



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MOMBASA
CIVIL SUIT NO. 172 OF 2004

BAMBURI CEMENT LIMITEDPLAINTIFF

VERSUS

FURNCON LIMITEDDEFENDANT

R U L I N G

PRELIMINARY

This Ruling was reserved to be delivered on 23rd April 2015. On that day I was not able to deliver this Ruling due to a number of factors. Firstly is, I was invited to attend a training at the Judicial Training Institute. I then proceeded on my annual leave and on resuming duty I found that my secretary and court assistant were on transfer to another station. The delay however to deliver this Ruling is highly regreted.

NOTICE OF MOTION.

1. The defendant has presented a Notice of Motion application dated 7th November 2013 seeking leave of the court to amend its defence to introduce a counter claim.

2. The application is opposed by the plaintiff who relied on 3 grounds of opposition as follows:

1. The application is contrary to the provision of order 8 rule 3 paragraphs (5) as there is currently no relief sought by the defendant in this suit.

2. The claim sought to be introduced here in by way of counter claim is time barred.

3. The application is an afterthought calculated at delaying the hearing and determination of this suit.

3. The plaintiff's claim is as pleaded in paragraph 3 of the plaint as seen below.

3. The plaintiff's claim against the defendant is for Ksh 5,272,795.00 due and owing from the defendant to the plaintiff in respect of supply of cement to the defendant by the plaintiff, at the defendant's request and instance which amount has been due and owing since August 1998, full particulars are whereof are well within your knowledge.

The claim for Ksh 5.2 million was in respect to defendant's supply of cement on behalf of the plaintiff.

4. Bearing that in mind I do reject the plaintiff's argument that the defendant's proposed amendment has

no bearing to the present? The defendant seeks to counter claim against the plaintiff for Ksh 54 million which defendant alleges is owed under the parties contract appointing defendant as distributor of plaintiff's cement. It therefore becomes clear that the plaintiff's claim and defendant's proposed counter claim are enter intertwined.

5. The plaintiff's main grounds of opposition are on basis that the proposed counter claim is time barred and is contrary to the provisions of Order 8 Rule 3 (5) of the Civil Procedure Rules.

6. Is that a ground for denying the defendant the prayer it seeks ? I respond in the negative. My response is based on Order 8 Rule 3 (2) which provides:

Where an application to the court for leave to make an amendment such as is mentioned in sub rule (3), (4) or (5) is made after any relevant period of limitation current at the date of filing of the suit has expired, the court may nevertheless grant such leave in the circumstances mentioned in any such sub rule if it thinks just so to do.

7. That sub- Rule refers to sub -rules (3) (4) and (5). The only one relevant to consider, and which the plaintiff referred to is , sub rule (5). It provides;

An amendment may be allowed under sub Rule (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.

Plaintiff referred to that sub Rule (5) to support its opposition to the proposed amendment on the ground that the proposed amendment would bring a new cause of action. Now, it is clear from sub Rule (5) that the court has discretion, even where an amendment would introduce a new cause of action, to permit such amendment.

8. Even if that sub rule (5) forbade introduction of new cause of action, as I discussed above in this ruling the defendant's proposed amendment is based on one and the same contract that the plaintiff's claim is based on.

9. The defendant swore, through its managing director, a very detailed affidavit in support of the application. That affidavit chronicled the problematic relationship the parties have gone through resulting in the plaintiff filing this claim against the defendant and resulting in the claim the defendant wishes to introduce in this case for Ksh 54 million. That amount is by no means a small amount and in my view, since this case has not yet been set down for hearing, the interest of justice would best be served by allowing the amendment.

10. In the case **KENYA COLD STORAGE (1964) Ltd -v-s OVERSEAS FOOD SERVICES (AFRICA) Ltd (1982) eKLR** the court discussed Order VIA Rule 3 which is now Order 8 and set out the law in regard to applications for amending pleading which, although decided in February 1997 by Justice S K Sachdeva, is still good law today. This is what he stated:

Under the provision of order VIA rule 3 of the Civil Procedure Rules , the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just allow each party to amend his pleadings notwithstanding that such an application is made after the expiry of a period of limitation upon which the other party might be entitled to rely, or substitute a party, or alter the capacity in which a party sues or even add or substitute a new cause of action.

In a commentary on a similar Indian Provision in Mulla: Code of Civil Procedure, 13th edition, volume 1, at page 726, it is observed:

“As general rule, leave to amend will be granted so as to enable the real question in issue

between the parties to be raised on the pleadings, where the amendment will occasion no injury to the opposite party except such as can be sufficiently compensated for by costs or other terms to be imposed by the order. It does not matter whether the original omission arose from negligence or carelessness...

Broadly stating it, there is no injustice in granting the amendment if the opposite side can be compensated in costs. It is only when costs would not be adequate compensation that amendment will be refused. It is immaterial whether the error sought to be amended was accidental or not. There is no rule limiting amendments to accidental errors...

The court can allow the plaintiff to amend the plaint by permitting him to substitute one ground or exemption from limitation for another. There is no kind of error or mistake which, if not fraudulent or intended to overreach, the court ought not to correct if it can be done without injustice to the other party. Thus, a plaintiff, in a suit for debt, may be allowed to amend the plaint by setting out an acknowledgment, but is not good ground for refusing the application. Even an admission made by mistake may be allowed to be withdrawn, and the pleading amended accordingly. (see *Hollis v Burton* (1982) 8 Ch 226, 236)..."

CONCLUSION

11. In the end and because of my findings above I grant the following orders;

- a) The defendant is granted leave to amend its defence as prayed. Such amended defence and counter claim shall be filed and served within 14 days from this date hereof.
- b) The plaintiff on being served shall file and serve its defence to the counter claim within 15 days of service.
- c) The plaintiff is awarded costs of the Notice of Motion dated 7th November 2013.

Dated and delivered at Mombasa this 25th day of June 2015.

MARY KASANGO

JUDGE

25.6.2015

Coram

Before Justice Mary Kasango

C/Assistant – Kavuku

For Plaintiff:

For Defendant:

Court

Ruling delivered in their presence/absence in open court.

MARY KASANGO

JUDGE

