



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT KERICHO

CIVIL SUIT NO. 23 OF 2008

**SHAJANAND HARDWARE (K)
LTD.....PLAINTIFF**

VERSUS

**KIRON WORKS
(RONO).....DEFENDANT**

RULING

In its Chamber Summons application dated 29th March, 2010, the Defendant in this suit sought an order to strike out with costs the amended Plaint dated 8th November, 2009. The application which was argued before me on 14th February, 2011 was supported by an affidavit sworn on 29th March, 2010 by **Wilson Rono**. The Plaintiff opposed the application by filing Grounds of Opposition dated 5th June, 2010.

The record reveals that on 9th November, 2009, the Plaintiff filed an amended Plaint following leave granted by the court to amend. The amendments effected involved deletion of Defendant's original name of "**Kiron Works (Rono)**" in the Plaint and insertion of the name of "**Wilson Rono T/A Kiron Works (Rono)**". In addition, the Plaintiff amended paragraph 2 of the Plaint which originally stated

"The Defendant is a business name duly registered under the Registration of Business Names Act (Cap 499) Laws of Kenya. Service of process upon it shall be effected through the Plaintiff's advocates offices and/or their agents"

The amended paragraph 2 of the Plaint stated

“The Defendant is an adult of sound mind trading in the business name of Kirono Works (Rono) duly registered under the Registration of Business Names Act (Cap 499) Laws of Kenya. Service of process upon it shall be effected through the Plaintiff’s advocates offices and/or their agents”.

The Plaintiff also inserted a new paragraph 3A in the Plaintiff as follows:

“3A. At all material times, the Plaintiff through its hardware shop was engaged in the business of supplying hardware goods and other building material and the Defendant was the Plaintiff’s customer by virtue of placing orders for supply of the said goods on diverse dates between January, 2004 and June, 2006 on credit, for which purpose the Defendant maintained an account with the Plaintiff”

Also amended was the re-numbering of paragraph 3 of the Plaintiff by re-numbering it as 3B and deletion of the sum of Shs. 4,454,465.10 and its substitution with a figure of Shs. 3,982,587/56.

When the application came up for hearing on 14th February, 2011, **Mr. Ombachi**, learned counsel for the Defendant/Applicant, urged the court to strike out the amended Plaintiff and in doing so relied on the affidavit of the Defendant filed in support of the application. It was his contention that the amendment was without proper leave and that the Plaintiff’s claim was time barred and that the Plaintiff was non-suited on the alleged claim. He also contended that the amendment was frivolous, prejudicial to fair trial and an abuse of the court process.

Mr. F. Maube, learned counsel for the Plaintiff, contended that the amendment was sanctioned by the court. He contended that the Defendant should have raised the issue of amendment during the hearing of the Plaintiff’s application dated 16th April, 2009 but did not.

I have given due consideration to the submissions of both counsel and I have perused the authorities cited.

In the application seeking to strike out the amended Plaintiff, the Defendant contended that the amendment effected could only be done on an application granted under **Rules 10 and 22 of Order 1 of the Civil Procedure Rules.**

Rule 10 of Order 1 of the repealed **Civil Procedure Rules** was in pari materia with **Rule 10 of Order 1** of the **2010 Civil Procedure Rules.** **Rule 10(1)** and **rule 10(4)** stipulate as follows:

r.10(1). Where a suit has been instituted in the name of the wrong person as Plaintiff, or where it is doubtful whether it has been instituted in the name of the right Plaintiff, the court may at any stage of the suit, if satisfied that the suit has been instituted through a bona fide mistake, and that it is necessary for the determination of the real matter in dispute to do so, order any other person to be substituted or added as Plaintiff upon such terms as the court thinks fit.

r. 10(4). Where a Defendant is added or substituted, the Plaintiff shall, unless the court otherwise directs, be amended in such manner as may be necessary, and amended copies of the summons and of the Plaintiff shall be served on the new Defendant and, if the court thinks fit, on the original Defendants.

