



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT MOMBASA
CIVIL SUIT NO. 217 OF 2012
(FAST TRACK)

FLECKVIEH GENETICS (EA) LTD.....1ST PLAINTIFF

LYDIAH WANJIAH BESSELING.....2ND PLAINTIFF

GERARD BESSELING.....3RD PLAINTIFF

V E R S U S

KEVIN BEALE.....1ST DEFENDANT

LEENDERD DEN DULK.....2ND DEFENDANT

DIANA NTHAMBI MUTUNGA.....3RD DEFENDANT

FLECKVIEH CATTLE BREEDERS LTD.....4TH DEFENDANT

RULING

1. This Ruling relates to the Notice of Motion dated 27th October 2014, herein after called the notice of motion. By that Notice of Motion the Plaintiffs seek to further amend their Plaint.

Back Ground

First plaintiff Company was registered by the second and third Plaintiffs when there were only two subscribers and shareholders. The objective of the first Plaintiff was to import Semen of Fleckvieh cows from Germany. It is that company which is licensed to import Fleckvieh into the East Africa region, which includes Rwanda, Burundi and Southern Sudan. Evidence has been adduced on behalf of the Plaintiffs to show that the first Plaintiff has developed Country wide distribution of that semen.

3. The Fleckvieh is said to be hardy type of a cow which is good for milk, Beef and its leather is said to be special. The second plaintiff in his evidence stated that the first Plaintiff introduction to the Kenya market of Fleckvieh Semen would go some way in assisting to eradicate poverty. That second Plaintiff further stated that the farmers who had received the Fleckvieh Semen had said that their lives had been changed because of the increase in output of milk. In evidence it was further stated that whereas the average and ordinary cow normally weighed 200 to 300 kg Fleckvieh cows reached 300 kg in six months

because they gained 1.5 kg per day.

4. The second and third Plaintiffs agreed to start a breeders Company with the first, second and third Defendants, using Fleckvieh semen. They then formed the fourth Defendant Company. The fourth defendant Company acquired two hundred cows, although 12 of them died, and started a breeding program with Fleckvieh semen. The relationship amongst the subscribers of the fourth Defendant subsequently soured so much that no meaningful business was transacted. The Plaintiffs' claim before the Court is for restraining orders, against the first to the third Defendants, from transacting any business of fourth Defendant Company and an order for the assets of the fourth Defendant to be shared out amongst the subscribers.

5. The Plaintiffs' case has started, in that the second and third Plaintiffs have testified, although the second Plaintiff has not yet been cross-examined. It is in that background that the Notice of Motion is seeking for leave to further amend the Plaintiff.

Notice of Motion

6. The application is brought under Article 159 (2) (d) of the Constitution, Sections 1A,1B and 3A of the Civil Procedure Act and Order 8 Rule 1 to 5 of the Civil Procedure Rules. By the proposed amendment the plaintiffs seek to introduce fifth defendant, Kilifi Hills Limited.

Plaintiffs' Submissions

7. The application to further amend the plaintiff is based on that Plaintiffs' allegation that the first to third defendants clandestinely Incorporated the proposed fifth defendant with a view to the fifth defendant stealing 600 head of cattle majority of which were expectant with the Fleckvieh insemination. In order to achieve that, Plaintiff submitted that the Defendants had changed the name of the fourth Defendant by placing a sign reading Kilifi Hills Limited in place of fourth Defendant. To support that allegation the Plaintiffs annexed letters of termination given to the fourth Defendant's employees and letters of appointment issued by Kilifi Hills Limited to the same employees. An order was also annexed issued by the Industrial Court sitting in Mombasa which restrained the Directors of Kilifi Hills Limited from forcing the employees to execute those letters of appointment by Kilifi Hills Limited.

8. The Plaintiff also annexed documents which showed that the Defendants in February 2013, during pendency of this case, sold through the fourth Defendant Company cattle valued at Kshs. 4,240,000/-.

9. It is on that basis that the Plaintiffs wish to join the proposed fifth Defendant into this action on the ground that it took into its possession 600 head of cattle that belonged to the fourth defendant.

