



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO 442 OF 2013

AAT HOLDINGS LIMITED.....PLAINTIFF

Versus

DIAMOND SHIELDS INTERNATIONAL LTD.....DEFENDANT

RULING

Two Applications: Amendment of Plaintiff and Summary Judgment

[1] I am considering two applications; 1) an oral application to amend paragraphs 6 and 10 of the Plaintiff; and 2) a motion made by the Plaintiff/Applicant which seeks for summary judgment in the sum of Kshs. 15,400,000 and interest thereon at commercial rates from the date of filing suit until payment in full, to be entered against the Defendant/Respondent under Order 36 Rule 1 of the Civil Procedure Rules (hereafter CPR). The said motion is also based on Order 51 Rule 1 of the CPR. The formal application is also seeking for costs of the application.

[2] The oral application to amend paragraphs 6 and 10 of the Plaintiff is fairly straight forward and bears preliminary connotation, which I can discern from its nature and the circumstances in which it was made. It must precede the application for summary judgment. I will, therefore, determine it first.

Amendment of Plaintiff

[3] The Plaintiff/Applicant applied for leave to amend paragraph 6 and 10 of the Plaintiff. Paragraph 6 of the Plaintiff avers:

6. The Plaintiff then raised an invoice of Kshs. 11,400,000 for rice.

And paragraph 10 of the Plaintiff avers:

10. The Plaintiff then raised an invoice of Kshs. 7,000,000 for sugar.

[4] The amendment was prompted by the submissions by counsel for the Defendant that: Whereas paragraph 6 talks of **an invoice of Kshs. 11,400,000 for rice**; And paragraph 10 talks of **an invoice of Kshs. 7,000,000 for sugar**; the invoices for rice and sugar which are annexed to the witness statement in support of the Plaintiff are for the sum of **Kshs. 7,000,000** and **Kshs.**

11,400,000, respectively. According to Mr Maondo, with this state of affairs, the evidence filed in court does not support the averments in the pleadings. Mr Wandabwa, counsel for the Plaintiff/Applicant then applied for leave to amend paragraphs 6 and 10 of the Plaintiff by replacing; 1) the word "rice" in paragraph 6 with the word "sugar"; and 2) the word "sugar" in paragraph 10 with the word "rice". He termed the anomaly as an inadvertent mix-up of those terms/items when the Plaintiff was being drafted. He further submitted that the factual situation of the averments in the Plaintiff is set out in the affidavit and annexures thereto. The amendment according to him will not cause any prejudice to the Defendant as they have had the invoices from the time they were rendered. It was the submission of counsel for the Plaintiff that an amendment can be granted any time before judgment. He, therefore, appealed to the court to evaluate the evidence before it and determine whether, in the light of the amendment, a summary judgment is sustainable. He pleaded for the court to resort to its unfettered discretion and grant the amendment.

[5] Mr Maondo opposed the application for amendment. First, he submitted, the amendment has come too late in the day. Second, whereas the court has unfettered discretion to allow amendment of pleadings, the discretion should be exercised judicially. In support of that argument, he submitted that from the time the Defendant raised the objection to the pleadings, the Plaintiff did not apply for amendment. It only applied to amend the Plaintiff to defeat the Defendant's defence. He did not stop there. He urged that, an amendment to the Plaintiff will not help things become better for the Plaintiff because the affidavit in support of the application for summary judgment contains similar depositions made under oath, and in law, those depositions cannot be amended. For those reasons, he asked the court to refuse the amendment.

COURT'S RENDITION

ON APPLICATION FOR AMENDMENT

[6] The general power of the court to amend pleadings draws from section 100 of the Civil Procedure Act (hereafter the CPA). Parties to the suit also have a right to amend their pleadings at any stage of the proceedings, albeit that right is not absolute, for it is dependent upon the discretion of the court. I agree with counsel for the Defendant that the discretion should be exercised judicially. Section 100 of the CPA and Order 8 rule 3 of the CPR, provides a broad criteria which should guide the court in the exercise of discretion that; 1) the amendment should be necessary for purposes of determining the real question or issue which has been raised by parties; and 2) is just to do so. Case law has then broken down these broad requirements into biteable and defined principles of law which circumscribe the exercise of discretion in an application for amendment of pleadings. The principles were set out by the Court of Appeal in **CENTRAL KENYA LTD v APPEAL NO 222 OF 1998** as shown below:-

