



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO 644 OF 2009

NIC BANK LIMITED.....PLAINTIFF

Versus

LLYOD MASIKA LIMITED.....DEFENDANT

RULING

Amendment of pleadings and Costs on withdrawn claim

[1] The application dated 7th March 2013 is for amendment of the Plaint to reduce the claim from Kshs. 280,000,000 to Kshs. 80,000,000. The amendment is not opposed and I have not seen anything which would prevent the court from granting it. I, therefore grant the amendment. Consequently, the Plaintiff will file and serve the amended plaint within 14 days and on such service the Defendant shall file its amended defence within 14 days. The only issue which has arisen and is hotly contested is the issue of costs on the withdrawn claim.

Costs on withdrawn claim

[2] The Plaintiff claims that costs of the withdrawn claim are awarded at the discretion of the court under section 27 of the Civil Procedure Act which must be exercised judiciously. The Plaintiff cautioned the court on the proposal by the Defendant that the amendment sought amounts to a withdrawal of the suit on the sum of Kshs. 200,000,000. The Plaintiff submitted that the application before the court is one for amendment and not withdrawal of suit. The vitality being assigned to the said application by the Defendant is therefore, wrong. The plaint is not divided in multiple parts or portions which are capable of withdrawal. It is a singular claim for tort of negligence. In the premises, the Defendant cannot claim to be a successful party on any part of the claim as to be entitled to costs. Even if the amendment was tantamount to a withdrawal, it does not automatically follow that costs should be awarded. The party applying must present before court such material as would enable the court to award costs. They contended that the Defendant has not provided any such material. They cited the case of ***JBKOHIL & OTHERS vs. BACCHULALPOPATAL [1964] EA. 219***. The Defendant has not even claimed that it will suffer any prejudice as to entitle it to more than thrown away costs. See ***COUNTY COUNCIL OF KWALE vs. BAMBURI CEMENT LIMITED***. The Plaintiff stated that should the court find for the Defendant, it will mean that they will be paid a sum in excess of Kshs. 3,000,000 in costs on an application to amend. Such move would militate against the overriding objective and the spirit of amendments; i.e. to enable the court determine the real issue in controversy effectually and completely. Therefore, they urged the court to award costs of the application alone.

[3] The Defendant on the other hand argued that the course being suggested by Plaintiff is dangerous,

misplaced and abuse of court process as it would leave the Defendant without remedy. According to the Defendant, the amendment effectively amounted to withdrawal of a substantial part of the claim. The appropriate procedural law on such cases is under Order 25 rule 1 or 2 of the Civil Procedure Rules, and as a consequence thereof, the Defendant is entitled to cost on the withdrawn part of the claim under Order 25 rule 3 of the Civil Procedure Rules. Therefore, the court should award them costs based on Order 25 of the CPR which is explicit and specifically designed to deal with such situation. Any attempt to fit this scenario outside Order 25 of the CPR as the Plaintiff is trying to do, is misplaced, wrong and an abuse of the court process. The applicable order is Order 25 rule 2 of the CPR as the suit has been set down for hearing, and they could only discontinue part of the claim with the consent of the Defendant or leave of the court. The Defendant urged that they are consenting to the abandonment of Kshs. 200,000,000 which also means that a major portion of the claim has been withdrawn. The Defendant will be entitled to ask, at the hearing for costs of the part of the claim which has been withdrawn. According to the Defendant, the application before the court is aimed at frustrating their said right.

[4] The Defendant continued to submit that the discretion in rule 25 of the CPR must be exercised judicially based on section 27 of the Civil Procedure Act and the following principles:-

- a) The right for an automatic entry of judgment for costs under Order 25 rule 3 of the CPR is not diminished by the fact that the Plaintiff has made an application;
- b) Costs follows the event unless court for good reason otherwise orders- see the proviso to section 27 of CPA;
- c) The case has been set down for hearing on the basis of the original claim;
- d) The proportion of claim being withdrawn is over 75% of the case; and
- e) The claim being withdrawn was on money advanced before the report in question was issued.

