



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MALINDI

CIVIL CASE NO. 179 OF 2012

RAIYA CONSTRUCTION LIMITED PLAINTIFF

VERSUS

SUN SAND DUNES LIMITED DEFENDANT

RULING

The application dated 13th August, 2015 seeks the following orders: -

- 1. THAT the Honourable Court be pleased to grant the defendant/applicant leave to re-amend its amended defence and counterclaim herein.**
- 2. THAT the costs of this application be costs in the cause of this suit.**

The application is supported by the applicant's affidavit sworn on the same date. The respondent filed grounds of opposition. Parties agreed to determine the application by way of written submissions.

The main issue being raised by the application is that the applicant would like to re-amend the defence and counterclaim so that it can claim the sum of Kshs.50,000/= being paid as security monthly from the plaintiff. The defendant's position is that should it be successful in the case, it will have to recoup the amount being paid monthly for security. The order to have that amount paid was made on 17th November, 2014 and 27th April, 2015. According to the defendant, the security costs arose due to the fact that the plaintiff refused to hand over the suit premises to the defendant yet the plaintiff is in breach of their agreement of 4th November, 2008. Counsel for the applicant relies on the case of **ELIJAH KIPNG'ENO ARAP BII V KENYA COMMERCIAL BANK NRB, C.A. Civil Appeal No. 81 of 2004.**

On his part, counsel for the plaintiff/respondent submit that the application is mischievous and an abuse of the court process. This suit was listed for hearing on 17th November, 2014. The applicant tried to hamper the hearing of the suit. The court adjourned the matter and ordered the applicant to contribute towards the cost of the security. The applicant now seeks to recover the contribution it makes for security costs. The amendment being sought is to introduce a claim for refund of the sum of Kshs.50,000/= the defendant contributes towards security.

It is the respondent's submission that the court adopted a consent of the parties dated 18th February, 2013 and filed on 13th March, 2013. Under the terms of the consent, the defendant was to deposit a sum of Kshs.16,304,500/= as security and then take possession of the suit premises. The defendant failed to honour the consent. The payment of the security expense was by way of a court order and the applicant

has not applied to have the order varied or set aside. The applicant would like to be placed in the position it was prior to the making of the order. Counsel relies on the case of **COFFEE BOARD OF KENYA AND THIKA COFFEE MILLS LIMITED & 2 OTHERS (2014) EKL**R and that of **MRS. KHATIJABAI AHMED DADA & 4 OTHERS VS SULEIMAN KASSAM DADA Mombasa HCCC No. 118 of 1996 (unreported)**.

The court record shows that the defendant filed an application dated 25th April, 2013 seeking to have the consent orders of 14th March, 2013 discharged or set aside. On 17th November, 2014, I heard the application fully. I advised the parties that the main suit could be heard instead of engaging the court with applications. I gave hearing dates of 23rd and 24th February, 2015. No ruling was delivered for the defendant's application dated 25th April, 2013. On the same date, Mr. Kagram, counsel for the plaintiff informed the court that his client was incurring security expenses of Kshs.99,000/= monthly. I made an order that each party meets the security costs and the defendant was to pay Kshs.50,000/= monthly.

The current application is seeking to re-amend the defence and counter-claim so that the incurred expenses of Kshs.50,000/= monthly can be claimed. The suit is fully heard and is pending submissions. The draft amended plaint introduces a claim of Kshs.50,000/= monthly from December, 2014 until the determination of this suit.

Order 8 rule 5 (1) of the Civil Procedure Rules states as follows: -

1. **For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either of its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to cost or otherwise as are just.**

Counsel for the plaintiff cited the case of **COFFEE BOARD OF KENYA V THIKA COFFEE MILLS & 3 OTHERS** (supra) where the court stated the following in relation to amendment of pleadings: -

“On the basis of the different judgments, it is settled that the following principles should be kept in mind in dealing with the applications for amendment of the pleadings: -

- i. **All amendments should be allowed which are necessary for determination of the real controversies in the suit;**
- ii. **The proposed amendment should not alter and be a substitute of the cause of action on the basis of which the original list was raised;**
- iii. **Inconsistent and contradictory allegations in negation to the admitted position of facts or mutually destructive allegations of facts would not be allowed to be incorporated by means of amendments;**
- iv. **Proposed amendment should not cause prejudice to the other side which cannot be compensated by means of costs;**
- v. **Amendment of a claim or relief barred by time should not be allowed;**
- vi. **No amendment should be allowed which amounts to or results in defeating a legal right to the opposite party on account of lapse to time;**
- vii. **No party should suffer on account of the technicalities of law and the amendment should be allowed to minimize the litigation between the parties;**
- viii. **The delay in filing the petitions for amendment of the pleadings should be properly compensated by costs;**
- ix. **Error or mistake, which is not fraudulent, should not be made the ground for rejecting the application for amendment of pleadings.”**

The general rule is that all necessary and relevant amendments should be allowed. There are exceptions to that general rule as indicated in the Coffee Board of Kenya case. Proposed amendments should not cause prejudice to the other party. The plaintiff's claim against the defendant as per the amended plaint

dated 24th January, 2013 is for Kshs.15,171,000/=, Kshs.99,500/= monthly and a prayer for injunction. The defendant is seeking in the counter claim among other prayers a weekly sum of Kshs.50,000/= being penalty for breach of contract until the suit premises are handed over to the defendant.

Although the plaintiff claimed a sum of Kshs.99,500/= monthly in the plaint, this court partly awarded that prayer before the suit was heard. The rationale is that the premises belong to the defendant and the security is for the defendant's benefit. However, if it can be subsequently proved that indeed the need to have the security on site is attributed to the plaintiff's breach of the contract, then the court may allow the defendant to recoup the security expense. The defendant did not foresee that it would have to pay that amount in advance and I believe that is why the counter claim did not plead that sum. Now that the plaintiff is incurring the expenses, just like the same manner the plaintiff pleaded for payment of that expense, it is prudent to allow the application to amend the plaint. Should the plaintiff be successful in its prayer for the sum of Kshs.99,500/= monthly, the sum of Kshs.50,000/= paid monthly in advance would be set off against that claim. Similarly, should the defendant be successful in its claim for Kshs.50,000/= monthly, the defendant will be called upon to settle that amount.

The overriding objective is to allow parties to present their cases at their full extent so that all what is being claimed can be deliberated upon and determined by the court. The request by the defendant is not an afterthought. The plaintiff will not be prejudiced as it has already pleaded for the security amount. Further, the claim is not time barred and is not made in bad faith.

In the end, the application dated 13th August, 2015 is granted as prayed. The applicant to file and serve its re-amended plaint within seven (7) days hereof. The defendant to file its re-amended plaint, if need be within fourteen (14) days after service. Costs in the course.

Dated and delivered in Malindi this 22nd day of June, 2016.

J.S. CHITEMBWE

JUDGE