- (i) That are necessary for determining the real question in controversy.**
- (ii) To avoid multiplicity of suits provided there has been no undue delay.**
- (iii) Only where no new or inconsistent cause of action is introduced i.e. if the new cause of action does not arise out of the same facts or substantially the same facts as a cause of action.**
- (iv) That no vested interest or accrued legal rights is affected; and**
- (v) So long as it does not occasion prejudice or injustice to the other side which cannot be properly compensated for in costs.**

[7] It is quite clear from decided cases that the discretion of a trial court to allow amendments of a Plaintiff is wide and unfettered except it should be exercised judicially upon the foregoing defined principles. That is why the court has power to allow amendment of a Plaintiff disclosing no

cause of action. See the case of **MOTOKOV v AUTO GARAGE LTD. AND OTHERS [1971] E.A. 353**. Also, the court has power, in special circumstances, to allow amendment of a plaint, notwithstanding that the effect will be to defeat a defence of limitation, which is an accrued defence in law. On this see the case of **BARCLAYS BANK D.C.O. v SHAMSUDIN [1973] E.A. 451**. But can it be said that there was an accrued defence in the present case? Let me examine the circumstances of this case.

[8] I have reproduced paragraphs 6 and 10 of the plaint. The plaint makes a claim for sugar and rice as goods supplied to the Defendant, and the unpaid consideration on the delivered items. Upon perusal of the witness statement and the documents in support of the plaint, it is clear that the invoice for rice is for the sum of Kshs. 7,000,000 and that for sugar is for the sum of Kshs. 11,400,000. These two invoices are annexed to the witness statement as the documents the Plaintiff intends to rely upon to support its case. That leaves no doubt that the averments in the plaint, the affidavit and the witness statement is a mere error or do I call it a mix-up which I believe is inadvertent. The amendment sought will remove the inadvertent error; reconcile the pleadings and the evidence without introducing any new or inconsistent cause of action. The amendment is not, therefore, useless or a time-wasting venture or merely technical. Can such error become a basis for a feasible defence in law? I think not, lest the entire corpus of law on amendment of pleadings should become obsolete. The error is apparently on the record and is easily discernible as such error, which, unless it is removed by way of amendment, may become a source of multiplicity of suits and unnecessary costs on the parties if the plaintiff is forced to file another suit on the same cause of action. This is not a case on un-pleaded facts which ought to have been pleaded or a case of an accrued defence in law. It is one of a simple error or mix-up of averments in pleadings. When the mix-up is viewed within the entire pleadings and evidence annexed by the Plaintiff; there is little difficulty to discern it as simply an error but which places itself as an unnecessary impediment to the determination of real question or issue in controversy. The circumstances of this case, I repeat, do not reveal any reason which may restrain the court from exercising discretion in favour of the Plaintiff/Applicant. It would also be unfair to label the Plaintiff/Applicant in this case a negligent pleader or the indolent as the application for amendment is bona fide and was made without delay, the suit having been filed on 10.10.2013. The amendment does not also cause any prejudice to the defendant. See the recent decision of the Court of Appeal in the case of **ELIJAH KIPNGENO ARAP BII v KENYA COMMERCIAL BANK LIMITED [2013]ECLR**, in which it upheld its earlier case in **JOSEPH OCHIENG & 2 OTHERS v FIRST NATIONAL BANK OF CHICAGO, CIVIL APPEAL, NO. 149 OF 1991** where in citing with approval *Bullen and Leake & Jacob's Precedents of Pleading, 12th Edition*, remarked, regarding amendment of pleading, as follows:

“...power to so amend can be exercised by the court at any stage of the proceedings (including appeal stages); that as a general rule, however late, the amendment is sought to be made it should be allowed if made in good faith provided costs can compensate the other side; that the proposed amendment must not be immaterial or useless or merely technical; that if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action...”