DEFENDANT'S SUBMISSIONS

10. The application was opposed by the defendants relying on the Replying Affidavit of first Defendant. Some of the depositions in that affidavit read as follows:-

i. That the application is an afterthought and delaying tactic as the proposed Defendant has been in existence since 26th November 2012 with the full knowledge of the Plaintiffs/Applicants as is apparent from the Court file;

ii. That the proposed Defendant is an independent entity which should not be unnecessarily dragged into the present proceedings;

11. Also by that affidavit the deponent stated that if the amendment was allowed it would result in delay of the finalization of this case.

COURT'S DETERMINATION

12. Order 8 Rule 3 (1) in part provides:-

“..... 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.”

13 The fact that the second and third Plaintiffs have testified in this case is not a hindrance to grant the application to amend the Plaintiff.

14. The purpose for which an amendment should be granted is as set out in Order 8 Rule 5 (1), as follows:-

“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 costs or otherwise as are just.”

15. The Plaintiffs seek by the proposed amendment to join the proposed 5th Defendant. If the Plaintiffs' prayer is allowed the proposed 5th Defendant will join this case after the 2nd and 3rd Plaintiffs have testified, although the 2nd Plaintiff has not been cross examined. The Plaintiffs' allegation is that the proposed 5th Defendant wrongfully obtained possession of 600 heads of cattle which belonged to the 4th Defendant. The jurisprudence on applications to amend pleadings is that such applications should be freely allowed provided that such amendment does not result in prejudice to the other parties. See the cases of **EASTERN BAKERY –VS- CASTELINO (1958)E.A. 461 and CENTRAL KENYA LTD – VS- TRUST BANK [2000]2 E.A. 365.** The annexures attached to the Plaintiffs' application show that the proposed 5th Defendant was registered on or about 5th November 2012. Proposed 5th Defendant has two subscribers/shareholders, namely the 1st and 3rd Defendants. Those Defendants have all along been before Court in this case as parties upto the present case, and as stated before, this case is part heard. The Plaintiffs have not yet closed their case. In view of the fact that the two subscribers of the proposed 5th Defendant have all along been before Court I am of the opinion that the proposed 5th Defendant will not suffer any prejudice if the amendment as sought is allowed.

16. On the converse if the amendment is not allowed it may lead to the Plaintiffs filing a separate suit against the proposed 5th Defendant which would undoubtedly go against the overriding principle of the Civil Procedure Act as set out in Sections 1A. As I understand the Plaintiffs' claim against the proposed 5th Defendant is that the Plaintiffs seek to trace the cows which were once owned by the 4th Defendant but now said to be in possession of the proposed 5th Defendant.

17. The right to amend the Plaintiff cannot in my view be defeated, as argued by the Defendants, by the fact that there will be some delay in the conclusion of this case, because the proposed 5th Defendant will need to file its witness statements and documents. In my view Plaintiffs have sufficiently made out a case for amendment to be allowed as sought. However since Plaintiffs knew of the existence of proposed 5th Defendant for sometime but delayed to seek to further amend the Plaintiff they shall bear the costs of the application.

18. I therefore grant the following orders-

a. The Plaintiffs are granted leave to file and serve within fourteen (14) days of today's date their further Amended Plaintiff as sought in Notice of Motion dated 27th October 2014.

b. The 1st to 4th Defendants are granted leave to amend their Defences, if need be, within fourteen (14) days of service of the Further Amended Plaintiff.

c. The proposed 5th Defendant shall file and serve its Defence within fifteen (15) days of service of the further Amended Plaintiff.

d. The proposed 5th Defendant shall within fifteen (15) days from the day of service of the Further Amended Plaintiff, file Witness Statements and Documents if any.

e. The Court at the reading of this Ruling shall give a date for directions when the proposed 5th Defendant shall inform the Court whether it wishes to have recalled any of the witnesses who have testified.

f. The Plaintiff shall pay 1st to 4th Defendants' costs of the Notice of Motion dated 27th October 2014.

DATED and DELIVERED at MOMBASA this 26TH day of FEBRUARY, 2015.

MARY KASANGO

JUDGE