



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
COMMERCIAL AND ADMIRALTY DIVISION
CIVIL CASE NO. 459 OF 2010

CHARLES NDIRANGU KAMAU & 6 OTHERS PLAINTIFF

VERSUS

WILLIAM KIMANI THUKU & 5 OTHERS DEFENDANT

RULING

1. I have before me the plaintiff's chamber summons dated 24th December 2010. The plaintiffs pray for leave to amend the plaint as per the draft annexed to the affidavit of Charles Ndirangu Kamau of even date. The application is expressed to be brought under sections 1A, 1B, 3A and 100 of the Civil Procedure Act as well as order 8 of the Civil Procedure Rules.

2. The primary ground is to replace the present individual plaintiffs with the company known as Njokerio Trading Company Limited. The current plaintiffs had alleged to be directors or shareholders of the company. They filed the original plaint on 6th July 2010 in their capacities as such directors or shareholders against the defendants for repossession of the company's premises, documents and records and to bar the defendants from interfering with the management of the company.

3. On 17th December 2010, the court, in a considered ruling, found that the plaintiffs could not maintain the suit on behalf of the company. The suit and the plaintiff's interlocutory application were struck out. The court had further observed as follows;

“for the avoidance of doubt and in order to prevent grievous wrongs such as those complained of herein going unremedied , I direct that the company, if it so wishes, brings the action in its name”.

4. That would seem to be the basis of the present application. The defendants contest the application. The defendants submitted that since the plaintiffs lacked locus standi to maintain the suit *in limine*, the non-joinder of the company cannot be cured by the intended amendment. The defendants thus pray that the application to amend the plaint be dismissed with costs.

5. I have heard the rival arguments. I am of the opinion that the present application was largely precipitated by the ruling and order of court of 17th December 2010. As I have stated, the suit and the interlocutory application by the plaintiffs were struck out. The court was of the view then that under the rule in *Foss Vs Harbottle* (1843) 2 Hare 461, only Njokerio Trading Company Limited could maintain the suit for remedies against the wrongs done to the company. The plaintiffs as directors or shareholders could not do so.

6. There is thus no suit before the court capable of amendment. The honourable judge had, I believe *obiter*, directed that “the company, if it so wishes, brings the action in its name”. I do not see where the judge ordered that that be done by amending the suit which he struck out. I venture to think that the judge meant bringing a fresh action. The judge had delivered himself thus;

“I find that the applicants have no locus standi to institute these proceedings and this suit and attendant application are hereby struck out”.

7. True, this court has power and wide discretion to allow amendment of pleadings at any time before judgment. See *Kenyatta National Hospital Vs Kenya Commercial Bank Limited* [2003] E A 528, *D.T. Dobie Vs Muchina* [1982] KLR 1, *Eastern Bakery Vs Castelino* [1958] E.A 461 and *Leroka Vs Middle Africa Finance Company Limited* [1990] KLR 549. The power is also explicit at order 8 rules 3, 5 and 8 of the Civil Procedure Rules 2010. The plaintiffs here may not be substituting a new cause of action. The plaintiffs may be looking at a short cut to bring the company into the suit. But there is no suit before the court and all of those good intentions are water under the bridge. I also note in passing that the application was brought by chamber summons against the clear guidance in orders 8 and 51 of the Civil Procedure Rules. But that is a technicality I was prepared to overlook in view of the overriding objective to do justice to the parties enunciated by section 1A and 1B of the Civil Procedure Act.

8. In the result, the plaintiff’s chamber summons dated 24th December 2010 is fatally defective. I proceed to dismiss it. As the court had previously declined to order costs when striking out the suit and for the reasons stated therein, I will also order that each party shall bear its own costs.

It is so ordered.

DATED and DELIVERED at NAIROBI this 19th day of April 2012.

G.K. KIMONDO

JUDGE

Ruling read in open court in the presence of

Mr. Mboche for the plaintiffs.

No appearance for the Defendants.