DETERMINATION OF APPLICATION FOR AMENDMENT

[9] The law on amendment of pleadings is tempered with discretion so that a court of law, properly guided by principles of law, should be able to allow an amendment for purposes of determining real question or issue in controversy; which is what adjudication of cases and effectual dispensation of substantive justice to parties under Article 159 of the Constitution is all about. Using the test set out in the decisions by the Court of Appeal, I find and hold that:

- (i) The proposed amendment is necessary for determining the real question in controversy. It is not immaterial or useless or merely technical.

- (ii) There has been no undue delay in making the application.
- (iii) The amendment does not introduce a new or inconsistent cause of action which would change the action into one of a substantially different character, which can only be more conveniently made the subject of a fresh action. The documents which support the amendment of the impugned averments in the plaint, clarifies the mix-up, are part of the record and relate to the same facts on which the cause of action is based.
- (iv) There is no vested interest or accrued legal rights which will be affected; and
- (v) The amendment does not occasion prejudice or injustice to the other side which cannot be properly compensated in costs.

[10] For the reasons above, I allow the amendment of paragraph 6 and 10 of the Plaint by deleting the word "rice", and the word "sugar" appearing in paragraph 6 and 10 of the Plaint respectively; and accordingly replacing the word "rice" with "sugar", and the word "sugar" with "rice".

ON APPLICATION FOR SUMMARY JUDGMENT

[11] The question of amendment of Plaint has been settled. I now move to the other application for summary judgment. I will start by setting out the arguments put forth by the parties in support of their various stand-points on the application. I will then re-state the legal dimensions governing the grant of application for summary judgment within the regime of the civil procedure.

Arguments by the Plaintiff/Applicant

[12] Mr Wandabwa, counsel for the Plaintiff/Applicant, relied on the grounds set out in the motion, and the affidavit of **DAVID ODINGA**. He also made oral submissions in court. From the above, it is discernible that the application sits on the following grounds:

- 1) The motion is properly before court having been filed after the entry of appearance filed and before the filing of defence by the Defendant as required by Order 36 of the CPR.**
- 2) The Plaintiff's claim is a liquidated claim.**
- 3) The Defendant is truly and justly indebted to the Plaintiff for the sum claimed; relevant quotations, L.P.Os, delivery notes and invoices on the goods supplied and delivered have been annexed.**
- 4) The goods were received and signed for by the Defendant.**
- 5) That despite demand made, the Defendant has not paid the due debt.**
- 6) The Defendant has no defence to the claim; there is no triable issue which is raised in the defence which, according to the counsel, amounts to mere denial of claim. The only defence they have raised is that the LPOs were not signed by the procurement manager, M/S Jane Wanjiku Ngikonyo and, therefore, a forgery. Counsel was of the opinion that that cannot constitute a defence since LPOs were stamped and duly signed by the Managing Director of the Plaintiff Company. Moreover, it was not open to the Defendant to enquire into the internal workings of the Plaintiff Company with regard to the signing of the LPOs. Finally, in any event, the Defendant is not saying that the LPOs did not emanate from the Plaintiff Company.**

7) *The amount of money involved herein is Kshs. 15, 400,000 which is huge and has affected the operations of the Plaintiff Company.*

8) *For those reasons, he is convinced this case is most apt for summary judgment and so he beseeched the court to enter summary judgment in favour of the Plaintiff.*

Arguments by the Respondent

[13] Mr Maondo, counsel for the Respondent opposed the application for summary judgment. He relied on his grounds of opposition. He buttressed the following points:

1) *That the evidence before the court does not support the pleadings. But without hesitation, I reckon that submission used to oppose the application for amending paragraph 6 and 10 of the Plaint. But that issue has been dealt with sufficiently and utilized for purposes of the application for amendment of the Plaint.*

2) *That the defence pleads forgery which is a triable issue and even a single triable issue is enough to decline an application for summary judgment. It matters not that the triable issue may or may not succeed.*

3) *The court should consider serving substantive justice to all the parties who have filed pleadings*

DETERMINATION OF SUMMARY-JUDGMENT APPLICATION

Competence of application

[14] The competence of the application for summary judgment has not been challenged; indeed the application was filed after the entry of appearance and before the filing of defence as required by Order 36 rule 1 of the CPR.

