



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

COMMERCIAL & ADMIRALTY DIVISION

CIVIL CASE NO. 62 OF 2008

JADE PETROLEUM LIMITED.....PLAINTIFF

-VERSUS-

KOBIL PETROLEUM LIMITED.....DEFENDANT

(By original action)

KOBIL PETROLEUM LIMITED.....PLAINTIFF

VERSUS

JADE PETROLEUM LIMITED1ST DEFENDANT

METRO PETROLEUM LIMITED2ND DEFENDANT

PANKAJ SOMAIA3RD DEFENDANT

(By way of Counter-claim)

RULING

1. The Application before this Court is the **Notice of Motion** dated **3rd April 2014** and filed in Court on the same day. It is taken out under Order 8 Rules 3 and 5 as well as Order 51 Rule 1 of the Civil Procedure Rules.
2. The application is based on the grounds stated on the face of the Application and is supported by the affidavit of **Patrick Kondo** sworn on **3rd April 2014**.
3. Mr. Kondo avers that at the time when the original defence and counter claim were drawn, the Defendant (in the original action) did not know, and had no means of knowing the exact role of the 3rd Defendant in the management of the two companies, Jade Petroleum Limited and Metro Petroleum Limited. The Defendant also did not know and had no means of knowing the Bank accounts of Metro Petroleum Limited, the signatories to the said accounts and the operation of these accounts.
4. It is Mr. Kondo's assertion that all these facts emerged and became known to the Defendant when the trial of this case commenced and the Plaintiff's witnesses gave their evidence.

He further avers that based on the Plaintiff's evidence and the disclosures made, the breaches committed by the three Defendants against the Plaintiff arising from the same cause of action have now become clearer.

5. It is the Defendant's case that the said breaches are not adequately pleaded and need to be amended as per the Draft amended defence and Counter claim. This, according to the Defendant, will enable the Court to properly and fairly determine the dispute between the parties. It is further the Defendant's case that the Defendant continued to incur additional damages after the close of the pleadings which have crystallized and are quantifiable. It is averred for the Defendant that the law requires the said damages be quantified and specifically pleaded so that this honourable Court can properly adjudicate and determine the said claims for damages.

6. In opposition to the application, the Plaintiff filed Grounds of Opposition dated 23rd April 2014. It is the Plaintiff's case that the proposed amendments are extremely prejudicial to its case as the same arise from the oral evidence of PW 1 Charles Mwangi during his testimony on 21st January 2014. It is the Plaintiff's position that it is extremely unfair for the Defendant to wait to hear the Plaintiff's evidence and thereafter seek to amend its pleadings based on the answers given in cross-examination.

7. According to the Plaintiff, the Defendant has all along known the case that it has to meet including the special damages it alleges to have incurred. The Plaintiff is of the opinion that it will be prejudiced if the proposed amendments are introduced at this stage and in the middle of the hearing. It is also the Plaintiff's case that the application has been brought with extreme inordinate delay of six years as pleadings were closed in 2008. The Plaintiff therefore urges this Court to dismiss the current application with costs.

8. The 2nd Defendant also filed a Statement of Grounds of Opposition on 7th May 2014 in response to the application. It is the 2nd Defendant's case that they shall be prejudiced by the proposed amendments. This is because the amendments are informed by the evidence of the Plaintiff's witness in the main suit at the hearing which exposes or incriminates the 2nd Defendant.

9. It is the 2nd Defendant's case that there is no averment in the proposed Amended Defence and Counterclaim that the 1st and 2nd Defendants ever conspired to obtain money or do any other wrong against the Defendant/Plaintiff in the Counterclaim.

10. The Application was orally canvassed before me on 4th July 2014. Mr. Koech appeared for the Plaintiff (original action, 1st and 3rd Defendant's in the Counter-claim) while Mr. Oyatsi appeared for the Plaintiff in the Counter-claim and the Defendant in the original action. Mr. Sijenje appeared for the 2nd Defendant in the counter-claim.

11. Mr. Oyatsi submitted that the proposed amendments arose out of facts which were within the exclusive knowledge of the Plaintiff in the main suit and the Defendants in the counter claim. These facts which concern the internal and private arrangement between the parties came out during the hearing of the suit. It was his submission that these facts entitle the Defendant in the main suit to rely on them as a defence to the claim and also in support of the counter-claim.

12. Mr. Oyatsi further submitted that there would be no prejudice suffered by any of these parties. It was submitted by Counsel that the defence has not closed its case, while the other two Defendants in the counter-claim are yet to give evidence in defence of the counter-claim. According to Counsel, if there is any party that would suffer prejudice it is the Defendant if the amendment is not allowed. This is because there is evidence which has come about, but if there are no pleadings to support it, it is useless. Counsel relied on the case of **Faulkner Vs Agricultural Development Corporation [1978] KLR**.

13. In opposition to the Application, Mr. Koech relied on the grounds of opposition filed on

24th April 2014 and the authorities filed on 12th May 2014. Counsel appreciated the fact that this Court has a wide discretion to allow amendments. However it was Counsel's submission that should such amendments create prejudice to the Respondents which cannot be computed by costs the same should be refused. It was his submission that the amendments as proposed by the Defendant are prejudicial to the Plaintiff. It was further his submission that the Applicant never made any requests for particulars and that Pleadings had been closed 6 years ago. Furthermore, it was Counsel's position that the Defendant could have secured the said information from the Registrar of Companies.

