



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL CASE NO.126 OF 2003

LUCY NJERI NG'ANG'A.....PLAINTIFF/APPLICANT

VERSUS

ESTHER WANJIRU MWANGI.....DEFENDANT/RESPONDENT

RULING

The originating summons in this dispute was filed on 29th July, 2003 and the usual directions taken on 23rd July, 2004. The originating summons was slated for hearing on 19th April, 2005 but was rescheduled to 17th January, 2007 when the parties and their counsel failed to attend. When the matter eventually came up before Koome, J on 2nd October, 2007, with only counsel for the plaintiff in attendance, it was once more stood over generally to enable the plaintiff amend the originating summons.

No application for amendment was brought until after nearly two years and only after being prompted by the defendant's application seeking orders to dismiss the suit for want of prosecution. Both the plaintiff and his counsel have each sworn affidavits in support of this application, the combined effect of which is that the amendment sought will assist the court to adjudicate over all issues in controversy between the parties and that the application has been brought before the commencement of the hearing.

The respondent did not respond to the application but her advocate stated from the bar that the application has not been brought in good faith.

I have considered the application and submissions by counsel.

On the provisions of **section 100** of the **Civil Procedure Act**, **Order 6A rules 3(1), 4, 5** and **7** of the **Civil Procedure Rules** and on the authority of case law it is now settled *inter alia* that:

- i) the court has a general power to amend pleadings at any time on such terms as to costs as it may think fit
- ii) an amendment will be allowed in order to determine the real question or issues in the dispute
- iii) amendments must be sought timeously
- iv) 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
- v) that the exact nature of proposed amendment sought ought to be formulated and submitted to the

other side and the court

- vi) the proposed amendment must not be useless or immaterial or merely technical
- vii) if the proposed amendments introduce a new case or new ground of defence it can be allowed unless it would change the action into one of a substantially different character which could more conveniently be made the subject of a fresh action.

Looking at the circumstances of this matter and applying the foregoing principles, I am of the considered view that the application for amendment has not been brought in bad faith, even though it was prompted by an application seeking that the suit be dismissed for want of prosecution. Learned counsel for the applicant has candidly admitted that fact.

Indeed as early as 2nd October, 2007, counsel for the applicant had intimated the intention to seek amendment. What the applicant seeks to introduce in the amendment is not useless or a mere technicality. It brings out the basis of the applicant's claim in the originating summons, namely trust. The only thing the applicant's counsel has failed to do it to comply with **Order 6A rule 7(2)** which requires that all amendments must be shown by striking out in red ink all the deleted words and underlining in red ink all added words.

This requirement, in practice, ought to be adopted in the draft amended pleading so as to give the court or the other side, at a glance, notice of the nature of the proposed amendments. Failure to comply with that requirement is not fatal as it does not go to the root of the matter.

For these reasons, I allow the application for amendment and order the applicant to pay costs to the respondent.

The amended originating summons to be filed and served within 14 days from today's date. The respondent has leave to respond+ within 14 days from the date of service.

Dated, Delivered and Signed at Nakuru this 17th day of February, 2011.

**W. OUKO
JUDGE**