



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Civil Case 79 of 2009

THARA ORCHARDS LIMITED PLAINTIFF

VERSUS

KENYA COMMERCIAL BANK LIMITED DEFENDANT

R U L I N G

1. The Plaintiff filed a Notice of Motion in this Court, dated 14 August, 2012. It asks of this Court that it be granted leave to amend its Plaint in terms of the draft amended Plaint attached to the Supporting Affidavit. The grounds that the Plaintiff details for such amendment are that it intends to provide further particulars and claim on loss suffered as a result of what it terms the Defendant's unlawful actions. Such are said to include loss and claim for compensation for loss of business, loss of business opportunity as a result of the withholding of funds by the Defendant and discrepancies on the Defendant's loan account statement for the Plaintiff. The Plaintiff maintained that the intended amendments will assist the court in determining the real issues between the parties. It also maintained that the Defendant was not likely to suffer any prejudice should leave to amend be granted.

2. The Application is supported by the Affidavit of **Charles Theuri Maina** who detailed that he was a director of the Plaintiff Company and duly authorised by the company's Board of Directors to swear the Affidavit on its behalf. The deponent repeated what had been detailed in the grounds in support of the Application. He particularly stated and pointed out that he had been advised by the advocates on record for the Plaintiff that the intended amendments to the Plaint did not introduce a new cause of action. He had also been advised by the said advocates that the Pleadings herein had closed as a consequence of which, this Application needed to be made.

3. In opposition to the Application, the Defendant filed Grounds of Opposition on 1 October, 2012. The grounds were detailed as follows:

- “1. The amendments are aimed at introducing a new and inconsistent cause of action.**
- 2. The Applicant has not provided particulars and/or pleaded the facts giving rise to the claim for loss of business to enable the Respondent effectively defend the said claim.**
- 3. There has been inordinate and unexplained delay on the part of the Applicant which disentitles it to the exercise of discretion in its favour.**
- 4. The amendments if allowed will prejudice and occasion injustice to the Respondent.**
- 5. The application for amendment is made in bad faith”.**

4. On 1 October 2012, counsel for the Plaintiff and the Defendant appeared before court. Mr. Ndegwa for the Plaintiff referred to the Application and the Affidavit in support. He detailed that the Plaintiff intended to provide further information as well as clarify the real issues as between the parties for the court's decision. He maintained that the Defendant would suffer no prejudice and that the amendments did not introduce a new cause of action. If anything, he said, the amendments added to the information already contained in the Plaintiff. He drew the court's attention to paragraph 37 of the draft Amended Plaintiff annexed to the Affidavit in support of the Application. That paragraph detailed that the Plaintiff's business had collapsed. Counsel commented that this was a new matter which had arisen since the initial Plaintiff had been filed. He referred the court to **Order 2 rule 5** of the *Civil Procedure Rules*. He stated that if there was any prejudice to the Defendant, the same could be adequately compensated in costs.

5. Mr. Nyabuki for the Defendant relied on the Grounds of Opposition that had been filed on 1 October, 2012. He noted that the first ground of objection was that the amendment sought to introduce a new cause of action and referred the Court to paragraph 32 of the draft Amended Plaintiff. He pointed out that such was indeed a new cause of action. It was a new claim for compensation for loss of business. Counsel stated that these facts were within the knowledge of the Plaintiff at the time that the suit was filed. He continued by saying that the amendment did not provide sufficient particulars to allow the Defendant to respond. There was nothing in the Amended Plaintiff to show how the Defendant did cause or contribute to the collapse of the Plaintiff's business. Further, counsel complained that the amendments sought were being brought late in the day amounting to inordinate and inexcusable delay. The period in question related to pre-2004. There had been no statement in either the Affidavit in support or the grounds of the Application as to when the facts relating to the collapse of the Plaintiff's business had become known. Counsel maintained that if the amendments were allowed, the Defendant will be prejudiced as particulars are not given in the draft Amended Plaintiff and the matters are now over eight years old, which will cause evidential problems. Finally, counsel maintained that the application had been made in bad faith as such was now being put forward after the suit had been fixed for hearing on several occasions as the record will show.