14. Mr. Koech submitted that if the application was to be allowed it would amount to parties seeking amendments at will whenever a party testified. It was his submission that a look at the proposed amendments revealed that the same had nothing to do with the evidence that was testified about. The amendment seeks to increase damages alleged to have been suffered. According to Counsel, this fact has always been within the knowledge of the Defendant/Applicant and therefore did not come about during the testimony of PW 1. He relied on the cases of **Easter Bakery Vs Castelino [1958] (E.A 461 CAK)** for the proposition that amendment to pleadings sought before the hearing should be freely allowed and the case of **James Ochieng' Oduol t/a Ochieng' Oduol & Company Advocates Vs Richard Kuloba[2008] eKLR** where the appeal court allowed an appeal against amendments in similar circumstances.

15. It was submitted by Counsel that the Applicant had the chance to cross-examine the witness and he did that. In conclusion Counsel urged the Court to dismiss the application.

16. Mr. Sijenje appearing for the 2nd Defendant associated himself with Mr. Koech's submissions. He relied on the 2nd Defendant's grounds of opposition filed on 7th May 2014. He noted that the 2nd Defendant was a separate legal entity from the Plaintiff in the original suit. He submitted that the 2nd Defendant was not privy to transactions between the Plaintiff and the Defendant in the original suit.

17. It was Counsel's submission that the 2nd Defendant would suffer prejudice since the proposed amendments emanated from evidence of the 1st Plaintiff's witness. According to Counsel, the amendments sought to bring a cause of action through the back door when the cause of action had expired.

18. Counsel referred to Section 3A of the Civil Procedure Act in submitting that the Court had powers to prevent abuse of due process. It was Counsel's submission that the Applicant should not use the proceedings of this case as a fishing ground to establish a cause of action.

19. In reply, Mr. Oyatsi disagreed with Mr. Koech's submission that his client (Plaintiff in the original suit) would suffer as the proposed amendments would serve to expose his client to higher damages. It was Mr. Oyatsi's submission that the case arose out of a breach of contract which is continuing and so the issue of exposure to more damages could not arise.

20. It was further his submission that the very essence of a trial is to establish the truth, and any party is at liberty to establish the truth. It was therefore his position that the Defendant was doing so by amending the pleadings accordingly.

21. With regard to Mr. Sijenje's submissions that the 2nd Defendant was not privy to transactions between the Plaintiff and the Defendant, it was Mr. Oyatsi's position that the 2nd Defendant was already a party to these proceedings. Therefore the Defendant was not seeking to enjoin the 2nd Defendant to the proceedings. In fact, according to Counsel, the 2nd Defendant had not given any evidence and he would have the opportunity to challenge any allegations.

22. Mr. Oyatsi concluded by submitting that the amendments did not seek to introduce any new cause of action. He therefore urged the Court to grant the amendment orders.

23. I have carefully considered the pleadings herein, the submissions by Counsel as well as the authorities cited. Having done so, I take the following view of the matter.

24. 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.”

25. 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.

26. It is the Defendant’s case that the amendments seek to plead matters which were not within its knowledge when the original defence and counterclaim were filed. Apparently, the Defendant established some of the said matters from the disclosures made by the Plaintiff’s witness at the commencement of the trial on 21st January 2014. The allegations by the Plaintiff that these were matters within the Defendant’s knowledge all along have not been substantiated. It is also not enough for the Respondents to say that they will be prejudiced with the proposed amendments without substantiating the same.

27. Besides, the defence (Defendant in the original suit) has not yet closed its case, while the other two Defendants in the counter-claim are yet to give evidence in defence of the counter-claim. In that case, the parties herein still have an opportunity to sufficiently argue their case.

28. I have perused the Defendant’s draft amended Defence. A look at the same indicates that the amendments were substantially aimed at bringing out clearly and precisely the damages suffered by the Defendant in the original suit. It is trite law that special damages must be pleaded. Indeed the purpose of amendments is to, *inter alia*, determine the real questions in controversy to the parties.

29. In summary, there is no comprehensible prejudice to be suffered by the Plaintiff or the other Defendants as a result of the proposed amendments by the Defendant in the original claim.

30. In light of the above findings, the order that commends itself to this Court is to allow the Defendant’s Notice of Motion dated **3rd April 2014** in the following terms:-

- a) *That leave is hereby granted to the Plaintiff to amend the defence and counterclaim in terms of the annexed draft amended defence and counterclaim.*
- b) *That the draft amended defence and counterclaim be deemed as duly filed subject only to payment of the requisite Court fees.*
- c) *That the Defendant shall file and serve the amended Defence and Counterclaim within 14 days from the date of this ruling.*
- d) *Any party wishing to respond can do that within 30 days.*
- e) *That the costs of this application be in the cause.*

Orders accordingly.

DATED, READ AND DELIVERED AT NAIROBI THIS 19TH DAY OF DECEMBER 2014

E. K. O. OGOLA

JUDGE

PRESENT:

Muriithi holding brief Koech for the Plaintiff/Applicant

M/s Makobu for the 2nd Defendant

Irene – Court Clerk