[5] The Defendant is convinced that in any application for amendment, thrown away costs which include the costs on the withdrawn claim is payable by the Plaintiff. They cited the case of ***SNEEDE vs. WOTHERNBARYTES & LEAD MINING CO LTD [1904] 1 KB 295 at page 297*** and ***EASTERN RADIO SERVICE vs. RJ PATEL T/A TINY TTOTS [1962] EA. 818 at page 823***. To them, an amendment speaks from the commencement of the suit, i.e. the claim as amended is deemed to have been so from the inception of the suit. Costs of the suit whichever way it goes will be on the case as amended and so the Defendant will be left without remedy unless an order or judgment for costs is signed by the Registrar as required in the rules. See ***JBKOHIL & OTHERS vs. BACCHULALPOPATL [1964] EA. 219*** and ***COUNTY COUNCIL OF KWALE vs. BAMBURI CEMENT LIMITED***.

[6] The Defendant further argued that instruction fee was earned when they filed the defence on the entire sum as claimed then. On this see the case of ***JORETH LTD vs. KIGANO & ASSOCIATES*** and ***FIRST AMERICAN BANK OF KENYA vs. SHAH & OTHERS [2002] EA. 64***. On the basis of the reasons above, the Defendant urged the court to allow the amendments sought with an order that costs for the withdrawn claim be paid by the Plaintiff.

Determination

[7] I see one major issue here, i.e.:-

- a) **Whether the Defendant is entitled to costs apart from thrown away costs? Under this head I shall determine whether the nature of the amendment is to correct a misnomer or is a withdrawal of a substantial part of the suit.**

Costs on amendment

[8] Costs on amendment are ordinarily provided for. They are paid by the Plaintiff to the defendant as

the plaintiff is deemed to be the author of the inconveniences in the suit. See the case of *LEROKAvs. MIDDLE AFRICA FINANCE COMPANY LTD [1990] KLR* on this general rule on costs when it the Court stated that:

“...on such applications (for amendment) is for the defendant to be paid as the plaintiff is deemed to be the author of the inconveniences. I see no reason to depart from this usual practice. The fact that the defendant opposed the application is not in my view sufficient to enable this court to depart from its usual practice. In fact in my view, the defendant would have failed in his duty if he had allowed the matter to proceed by default. In any case, he only exercised his rights as given by the Civil Procedure Rules.”

[9] Both parties are agreed on this fact except the Defendant has argued that the amendment herein amounted to withdrawal of suit for which they should get a certification by the court in order for them to claim for costs during the hearing. The Plaintiff on the other hand claims that this is simply an amendment and should be treated as such. And so, only thrown away costs should be paid. My view of the matter is as follows. The amendment was not to correct a misnomer but rather to drop a substantial part of the original claim. The Defendant filed a defence based on the original claim and presumably was charged or paid fees on the original claim. I do not accede to the argument by the Plaintiff that their claim was a singular claim for negligence which was not capable of being withdrawn in part. In fact, the plaintiff has specifically pleaded for judgment to be entered against the Defendant for a sum of Kshs. 280,000,000. The impleading of the sum of Kshs. 200,000,000 now being dropped is not an error because; the fact that the said sum had been advanced before the report in question was made is a matter that was not hidden to the Plaintiff. The facts of this case reveal, and the Plaintiff was aware that the said amount had been advanced before the report in issue was made. It took the Plaintiff more than three years to apply to rectify the situation. It may have been sheer negligence on the part of the Plaintiff to have so impleaded. But, nevertheless, in the circumstances of this case, the amendment amounted to a withdrawal of claim. Therefore, nothing stops the Defendant from applying at the hearing for costs of the part of the claim against it which has been withdrawn. In assessing costs thereof, the taxing master will, however, apply the lower scale given the facts of this case. I take this path because; any other course will be allowing negligent suitors to file claims against people without any basis only at the pain of thrown away costs or in the hope that they will adopt a painless process of amendment to remedy the situation at their own time. The court should always consider the entire circumstances of the case and the nature of amendment when awarding costs. But costs of the application are awarded to the Defendant. It is so ordered.

Dated, signed and delivered in court at Nairobi this 23rd day of June 2015.

F. GIKONYO

JUDGE