



REPUBLIC OF KENYA

High Court at Eldoret

Civil Case 8 of 2010

DR. BEATRICE KAMONYA 1ST PLAINTIFF

DR. CHARLES JAKAIT 2ND PLAINTIFF

=VRS=

DR. ZHAO XIAO HU DEFENDANT

RULING

The Plaintiffs herein seek leave to amend their pleadings. The application is expressed to be made under order VI A Rules 3 and 8 of the Civil Procedure Rules and Sections 3A and 63 (e) of the Civil Procedure Act and all the enabling provisions of the law. The application is supported by the affidavit of the 1st plaintiff sworn on 14th October, 2010 to which a draft amended pleading is annexed. The application is opposed by the defendant upon the grounds (as they appear in the affidavit in opposition sworn by the defendant on 11th March, 2011) that the amendments do not seek to clarify the real issues in controversy; that those amendments amount to striking out the 2nd plaintiff without compliance with order 1 rule 10 and 13 of the Civil Procedure Rules; that the amendment is an attempt to circumvent the ruling made on 28th July, 2010 and that the amendments amount to a withdrawal of the suit by the 2nd plaintiff without compliance with Order XXIV of rule 1 of the Civil Procedure Rules.

I have given due consideration to the written submissions of Learned Counsel appearing. I have also read all the authorities quoted. Having done so, I take the following view of the matter. The law with regard to amendment of pleadings with the leave of the court, as I understand, it is as follows:-

- 1). The court may allow amendment at any stage of the proceedings on such terms as to costs or otherwise as may be just (see former sub-rule 3 of Order VI A of the Civil Procedure Rules).
- 2). Amendments before hearing should be freely allowed if they can be made with no injustice, if the opposite side can be compensated by costs. (See **Eastern Bakery =vrs= Castelino [1958] E.A (EA 46)**).
- 3). Leave to amend to correct the name of a party may be allowed even where the application for leave is made outside the relevant period of limitation and the effect of the amendment would be to substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the party. (see sub-rule 3 as read with subrule 2 of rule 3 of the Civil Procedure Rules).
- 4). Similarly, amendment to alter the capacity in which a party sues may be allowed if the

capacity in which the party will sue is one in which at the date of filing of plaint or counter-claim, he would have sued. (see Sub-rule (4) as read with Sub-rule 3 (2) of rule 3 of the Civil Procedure Rules).

5). Finally, amendment may be allowed even if the application for leave is made outside the relevant period of limitation notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action arises out of the same facts or substantially the same facts as pleaded in the original plaint or counter claim. (see subrule (5) as read with subrule (2) of the same rule of the Civil Procedure Rules.)

Besides the above, there is also the general power to amend found in rule 5 of the same Order VI A. The power can be exercised by the court either of its own motion or on application of any party and the power is exercisable for the purpose of determining the real question in controversy between the parties or of correcting any defect or error in any proceeding.

In the plaint sought to be amended, the plaintiffs did not seek refund of any sums which claim is now made in the proposed amended plaint. Simultaneously with the original plaint, the plaintiffs lodged a Chamber Summons in which they sought a temporary injunction restraining the defendant from dealing with the operations of Beijing Kenya Company Ltd and in particular Imani Hospital pending the hearing and determination of the suit. That application was heard by **Mwilu J.** and dismissed. The findings of the learned judge are the substantive bases for opposing the plaintiffs' application for leave to amend. But to my mind however, those findings were made on an interlocutory application and even if the findings may appear definitive, they cannot be conclusive. Reliance upon the same to resist this application is therefore in my view misconceived.

The defendant also seems to be of the view that the amendment to omit the name of the 2nd plaintiff cannot be allowed as the provisions of Order 1 Rule 10 and 13 have been offended. The Order and Rules may not have been expressly invoked by the plaintiff but they have invoked all enabling provisions of the law which, in my view, was sufficient to invite a decision under those provisions. Besides, an application under the said order can be dealt with in a summary manner even on an oral application. In the premises, I do not find that the said Order and Rules have been offended.

The defendant has further contended that the proposed amendment amounts to a withdrawal of the suit by the 2nd plaintiff without compliance with order XXIV Rule 1 of the Civil Procedure Rules. In my view, the requisite notice envisaged under the Order and Rule can be implied in this application. In any event, Rules 3 (5) of Order VIA expressly permits the proposed amendment.

So, all the objections to the proposed amendments have not found favour with me. As already stated, the court may allow amendment at any stage of the proceedings on such terms as may be just, and amendments before hearing should be freely allowed if they can be made without injustice to the opposite side. There will normally be no injustice if the opposite side can be compensated by an award of costs. It is also noted that under subrule (3) as read with subrule (2) of rule (3) of Order VI A, amendment may be allowed notwithstanding that its effect will be to correct the name of a party and substitute a new party if the court is satisfied that the mistake sought to be corrected was a genuine mistake and was not misleading or such as to cause any reasonable doubt as to the identity of the person intending to sue or intended to be sued.

I have considered the application before me with the principles discussed above and I have come to the conclusion that the defendant will suffer no prejudice if the amendments are allowed. I will therefore grant the leave sought. The application dated 14th October, 2010 is accordingly allowed in terms of prayers (a) and (b) thereof.

The defendant may file an amended defence within 14 days of service of the amended plaint.

The defendant will have the costs of this application.

Orders accordingly.

**DATED SIGNED AND DELIVERED AT ELDORET
THIS 27TH DAY OF NOVEMBER, 2012.**

F. AZANGALALA

JUDGE

Read in the presence of:-

Mr. Kiboi holding brief for Nyambegera for the plaintiff and **Ms Chepkru**i holding brief for **Mr. Kigamwa** for the defendant.

F. AZANGALALA

JUDGE

27/11/2012.