further and better particulars of the plaint before filing its defence.

The issue of date of the contract and when the cause of action could have arisen or did arise are crucial issues in this dispute. In Limitation areas as a result of statutory provisions of the law, then the 1<sup>st</sup> Defendant was entitled to raise the question of limitation in its defence.

If the plaintiff had made full disclosure in the plaint then this application for amendment may not have arisen. There is no unreasonable delay from the time the discovery was done when the plaintiff filed its list of documents on 16.12.2008. In any case, any delay if any can be reasonably compensated for costs.

There is no prejudice to the plaintiff as there are no vested interests or accrued legal rights which will be affected by the amended pleadings.

In any case, the question as to whether there is any prejudice or not can only in my view be determined in the case upon the full trial of the case in the circumstances. Even if it was possible for each determination on the pleadings, I think that it is fair and just for the 1<sup>st</sup> Defendant to prove this head of defence at the trial. It would be prejudicial for the 1<sup>st</sup> Defendant to apply for dismissal of suit if the amendment is allowed.

I do hold that the amendment herein is necessary to determine all the real questions in controversy between the parties.

I do hereby grant prayer (a) of the Chamber summons dated 10<sup>th</sup> July 2009. The 1<sup>st</sup> Defendant shall file and serve the Amended Defence within the next 21 days. The plaintiff and the second defendant are granted leave to file their Reply to the Amended Defence and Amended Defence respectively within 21 days of being served. The 1<sup>st</sup> Defendant shall pay the costs of the application to the Plaintiff.

The leave to amend is granted to the 1<sup>st</sup> Defendant on condition that it shall not apply to rectify or to amend the plaintiff's suit on grounds of limitation of Action and the matter shall go for full trial.

**this 12<sup>th</sup> day of July 2010.**

**Dated and delivered at Mombasa**

M. K. IRABINI

**JUDGE**



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