



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL & ADMIRALTY DIVISION
CIVIL SUIT NO 795 OF 2009

BAG & ENVELOPE CONVERTERS LIMITED.....
.....PLAINITFF

VERSUS

PANAFRICAN PAPER MILLS (EAST AFRICA) LIMITED (IN RECEIVERSHIP).....1ST
DEFENDANT

PRIME BANK LIMITED.....2ND
DEFENDANT

RULING

INTRODUCTION

1. The Plaintiff's Chamber Summons application dated 18th December 2013 and filed on 14th January 2014 was brought under the provisions of Order 8 Rule 3, Order 1 Rules 10 & 14 of the Civil Procedure Rules, 2010, Sections 1A, 1B, 3 and 3A of the Civil Procedure Act and all the enabling provisions of the law. It sought to enjoin Ian Small and Kieran Day as parties to the suit herein and amendment of the Plaintiff. Suit against the 2nd Defendant herein was withdrawn vide a Notice of Withdrawal dated and filed on 27th March 2012.

2. The 1st Defendant filed Grounds of Opposition dated 22nd January 2014 on 24th January 2014. It objected the enjoining of the said Ian Small and Kieran Day as parties in the suit herein on the ground that they were the Receiver's agents and could therefore not be sued in their personal names as the contract herein was between it and the Plaintiff.

LEGAL ANALYSIS

3. The court has carefully considered the Plaintiff's written submissions dated 7th and 27th March 2014 and those of the 1st Defendant dated 19th March 2014 and notes that the real issue in contention is whether or not the said Ian Small and Kieran Day ought to be enjoined in the suit herein and whether or not the order for amendment of the Plaintiff ought to be allowed.

4. The basis of the proposed amendment by the Plaintiff is that it wishes to present its cause of action against the said Ian Small and Kieran Day as its claim against the Prime Bank Limited had been overtaken by events.

5. It is trite law that a party must be given a fair and reasonable opportunity to present its case. This includes the right to present its case in whatever form it deems fit. Whilst the court has noted the 1st Defendant's submissions that Ian Small and Kieran Day were agents of a disclosed agent and had only acted in their capacity as such, it is up to the Plaintiff to decide what case to bring or not to bring to court.

6. The court must therefore 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.

7. 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...”

8. There may have been inordinate delay in the bringing of the Plaintiff's application to court but the circumstances of the case herein appear to have changed mid-stream. The amendments sought appear to assist the Plaintiff in fully ventilating its case by enjoining the said Ian Small and Kieran Day relating to the enforcement of the Guarantee herein as its claim against Prime Bank Limited had been overtaken by events.

9. As has rightly been pointed out by the Plaintiff's counsel, these are issues that should and can be canvassed during the trial. The competence or otherwise of enjoining the said Ian Small and Kieran Day in this case in their personal capacities is one that would be best left for determination at the time of trial.

10. The question of whether or not the sum of Kshs 8,000,000/= was subject to a constructive/implied trust as was submitted by the 1st Defendant is also a substantive matter that is best left for determination at the time of trial. Although the court has noted the submissions and case law by both the Plaintiff and the 1st Defendant, it has not considered the same as it runs the risk of adjudicating on the merits of the case at this interlocutory stage before hearing the evidence to be adduced by both parties.

11. Every party has a right under Article 50 of the Constitution of Kenya, 2010 to have access the court to ventilate its case. The Plaintiff believes that the participation of Ian Small and Kieran Day in the case herein would be necessary for the real issues in dispute to be heard and determined.

12. Indeed, Order 1 Rule 7 of the Civil Procedure Rules, 2010 provides as follows:-

“Where the plaintiff is in doubt as to the persons from whom he is entitled to obtain redress, he may join two or more defendants in order that the question as to which of the defendants is liable, and to what extent, may be determined between the parties.”

13. The primary concern for the court is whether or not the Plaintiff had been able to demonstrate that the court should exercise its discretion its favour and allow its application seeking orders for amendment. The court's discretion to allow an application for amendment is not an absolute one. The court must exercise the discretion judiciously upon being satisfied that the application has basis on facts and legal principles.

14. The court entirely agrees with the holding in the case of Eastern Bakery vs Castelino [1958] 1 EA 461 amongst other cases cited by the Plaintiff to the effect that applications for amendments ought to be freely allowed if they can be made without injustice to the other side and if the injustice to that side can be compensated by way of costs.

15. There does not appear to be any proof of any prejudice that has been shown to this court by the 1st Defendant that it would suffer prejudice that could not be compensated by way of costs. On the other hand, the court finds that it would be the Plaintiff that would be prejudiced if its application was not allowed. The court has not found any evidence that the enjoining the two (2) parties would cause delay and embarrass the proceedings herein.

16. If it is found at the end of the trial that the said Ian Small and Kieran Day were not necessary parties to the suit herein, the Plaintiff will be condemned to pay them costs, a risk this court believes the Plaintiff is well aware of.

17. It was not necessary for the Plaintiff to seek orders both under Order 8 and Order 1 Rule 10 of the Civil Procedure Rules, 2010 in the same application. If an application under Order 1 Rule 10 of the Civil Procedure Rules, 2010 would automatically have entailed the amendment of the Plaint as envisaged in Order 1 Rule 10 (4) of the Civil Procedure Rules, 2010.

18. Order 1 Rule of the Civil Procedure Rules, 2010 stipulates as follows:-

“1. Where a suit has been instituted in the name of the wrong persons as plaintiff, or where it is doubtful whether it has been instituted in the name of the right plaintiff, the court may at any stage of the suit, it is satisfied that the suit had been instituted through a *bona fide* mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as plaintiff upon such terms as the court thinks fit.

2.

3.

4. Where a defendant is added or substituted, the plaint shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the persons and plaint shall be served on the new defendant and, if the court thinks fit, on the original defendants.”

19. Order 8 Rule 3(1) provides that:-

“ ... 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 its pleadings.”

20. While agreeing with the court's observations with the 1st Defendant that it was not necessary for the Plaintiff to have brought its application under the said two (2) Orders, it is not a defect that goes into the substance of the prayers that have been sought by the Plaintiff for the reason that Article 159 (2) (d) of the Constitution of Kenya, 2010 enjoins this court to administer justice without undue regard to procedural technicalities. Order 51 Rule 10 (2) of the Civil Procedure Rules, 2010 also expressly provides that no application shall be defeated on a technicality or for want of form that does not affect the substance of the application.

21. As the effect of the two (2) Orders would be to amend the Plaint, it would be superfluous to grant the order for amendment under both Orders. The Plaintiff's sole objective is to enjoin Ian Small and Kieran Day as parties to the suit herein in which event the court will grant orders pursuant to the provisions of Order 1 Rule 10 of the Civil Procedure Rules, 2010.

DISPOSITION

22. Accordingly, the upshot of this court's ruling is that the Plaintiff's Chamber Summons application dated 19th December 2013 and filed on 14th January 2014 was merited and the same is hereby allowed in terms of prayers 1 & (4) of the said application.

23. As the 1st Defendant has suffered injustice by the amendments sought by the Plaintiff, the same having been made almost five (5) years after the filing of the suit, the Plaintiff is hereby ordered to pay the 1st Defendant thrown away costs in the sum of Kshs 30,000/= within fourteen (14) from the date of this ruling.

24. It is so ordered.

DATED and DELIVERED at NAIROBI this 18th day of September 2014

J. KAMAU

JUDGE