



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
COMMERCIAL & TAX DIVISION
CIVIL SUIT NO 526 OF 2011

RUPA COTTON MILLS (EPZ) LIMITED.....1ST PLAINTIFF

PRABOTH K. SHAH.....2ND PLAINTIFF

ASMITA SHAH.....3RD PLAINTIFF

VERSUS

BANK OF BARODA (K) LIMITED.....DEFENDANT

(BY COUNTER-CLAIM)

BANK OF BARODA (K) LIMITED.....PLAINTIFF

VERSUS

RUPA COTTON MILLS (EPZ) LIMITED.....1ST DEFENDANT

PRABOTH K. SHAH.....2ND DEFENDANT

ASMITA SHAH.....3RD DEFENDANT

RULING

INTRODUCTION

1. The Applicant's (Plaintiff By Counter-Claim) Chamber Summons application dated and filed on 3rd March 2014 was brought under the provisions of Order 8 Rule 6, Order 51 Rules 1, 3 and 4 of the Civil Procedure Rules, 2010, Sections 1A, 1B and 3A of the Civil Procedure Act and all other enabling provisions of the law.
2. It sought that the time for filing the Further Amended Defence and Counter-Claim pursuant to the court order issued on 16th January 2014 be extended up to 18th February 2014 and that the said pleading filed on 18th January 2014 be deemed as properly filed within time.

APPLICANT'S CASE

3. The main ground on which the Applicant relied upon in support of its application was that the said Further Amended Defence and Counter-Claim was filed after the fourteen (14) days period provided for under Order 8 Rule 6 of the Civil Procedure Rules.
4. It stated that the said delay was caused by system hitches at its client's offices when the court filing fees in the sum of Kshs 71,000/= were being processed and contended that the same was not inordinate and would cause no prejudice to the Respondents. The said application was also supported by the affidavit of Gad Gathu that was sworn on 25th February 2014 in which he reiterated the grounds that had been set out in the face of the present application.
5. In its written submissions dated and filed on 29th May 2014, the Applicant submitted that the delay was not inordinate and that the same had been sufficiently explained, that the Respondents would not suffer any prejudice if the application was allowed, that it would instead suffer prejudice if the said application was not allowed and that it was in the best interests of justice if the said application was allowed.

RESPONDENT'S CASE

6. The Respondents (Defendants by Counter-Claim) filed their Grounds of Opposition dated and filed on 10th March 2014 in which they averred that the application was incompetent and that there was no reasonable and/or valid ground made for the extension of time prayed.
7. In their written submissions dated and filed on 5th June 2014, they were emphatic that there was inordinate delay on the part of the Applicant in filing its Further Amended Defence and Counter-Claim and that this was a tactic employed to subvert justice.

LEGAL ANALYSIS

8. The court must be very cautious while denying a party an opportunity to ventilate its case sought to be achieved through amendment of pleadings. A court should only deny a party leave to amend its pleadings as a last resort and with good or sufficient cause. This is where the other party will suffer great prejudice which cannot be compensated by way of costs or otherwise as may be just.
9. This is a position that has been well laid out in several cases. In **Joseph Ochieng & 2 others t/a Aquiline Agencies vs First National Bank of Chicago Civil Appeal No 149 of 1991** cited in **David Jonathan Grantham & Another vs National Social Security Fund**, Shah J.A. (as he then was) stated thus:-

“...amendments should be timeously applied for...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...”

10. The Respondents' contention that the processing of the payment by the Applicant could not have taken a month was not one the court would consider at the submission stage as the same ought to have been introduced by way of affidavit evidence.
11. Similarly, the court also hereby rejects the Applicant's argument that as the Respondents had since filed their Reply to Defence and Counter-Claim, it led to a strong reference that their opposition to its application herein was vexatious and an afterthought. This ought to have also been placed before the court by way of affidavit evidence because a perusal of the court file does not indicate whether or not the said Reply to Defence and Counter-Claim was filed as was alleged by the Applicant or at all. If the same was filed, there was none in the court record.
12. Contrary to the Respondents' suggestions that the Applicant could not be permitted to file a Defence out of time once an order had been issued, the court wishes to point that it has jurisdiction and power to allow the application as prayed in view of Order 8 Rule 6 of the Civil Procedure Rules, 2010 which provides as follows:-

“Where the court has made an order giving any party leave to amend, unless that party amends within the period specified or if not period is specified, within fourteen days, the order shall cease to have effect, without prejudice to the power of the court to extend the period.”

13. In deciding whether or not to exercise its discretion in favour of a party who has failed to file its amended pleadings within fourteen (14) days or a stipulated period, the court has to consider what prejudice the opposing side would suffer or be likely to suffer and if such prejudice would be one that could be compensated by way of costs.
14. Despite the delay of almost a month since the orders were issued by the court granting the Applicant leave to file their Further Amended Defence and Counter-Claim, a careful perusal of the Respondents’ Grounds of Opposition does not reveal any ground under which the court would find that they would be prejudiced to an extent that an award of costs would not be adequate to compensate them, if the present application was allowed.
15. On the other hand, the court wholly concurs with the Applicant’s submissions that it would suffer prejudice if its application was not allowed. It has since paid the hefty filing fees in the sum of Kshs 70,075/= and not Kshs 71,000/= as had been deposited by Gad Gathu. The interests of justice demand that the Applicant be afforded a fair and reasonable opportunity to ventilate its case.
16. The above notwithstanding, the court would not wish to be drawn to the challenges of the internal mechanisms of processing of payments in the Applicant’s offices. The Applicant was under a duty and obligation to comply with the orders of the court once the same were issued and/or to approach the court in good time to seek extension within which it was to comply.
17. Appreciably, the Applicant sought leave to file its application seeking leave to amend its Amended Defence on 22nd November 2013 when the matter had in fact been listed for pre-trial. The Respondents did not object to the same and the court granted the Applicant the said leave to enable them present their case fully.
18. Its failure to comply with the court orders and subsequently to file the present application almost three (3) months after the court issued its orders was inconveniencing both to the court and to the Respondents as parties would ideally have been preparing for the trial of this matter.
19. The Applicant must bear responsibility for preventing the Respondents from taking the necessary steps to prepare this matter for trial as pleadings have essentially not closed almost three (3) years after suit was filed. It cannot be allowed trample on the rights of the Respondents or to go scot free when it had failed to adhere to court procedures that were couched in mandatory terms. Failure by the court to penalise the Applicant for its omission would be a great miscarriage of justice against the Respondents.
20. It is for this reason that the court has no hesitation in condemning the Applicant to pay the Respondents’ throw away costs to compensate them for the prejudice and inconvenience that they have suffered or will suffer as a result of the court granting the Applicant’s application.

DIPOSITION

21. Accordingly, the upshot of this court’s ruling is that the Applicant’s Notice of Motion application dated 25th February 2014 and filed on 3rd March 2014 was merited and the same is hereby granted in terms of Prayer Nos (1) and (2) therein.
22. However, the Applicant is hereby directed to pay the Respondents’ thrown away costs in the sum of Kshs 30,000/= within fourteen (14) days from the date hereof.
23. It is so ordered.

DATED and DELIVERED at NAIROBI this 22nd day of September 2014

J. KAMAU

JUDGE