



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT EMBU
CIVIL CASE NO. 109 OF 1998

J.G. BUILDERSPLAINTIFF/RESPONDENT

VERSUS

PLAN INTERNATIONAL.....DEFENDANT/APPLICANT

RULING

This is a ruling on an application dated 14/10/2014 seeking for leave to amend the Amended Defence dated 3/7/1998. It is supported by the affidavit of one David Njoroge an advocate of the High Court of Kenya acting for the defendant/applicant from the firm of Igerial Ngugi & Company Advocates.

Mr. Ndolo argued the application basing his submissions on the supporting affidavit. He told the court that the plaintiff was allowed to amend his pleadings by the court and subsequently filed his Amended Pleadings dated 21/8/1999. When the defendant was given an opportunity to amend his defence, the counsel on record at that time made a statement from the bar that the court endorses on the defence the word "Amended". The defence dated 3/7/1998 then became the Amended defence.

The application was opposed by the plaintiff/respondent relying on his replying affidavit. He argued that the applicant is using his application as a delaying tactic. The applicant was served with the Amended Pleadings in 1999 but found no need to file an amended defence. On 20/8/2014 the defendant served the respondent with the list of documents which means he had no intention to amend the defence.

It was the applicant's response that it was a different counsel who was representing the applicant at the time the pleadings were amended and that his mistakes should not be visited on the defendant. Under Order 8, the defendant has a right to amend his defence at any stage of the proceedings.

It is not in dispute that the plaintiff amended his pleadings in 1999 and that the applicant did not file an amended defence. The record confirms the applicant's argument that he was represented by another counsel at that time and not the one on record. The applicant has a new counsel on record known as Igeria Ngugi & Company since the 22/7/2014 who took over from Mogusu & Company Advocates.

Order 8 Rule 3(1) provides:-

“Subject to Order 1, rules 9 and 10, Order 24 rules 3,4, 5 and 6... the court may at any stage of the proceedings, on such terms as to costs or otherwise as may be just and in such a manner as may direct, allow any party to amend his pleadings”.

The rules gives any of the parties the liberty to amend their pleadings at any stage of the proceedings with leave of the court. If one party amends his pleadings, the opposite party ought to be granted leave to file a reply, if finds it fit to do so. The fear of the plaintiff/respondent that the case will delay if this application

is entertained is not founded on any sound facts. After all, this is a very old case and it has dragged for over 15 years for reasons known to both parties. There was an attempt to have the matter dismissed at one time for want of prosecution. I am not convinced that this application will delay the suit.

The applicant's right to amend his pleadings shall not be curtailed unless there is a very good reason to interfere with it. The mistake of an advocate should not be used to punish a party who had entrusted his advocate with sufficient instruction to do what it takes to give him adequate representation.

It is my finding that the application is merited and it is allowed in the following terms:-

(a) That the amended defence is hereby deemed filed upon payment of the requisite court fees to be paid within 14 days.

(b) Costs to be in the Cause.

DELIVERED, DATED AND SIGNED AT EMBU THIS 26TH DAY OF NOVEMBER, 2014.

F. MUCHEMI

JUDGE

In the presence of:-

The Plaintiff in person

Ms. Muriuki for Njoroge for Defendant

F. MUCHEMI

JUDGE