



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI COMMERCIAL COURT
CIVIL SUIT NO 618 OF 2012

AJIT SINGH VIRDI.....PLAINITFF

VERSUS

J.F. McCLOY.....DEFENDANT

RULING

1. The Plaintiff's Notice of Motion application dated 15th April 2013 was brought under the provisions of Order 8 Rule 3(1), 5(1), Order 51 Rule 1 of the Civil Procedure Rules and Section 1A, 1B (sic) 3A of the Civil Procedure Act. It sought the following orders:-
 - a. **THAT this Honourable Court be pleased to grant leave to the Plaintiff to amend his Plaint herein filed on the 24th September 2012 in terms of the annexed Amended Plaint.**
 - b. **THAT the annexed Amended Plaint be deemed to be duly filed upon payment of filing fees.**
 - c. **THAT the costs of this application be provided for.**
2. The grounds on which the Plaintiff relied on in support of the application were as follows:-
 - a. **THAT the Plaintiff filed suit to enforce the Agreement dated 22nd May 2012 whereby the Defendant company was to pay him a sum of \$ 400,000 payable in four (4) equal monthly instalments.**
 - b. **THAT as at the time the Plaintiff filed suit on 24th September 2012, the Plaintiff had only paid a sum of \$ 100,000 leaving a balance of \$ 300,000.**
 - c. **THAT to capture the various time frames when the instalments were due, the Plaintiff prayed for declaratory orders specifying when the said instalments were payable.**
 - d. **THAT the Defendant further remitted to the Plaintiff a sum of \$ 100,000 which was to be reflected in the Amended Plaint.**
 - e. **THAT it was in the interests of justice that the application herein be allowed for purposes of showing the current position between the parties and to allow the determination of the real question in controversy.**
3. The Plaintiff swore his Supporting Affidavit on 15th April 2013 in support of his application. He reiterated the grounds on the face of his said application.

4. He contended that the passage of time between the date of filing the Plaint which had sought declaratory orders and the filing of his Notice of Motion application dated 29th October 2012 seeking the striking out of the Defendant's Defence changed the nature of the prayers that it was in actual effect seeking.
5. He also stated that he also was entitled to interest on the sum of \$ 100,000 which was due at the end of July 2012 but was instead paid on 22nd March 2013.
6. In response thereto, Resham Singh Birdee, a director in the Defendant company swore a Replying Affidavit on 29th April 2013 on behalf of the Defendant company in which he stated that the Plaintiff's application lacked merit and was defective as the said application was seeking to change the whole ground of the suit herein.
7. He deposed that the Plaintiff was seeking to have the Defence filed wholly spent when in fact the Defendant had denied owing the Plaintiff any monies. He also stated that the sole purpose of the amendment sought by the Plaintiff was to defeat the Defence filed herein and consequently, the said application should not be allowed.
8. He argued that there were issues that arose out of the Defence that should not be defeated by the Plaintiff's alleged amendment to the Plaint. In addition, he averred that the money was not capable of being due while the matter was pending before the court.
9. The Defendant therefore prayed that it be allowed to serve the Memorandum of Appearance, Defence and Witness Statement to enable the matter go for full trial.
10. In his submissions filed on 9th May 2013, the Plaintiff submitted that the proposed amendment would not prejudice the Defendant in any way. He also stated that the Defendant had not shown in which way it stood to be prejudiced if the proposed amendment was allowed. He relied on the case of **Molu & Another vs Kenya Railways & Anor [2002] 2 KLR 551** where at page 555 paragraph 20, Onyango Otieno J (as he then was) stated as follows:-

“ I think the reason why amendments to pleadings are generally granted without much fuss particularly before the hearing is because such amendments help to have all matters between the parties in the suit availed to the court so that the court may be in a better position to have an informed view of the entire case and that ensures justice.”

11. The Plaintiff submitted that the learned judge held that an amendment that changed the cause of action could still be allowed as it was in line with Order 8 Rule 3(5) of the Civil Procedure Rules, 2010.
12. The Plaintiff further submitted that the Defendant ought to plead denial of any outstanding debt but not deny him an opportunity to amend his Plaint. It was his contention that the Defendant had a corresponding right to file an Amended Defence if it deemed it appropriate and that in the circumstances it was in the interest of justice that his application be allowed.
13. On its part, the Defendant relied on the case of **Shah vs Patel (1961) E.A. 397** in which it was held that a denial even though general may be effectual in the defence. This authority was not attached to the Defendant's submissions.
14. It also relied on the case of **Sumvir Trustees Limited vs Guardian Bank Limited Nairobi (Milimani) HCCC No 795 of 1997** which was also not attached to its submissions where Mwera J (as he then was) is said to have stated that:-

“the Court has discretion to allow amendments even during trial as long as that amounts to fully and clearly putting the matter in controversy before it for a just and fair determination.”