6. Mr. Ndegwa, in reply, submitted that the Application had been made in good faith and in order to highlight the differences and disputes between the parties. He stated that he had raised in correspondence the intention to amend the Plaintiff but the Court file had gone missing. Immediately it reappeared, the Plaintiff made the Application. Counsel denied that paragraph 32 of the proposed Amended Plaintiff introduced a new cause of action. The court would realise from the Application, that the intended amendments are by nature of special damages and the onus of proving the same will lie with the Plaintiff. As such, the Plaintiff would prove the same by producing documentation at the hearing in due course. Counsel insisted that the collapse of the Plaintiff's business was not within its knowledge at the time of filing Plaintiff. At paragraph 37 of the proposed Amended Plaintiff, the Plaintiff had detailed just what had galvanised this Application. Finally, Mr. Ndegwa submitted that there was no evidence that the Defendant would suffer any prejudice if the Application was allowed and it was in the greater interests of justice if the court would permit the same.

7. One of the clearest statements as to the law involved in considering an application for amendment to pleadings is to be found in the persuasive authority of **Amalo Co Ltd vs. Investments & Mortgages Bank Ltd** (2005) eKLR as per my learned brother Warsame J. (as he then was). On page 2 of that Ruling, he had this to say:

“The paramount and fundamental question is that an amendment meant to overreach or with ulterior motive would not be allowed. The Court is duty bound to determine the materiality of the proposed amendment without deciding the merit of the new cause of action. It is important to bear in mind that a party would be allowed or permitted to make amendments to its pleadings at any stage of the proceedings maybe even to add a new cause of action or reframe or reformulate his cause of action as to bring out the real questions in controversy between the parties. As a matter of caution the court is empowered to ensure that the party seeking amendment is acting in good faith and the opposite party would not suffer or sustain irreparable injury or prejudice of which compensation by an award of costs would be inappropriate.”

In Bullen and Leake, the Chapter on Amendment of pleadings at pages 1, 2 and 3 it was stated:

‘The Rule that a party is bound by his own pleading is to a very large extent mitigated by the power to amend pleadings. The object of the amendment of pleadings is to enable the parties to alter their pleadings so as to ensure that the litigation between them is conducted, not on the false hypothesis of the facts already pleaded or the relief or remedy already claimed, but rather on the basis of the true state of the facts or the true relief or remedy which the parties readily and finally intend to rely on or to claim. The powers of amendment are intended to make more effective the function of the courts to determine the true substantive merits of the case, to have more regard to substance than to form and thus to free the parties and the court from the technicalities or formalities of procedure. Sometimes the litigant may find it necessary to revise his own pleading to re-state or reframe his case, before the action proceeds to trial in order to bring out the question in controversy between the parties. Under its general powers of amendment, for the purposes of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings, the court may at any stage of the proceedings and either on its own or on an application of any party to the proceedings, order any document in the proceedings to be amended on such form as to costs or otherwise as may be just and in such manner if any as it may direct’.

It is clear that in fulfilling its core primary function of determining the dispute on the real and pertinent issues, the court is empowered to allow amendment at any stage, provided no prejudice shall be visited to the opposite party. The only way to inject or improve a cause of action is to seek an amendment so that any matter with even a semblance of cause of action can be injected with real life by an amendment. The purpose of an amendment is to bring out the real questions and controversies between the parties before court. All the issues important for the just determination of the dispute must be placed on the table. In my understanding an amendment must be intended to make more effective and efficient the primary function of the Court, which is to determine the dispute on substantive merit. It is intended to lay on the field the real controversy and would essentially and effectively shape the landscape of the case as between the parties”.

8. In my opinion, the Ruling that I have set out above from **Warsame J.** clearly sets out the position of the law with regard to amendments. Adapting the same to the circumstances of this case, I am satisfied that the amendments sought by the Plaintiff herein as per the Application are genuine. Even if the particular paragraphs as outlined in the proposed Amended Plaintiff, do introduce a new cause of action, I do not see any reason why they should not be allowed. As regards Mr. Nyabuki’s submission that they are brought late in the day, as per the Ruling above, amendments can be sought and made at any time during the proceedings even just before Judgement is pronounced. The fact that this suit has been set down for hearing on a number of occasions does not count anything toward the fact that an amendment can be made. I am also persuaded that the Application is not made *mala fides* and I see no reason why the same should not be allowed. Further, I do not consider that the Defendant will suffer any prejudice for, as counsel for the Plaintiff has stated, it is for the latter to prove special damages relating to the collapse of its business. With regard to the Defendant's counsel, stating that there was insufficient information contained in the proposed Amended Plaintiff to which the Defendant could reply, it would seem to this court that there is nothing to stop the Defendant from making an application for Further and Better Particulars.

9. As a consequence of the above, I allow the Plaintiff's Notice of Motion dated 14 August, 2012. As the Plaintiff has prayed for the costs of the same to be in the cause, I order so accordingly.

DATED and delivered at Nairobi this 9th day of November, 2012.

**J.B. HAVELOCK
JUDGE**