The Substantive Issues

[15] The legal dimensions governing entry of summary judgment are well settled that they cannot be called upon to justify themselves. Case law on the subject is legion which I need not multiply except I will refer to two cases; 1) **ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR;** and 2) **SULTAN HARDWARES LIMITED v STEEL AFRICA LIMITED [2011] eKLR;** where the Court of Appeal quoted its earlier decisions and also from its predecessor. That rendition by the Court of Appeal in the two cases is reproduced below, and it is in such subtle and absolute simplicity that I will not need further elaboration.

[16] In the case of **ISAAC AWUONDO v SURGIPHARM LIMITED & ANOTHER [2011] eKLR** the Court of Appeal had the following to say:

In **MOI UNIVERSITY v VISHVA BUILDERS LIMITED** - Civil Appeal No. 296 of 2004 (unreported) this Court said:-

“The law is now settled that if the defence raises even one bona fide triable issue, then the Defendant must be given leave to defend. In this appeal we traced the history from the commencement of relationship between the parties herein. The dispute arises out of a building contract. In the initial Plaint the sum claimed was well over 300 million but this was scaled down by various amendments until the final figure claimed was Shs.185,305,011.30/- We have looked at the pleadings and the history of the matter and it would appear to us that the appellant had serious issues raised in its defence. As

we know even one triable issue would be sufficient – see H.D Hasmani v. Banque Du Congo Belge (1938) 5 E.AC.A 89. We must however hasten to add that a triable issue does not mean one that will succeed. Indeed, in Patel vs. E.A. Cargo Handling Services Ltd. [1974] E.A. 75 at P. 76 Duffus P. said:-

“In this respect defence on the merits does not mean, in my view a defence that must succeed, it means as SHERIDAN, J put it “a triable issue” that is an issue which raises a prima facie defence and which should go to trial for adjudication.”

And finally in Postal Corporation of Kenya vs. Inamdar & 2 Others [2004] 1 KLR 359 at p. 365 this Court said:-

“However, we have accepted that the application that was before the learned Judge was an application for summary judgment under Order XXXV rule 1 and 2. We must now consider whether the principles of law that need to be satisfied before such a judgment is entered were indeed satisfied. The law is now well settled that if the defence filed by a Defendant raises even one bona fide triable issue, then the Defendant must be given leave to defend. There are several authorities in support of this proposition. One of them is this Court’s decision in the case of Continental Butchery Limited vs. Samson Musila Ndura, Civil Appeal No. 35 of 1997 where this Court stated:

With a view to eliminate delay in the administration of justice which would keep litigants out of their just dues or enjoyment of their property, the court is empowered in an appropriate suit to enter judgment for the claim from the Plaintiff under summary procedure provided by Order 35 subject to there being no triable issues which would entitle a Defendant leave to defend.

If a bona fide triable issue is raised the Defendant must be given unconditional leave to defend but not so in a case in which the Court feels justified in thinking that the defences raised are a sham.

That decision was made in 1977. In 1997, this Court again confirmed the same principle in the case of Dhanjal Investments Limited vs. Shabana Investments Limited, Civil Appeal No. 1232 of 1997 (unreported) where it stated:

The law on summary judgment procedure has been settled for many years now. It was held as early as in 1952 in the case of Kundanlal Restaurant vs. Devshi & Company Limited [1952] 19 EA 77, and followed in the Court of Appeal for Eastern Africa in the case of Souza Fiqueredo & Co. vs. Moorings Hotel [1959] EA 425, that if the Defendant shows a bona fide triable issue he must be allowed to defend without conditions.”

[17] In the case of SULTAN HARDWARES LIMITED v STEEL AFRICA LIMITED [2011] eKLR the Court of Appeal stated the following:

We are aware that the suit in the superior court was not heard on its merits and what is at stake before us is whether the appellant should have been given an opportunity to be heard on its defence which had been filed. In the case of Lalji t/a Vakkep Building Contractors vs. Casousel Ltd. [1989] KLR. 386 the predecessors of this Court (Nyarangi, Platt, J.J.A. and Kwach, Ag. J.A.) held that:

“Summary judgment is a draconian measure and should be given in only the clearest of cases. A trial must be ordered if a triable issue is found or one which is fairly arguable is found to exist”.