15. In paragraph 33 of my ruling of 12th April 2013 in respect of the Plaintiff's Notice of Motion dated 29th October 2012, the Defendant submitted on a case which was unreported and not attached to the written submissions in respect of that application. This practise of not attaching the case law relied upon by advocates must be strongly discouraged. A party who wishes to rely on any case must its opponent and court a copy of the same for their perusal to save their time in obtaining the same. For the same reason that I did not consider the **Re: Sumvir** case in the previous application, I will also not consider the same as it was unreported and was not accessible

- to the court.
16. I have, however, looked at the **Shah vs Patel** case, though not attached because it was reported and note that the same is not relevant to the facts of this case. None of the holdings by the court were couched in the way the Defendant wanted this court to believe they were. I will therefore say no more regarding the said case.
17. In respect of **Kenyatta National Hospital vs Kenya Commercial Bank Ltd & Another [2003] 2 EA** also relied on by the Defendant, Njagi J held that the general rule is that amendments should be freely allowed if they can be made without injustice to the other side and there is no injustice if the other party can be compensated by costs.
18. It was the Defendant's case that the amendments proposed by the Plaintiff would defeat the Defence herein. It argued that the said proposed amendments, which should be done where there is necessity, were not made in good faith. The Defendant nonetheless stated that in the event the Plaintiff was allowed to amend the Plaintiff, it should be given corresponding leave to amend its Defence.
19. The court must be very cautious not to deny a party an opportunity to ventilate its case sought if the same can 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.
20. I agree entirely with the holding of Njagi J in the **Kenyatta National Hospital** case. The general rule is that applications for amendments should be allowed at any time during the proceedings provided that the opposing party can be adequately compensated by costs. The court will more inclined to allow such applications before the hearing commences and only allow the amendments where a hearing has commenced on very limited and exceptional circumstances to be made out by the applying party.
21. 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...”

22. Both the Plaintiff and the Defendant are agreed that amendments should be freely allowed if the inconvenienced party can be compensated by costs. It is not sufficient for the Defendant to say that its Defence will be rendered useless if the proposed amendments are allowed. What should be of concern to the court is whether the Defendant will suffer any prejudice if the said application is allowed.
23. The Defendant did not demonstrate to this court how it would be prejudiced if the proposed amendments were allowed. It is immaterial if there will be a new cause of action arising out of the amendment as Order 8 Rule 3 (1) of the Civil Procedure Rules, 2010 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 his pleading...”

24. It is clear that leave to amend pleadings is to enable the court determine the real issues on controversy between the parties. Order 8 Rule 5(1) of the said rules provides as follows:-

“For the purpose of determining the real question in controversy between the parties, or of correcting any defect or error in any proceedings, the court may either on its own motion or on the application of any party order any document to be amended in such manner as it directs and on such terms as to costs or otherwise as are just”

25. An amendment will be allowed even if its effect would be to add or substitute a new cause of action if the new cause of action out of the same facts or substantially the same facts as a cause of

- action in respect of which a relief has been already been claimed in the suit by the party applying to amend the suit, the amendment would still be allowed.
26. I am therefore not persuaded by the Defendant's submissions that the Plaintiff's proposed amendments should not be allowed for the reason that the same will render its Defence useless. The Defendant acknowledged in its submissions that if the proposed amendments were allowed, then it ought to be given corresponding leave to file an amended Defence. The Plaintiff also conceded to the Defendant's right to file an amended Defence if it deemed it appropriate to do.
 27. The decision of whether or not to allow an amendment is a matter of discretion to be exercised by the court. It is, however, not absolute. The court must exercise the discretion judiciously upon being satisfied that the application has basis on facts and legal principles. It is sufficient for this court to find that denying the Plaintiff a right to amend its Plaintiff will be an infringement of its right to fair trial as enshrined in Article 50 of the Constitution of Kenya, 2010. I find the Plaintiff to have persuaded this court that it was entitled to this court exercising discretion in its favour.
 28. I note that the Defendant did not comply with the provisions of Order 7 Rule 5 of the Civil Procedure Rules when it filed its Defence herein. It asked this court to allow it to serve its Memorandum of Appearance, Defence and Witness Statements upon the Plaintiff. I do not think that is a request that the court ought to accede to because it is the duty of the Defendant or its counsel to prepare its case as it deems fit. It is superfluous for the Defendant to request to be allowed to conduct its case in the best way that it deems appropriate. In any event the Defendant has already filed its Defence in this matter.
 29. I have considered submissions by both parties and do not find that any prejudice will be suffered by the Defendant. I, on the other hand, find that it is the Plaintiff who will be prejudiced if I do not allow its application as it will have been denied an opportunity to ventilate its case. It is necessary that the Plaintiff submits its facts to allow this court to adjudicate on the real issues between himself and the Defendant.
 30. Bearing in mind the foregoing, I am satisfied that this is a case which merits the exercise of my discretion in favour of the Plaintiff herein. The upshot of my ruling is that I find that the Plaintiff's Notice of Motion application dated 15th April 2013 merited. It is hereby allowed as prayed subject to the filing of an Amended Plaintiff within fourteen (14) days from today. Both parties are at liberty to file the subsequent pleadings within the time lines stipulated under the Civil Procedure Rules, 2010.
 31. As has been seen above, a well settled principle of the law is that a party applying to amend its pleadings could be condemned to pay costs to the other party. The Plaintiff filed suit which he has deemed fit to amend at this stage of the proceedings. The Defendant has obviously incurred time and costs in defending the Plaintiff as was drafted. I am therefore persuaded that this is a good case in which I should order the Plaintiff to compensate the Defendant with costs. In this regard, I hereby order that the Plaintiff pays the Defendant thrown away costs in the sum of Kshs 10,000/= to be paid within fourteen (14) days from today.
 32. Orders accordingly.

DATED and DELIVERED at NAIROBI this 24th day of May 2013

J. KAMAU

JUDGE