The Defendant’s application to strike out the amended Plaintiff did not confine itself to the issue of leave. It also contended that the claim was time barred under the **Limitation of Actions Act** and further that it was scandalous, frivolous and vexatious and that it may prejudice, embarrass or delay the fair trial of the action. In addition, it was contended that it was otherwise an abuse of the process of the court.

Was the Plaintiff entitled to amend the Plaintiff as it did? The record shows that on 19th October, 2009, the Hon. Lady Justice Mary Ang’awa made an order requiring the Deputy Registrar to hear pursuant to **Order 48 Rule 5(1) (b) (IV)** the Plaintiff’s application dated 16th April, 2009 seeking to amend the Plaintiff. The Deputy Registrar heard the application on 26th October, 2009 and allowed the amendments in

the draft amended Plaintiff annexed to the Plaintiff's application which the Plaintiff filed. There was no appeal from or setting aside or variation of the order made by the Deputy Registrar. That order was valid and therefore the Defendant's contention in this regard must fail. At any rate, the rules do allow amendment in the manner that the Plaintiff amended the Plaintiff.

Is the Plaintiff's claim time barred as contended by the Defendant? The claim for Shs. 3,982,587.56 is allegedly for the balance of an amount due and owing by the Defendant to the Plaintiff for goods supplied to the Defendant between January, 2004 and June, 2006. The suit was initially instituted as suit No. 153 of 2007 in the High Court at Kisumu in the year 2007 and was transferred to Kericho in May of the year 2008. It was in Kericho Station that it acquired suit No. 23 of 2008. The Plaintiff's claim from the beginning was founded on contract and limitation period spanned six (6) years under **section 4 of the Limitation of Actions Act, Cap 22** of the Laws of Kenya. As the cause of action is alleged to have accrued in 2004, the period of six (6) years had not run out by the time the suit was filed in 2007. In the circumstances, this ground by the Defendant also fails.

The amended Plaintiff was alleged to be scandalous, frivolous or vexatious and that it may prejudice, embarrass, or delay the fair trial of the action, or was otherwise an abuse of the process of the court.

For a defence to be said to be scandalous, frivolous or vexatious under **Rule 13(1) (b) of Order VI**, the Applicant must show that it is unsustainable and lacks in seriousness and tends to annoy. A scandalous defence is one which contains irrelevant matters that tend to stain the reputation and wound the feelings of the other party. The court is entitled to expunge any scandalous matter in any record or proceedings. A matter that is inadmissible in evidence and does not establish the truth of an allegation in the pleading which is material with reference to the relief prayed for will also be deemed to be scandalous and embarrassing and will therefore be struck out. See **Christine V. Christie [1873] LR 8 Ch. App. 499 at page 503**: See also **Whitney V. Moignard [1890] 24 BD 630**. In the instant case, the Defendant has not established this to be the case.

For a defence to be said to prejudice, embarrass or delay the fair trial of the action it must be shown that it is beyond the right of a party to make. For example, a defence that raises irrelevant matter or issue which may involve expense, trouble and delay to answer is deemed to be prejudicial to the fair trial of the suit and will be struck out (See **Rossam V. Budge [1893] 1 QB 571**). This is not the case here.

As regards the alleged abuse of the process of court, it was not shown that the process of the court was not carried out honestly and in good faith or that the function of the court was being misused.

It is clear that the allegations made by the Defendant in an attempt to have the amended Plaintiff struck out have no merit. I so find. In the circumstances, I dismiss the Defendant's application dated 29th March, 2010 and award the costs to the Plaintiff.

DATED at KERICHO this 30th day of March, 2011

G.B.M. KARIUKI, sc

RESIDENT JUDGE

Advocates

Mr. Ombachi advocate for the Applicant/Defendant.

Mr. F. Maube advocate for the Respondent/Plaintiff

Court Clerk – Mr. Koech