



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL & ADMIRALTY DIVISION
CIVIL CASE NO. 577 OF 2011

SHOWCASE PROPERTIES LIMITED ::::::::::::::: PLAINTIFF

-VERSUS-

BAMBURI SPECIAL PRODUCTS LIMITED ::::::::::::::: DEFENDANT

RULING

1. The Notice of Motion before the Court is dated **20th June 2014** and filed in Court on the same day. The application is expressed to be brought under Section 3A of the Civil Procedure Act and Order 8 Rule 3, Order 51 Rule 1 of the Civil Procedure Rules and all other enabling provisions of the law.
2. The application seeks to amend the Complaint dated 16th December 2011 as per the draft amended Complaint attached to the application.
3. The application is premised on the grounds stated in the application and is supported by the affidavit of FRANCIS M. GACHANJA dated 20th June 2014. Mr. Gachanja is a director in the Plaintiff Company.
4. Mr. Gachanja avers that subsequent to the filing of the suit, it transpired to the Plaintiff that certain losses such as lost income through rent during the construction period, lost income through the hiring of idle equipment at the site, cost of demolishing the two blocks of apartments, interest on Bank loan as well as other related costs had not been sufficiently pleaded in the claim. Therefore, it became necessary for the Complaint to be amended so as to include the entire claim.
5. It is averred for the Plaintiff that the proposed amendments are necessitated by the fact that, the aforesaid information which is relevant for the fair and just determination of the real questions in controversy in this suit, only came to the Plaintiff's knowledge subsequent to the filing of the Complaint. The deponent further avers that the proposed amendments arise out of the same facts or substantially the same facts in respect of which relief is claimed by the Plaintiff in the current suit.
6. The application is opposed. The Defendant filed grounds of opposition in Court on 21st July 2014. It is the Defendant's case that the application is misconceived and does not lie, being in effect an application for withdrawal of the suit disguised as an application for amendment of the Complaint. It is the Defendant's argument that the Plaintiff can only withdraw the suit in the manner prescribed by law, under the provisions of Order 25 of the Civil Procedure Rules.
7. The Plaintiff filed their written submissions in support of the application on 3rd September 2014 while the Defendant filed their reply on 7th September 2014.
8. I have considered the application, the Grounds of opposition as well as submissions by Counsel and the authorities cited. Having done so, I take the following view of the matter.

ANALYSIS

9. The application was orally canvassed before the Court on 17th September 2014.
10. The main issue for determination is whether the Plaintiff is entitled to the orders of amendment sought for. Under Order 8 rule 5 of the Civil Procedure Rules the Court has wide discretion and power to grant amendments. Furthermore, in the 12th Edition of “**Precedents of Pleadings**” by **Bullen & Leake & Jacob**, the learned authors say at page 124 –

“The guiding principle of cardinal importance on the question of amendments is that, generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defects or error in any proceedings. The rule of conduct of the Court is that however negligent or careless may have been the first omission, and however late the proposed amendment, the amendment should be allowed if it can be made without injustice to the other side.”

11. In addition, under Order 8 of the Civil Procedure Rules, amendments may be allowed even if the effect would be to introduce a new cause of action and they may be allowed at any time before judgment provided that the damage which may arise as a result of the amendment can be cured by way of costs.
12. The Defendant does not challenge the Plaintiff’s right to amend its pleadings. However, the Defendant takes issue with the manner in which the Plaintiff has sought to amend its Plaintiff. According to the Defendant, the Plaintiff’s act of striking out in red each and every word contained in the original Plaintiff amounts to a withdrawal of the Present suit.
13. It is submitted for the Plaintiff that there was no intention on the Plaintiff’s part to withdraw its claim against the Defendant as alleged by the Defendant in its Grounds of Opposition. What the Plaintiff sought to do was to enhance its existing claim against the Defendant by expanding the heads of damages. According to the Plaintiff, the damages have arisen due to effluxion of time.
14. I have perused the Draft amended Plaintiff and indeed the amendments by the Plaintiff are extensive. However, the amendments therein do not raise a different cause of action. They are a direct result of the proceedings and circumstances of the current suit. It is submitted for the Plaintiff that while this suit has been in Court for over two years, further losses have been incurred and continue to be incurred arising from the breach of contract in question. The said losses could not have been sufficiently pleaded or quantified at the time of filing the suit hence the amendments.
15. Besides, there is no cap in the law as to what extent a party should amend its pleadings. Order 8 Rule 7 of the Civil Procedure Rules only provides for the mode of amendment which the Plaintiff has applied but there are no restrictions as to the extent of the amendments.
16. I therefore beg to differ with the Defendant’s position that they will now have to face an entirely new suit. The cause of action by the Plaintiff remains the same only that the nature of the claim has been enhanced. The amendments arise out of substantially the same facts in respect of which relief is sought in this suit. The Defendant has the right to put in an Amended Defence in reply to the Amended Plaintiff. In other words, there is no comprehensible prejudice to be suffered by the Defendant as a result of the amendments sought by the Plaintiff.
17. In light of the above findings, the order that commends itself to this Court is to allow the Plaintiff’s Notice of Motion dated 20th June 2014 in the following terms:-
- a. ***That leave is hereby granted to the Plaintiff to amend the Plaintiff in terms of the Draft amended Plaintiff annexed hereto.***
 - b. ***That the draft amended Plaintiff be deemed as duly filed subject only to payment of the requisite Court fees.***
 - c. ***That the Plaintiff shall file and serve the amended Plaintiff within 14 days from the date of this ruling.***
 - d. ***That the Defendant be at liberty to file and serve its amended Defence within fourteen days from the date of service.***
 - e. ***That the costs of this application be in the cause.***

Orders accordingly.

READ, DELIVERED AND DATED AT NAIROBI

THIS 31ST DAY OF OCTOBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Mugambi and M/s Kariuki for the Plaintiff

Wanandwa holding brief for Oyatsi for the Defendants

Irene – Court Clerk