



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAKURU
Civil Case 217 of 2004

EDWARD G. KIHIA.....DEFENDANT/APPLICANT
VERSUS
THOMAS CAROLL.....PLAINTIFF/RESPONDENT
RULING

On 21st June, 2007, the plaintiff/respondent closed his case having called three witnesses. The hearing of the defendant/applicant's case has not commenced from what I can glean from the record, following the transfer of the trial judge, Hon. Mr. Justice D. Musinga and also due to the present application. The defendant/applicant is praying for leave to amend the defence and the counterclaim.

The amendment is sought on the grounds that the defendant/applicant has engaged a new advocate who has advised him that the statement of defence and counterclaim filed by his erstwhile advocate does not disclose any specific prayer; that the amendment sought will not prejudice the plaintiff/respondent.

In his grounds of opposition, the plaintiff/respondent has deposed that the application has been brought after inordinate delay; that the defendant/applicant by raising the issue of the Law Society of Kenya terms and conditions, is introducing a new cause of action; that the application is prejudicial to the plaintiff/respondent, the parties having done discovery, exchanged documents and filed agreed issues.

On the basis of **Section 100** of the **Civil Procedure Act** and **Order 6A rule 3** of the **Civil Procedure Rules** as well as numerous decisions of the Court of Appeal and this court, it is common ground that the power to amend pleadings is discretionary, exercised with the sole aim of determining the real question or issue in controversy before the court.

It is therefore trite learning that application for amendment of pleadings must be made timeously and in any case at any stage of the proceedings (including appeal stage). 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. The amendment sought should be material and not merely technical. It is also common ground that if the proposed amendment introduces a new case or a new ground of defence it can nonetheless 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. Again an amendment which would have the effect of depriving the other party of his right to rely on limitation will not be allowed. See **Joseph Ochieng' and 2 Others Vs. First National Bank of Chicago**, Civil Appeal No.149 of 1991. Indeed **Order VI rule 13** of the **Civil Procedure Rules** gives the court the discretion first to order an amendment or strike out pleadings which do not disclose reasonable cause of action or defence. See also **Motocor Vs. Auto Garage Limited and Another** (1971) EA 353.

The defendant/applicant in the instant matter has averred that he has been prompted to bring this application because the original statement of defence and counter claim make no specific prayer. The substantive amendments sought in this matter relate to:

- i) paragraph 4(h) where the only addition is the figure of Kshs.129,833.00 which the defendant/applicant has alleged the Nakuru Municipal Council had agreed to waive
- ii) paragraph 4(1) is a line that the transaction was not consistent with the Law Society terms and conditions of sale
- iii) the five prayers which were not in the original counter-claim.

All these proposed amendments are made in good faith and are in no way prejudicial to the plaintiff/respondent as he can be compensated by an award of cost. The defendant/applicant will be available for cross-examination or the plaintiff/respondent recalled. But more fundamentally, the proposed amendments do not seek to introduce a new case or ground of defence. They indeed flow from the original pleadings. The counter-claim as originally framed, sought no specific relief. All the amendments sought cannot form the basis of a separate suit and clearly belong to this suit.

No doubts there has been some delay, the suit having been filed on 22nd July, 2004 and the statement of defence and counterclaim filed on

29th July, 2004. In between, parties have changed advocates and the hearing itself did not start until late (October) 2005 and was further delayed for two years (September, 2007). One year, (2008) later the trial judge was transferred. In the light of these events, the delay, although inordinate, are excusable and the plaintiff/respondent will not be prejudiced by the lateness. In the result, the proposed amendments are allowed.

Subject to filing fees being paid, the draft Amended Statement of Defence and Counter Claim is deemed as having been duly filed and served. Costs to the plaintiff/respondent.

Dated, Signed and Delivered at Nakuru this 5th day of February, 2010.

W. OUKO

JUDGE