See also – Kassam vs. Sachania [1982] KLR 191 and Zola v Ralli V Bros Ltd [1969] E.A. 591.

[18] I should only decipher the principles which should guide the exercise of discretion in determining an application for summary judgment to be:

- 1) That Summary judgment is a draconian measure and should be given in only the clearest of cases.
- 2) That a trial must be ordered if a bona fide triable issue is found or one which is fairly arguable is found to exist. But a triable issue does not mean one that will succeed. It means an issue which raises a prima facie defence and which should go to trial for adjudication. See the opinion of Duffus P. and Sheridan, J, in **PATEL v E.A. CARGO HANDLING SERVICES LTD. [1974] E.A. 75.**
- 3) But a trial should not be ordered in a case where the Court strongly feels it is justified in thinking that the defences raised are a sham.

[19] There are sound legal and policy consideration which are responsible for the approach taken by the law on this subject; arising from the right of access to and to justice by all parties. On the one hand, there is the Defendant who will be driven from the seat of justice without trial if summary judgment is entered, and on the other hand, you have the Plaintiff who is entitled to expeditious disposal of his case without delay especially where the Defendant has not any defence worth a trial. Which, then places the court in a situation where it has to engage in a novel and delicate balancing act of ensuring that; 1) the Defendant gets a fair trial by considering whether a bona fide triable issue exists; and 2) the Plaintiff equally gets fair trial by eliminating such delay in the administration of justice which would keep him away from his just dues or enjoyment of property; this is the basis for the entry of summary judgment under Order 36 of the CPR in appropriate cases. I admit, this balancing act of the rights and interests of parties is most useful in the adjudication of cases, yet quite delicate as well. But courts are experienced at carrying out the exercise by following the laid down principles of law enunciated above.

[20] Has the principles above been satisfied in this case? The claim herein is for a liquidated sum of Kshs. 15,400,000 for goods sold and supplied by the Plaintiff to the Defendant. Quotations, LPOs, Invoices and delivery notes in support of the claim have been annexed to the application as well as the witness statement. The Defendant has made a general denial of all the allegations in the Plaintiff without offering any specific defence against the claim. The only averment which looks specific and distinct is in paragraphs 4 and 8 of the defence; that the LPO purportedly forwarded by the Defendant were forgeries. That defence has no foot on which to stand; surprisingly it is directed to the LPO alone and not the other documents, especially the invoices that were stamped and signed for and on behalf of the Defendant. Importantly, the Defendant did not provide the necessary particulars of forgery as is required of such impleading under Order 2 rule 10 of the CPR. That requirement of the law is fashioned that way because an allegation of forgery is serious and imputes a criminal conduct on the part of the Plaintiff; it must, therefore, be pleaded with full particulars and details as to bring to the attention of the Plaintiff of the kind of defence his case is faced with. Equally, that information is necessary for purposes of filing subsequent pleadings by the Plaintiff, particularly reply to defence. In the absence of such particularities of the alleged defence, the proposed defence of forgery is a mere sham and is only contrived to pass for a triable issue. Allowing this case to go for trial will be prolonging the disposal of a clear claim of a liquidated sum. I find and hold that the defence is a mere sham; a general statement of non-admission of the allegations in the Plaintiff; and does not bring forth any triable issue which raises a prima facie defence worth going to trial. Consequently, I enter judgment against the Defendant in the sum of Kshs. 15,400,000 with interest thereon at commercial rate from the date of filing suit until payment in full. I also award costs of the application to the Plaintiff/Applicant.

[21] I will not consider the other issues raised by the Plaintiff's counsel, particularly the one on probing of the internal workings of the Plaintiff Company in the signing of company documents because the Defendant or its counsel did not make such allegation or submission before the court.

Dated, signed and delivered at Nairobi this 21st day of January, 2014

F. GIKONYO

JUDGE