



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**  
**AT NAKURU**

**Civil Case 347 of 2008**

**SHER KARUTURI LIMITED (FORMELY KNOWN AS  
SHER AGENCIES LIMITED).....PLAINTIFF**

**VERSUS**

**V/D BERG ROSES KENYA LIMITED.....1<sup>ST</sup> DEFENDANT**

**RULING**

The applicant brought this suit on 3<sup>rd</sup> November, 2008 for orders of injunction to restrain the respondent whether by its employees, servants or agents or otherwise howsoever from forcibly evicting the applicant from LR No.10854.

By the instant application dated 29<sup>th</sup> January, 2010, the applicant seeks to amend the plaint to include a claim of damages in the sum of Euros 63,297 and Kshs.2,959,000/= being the value of the applicant's property destroyed in the attempted eviction of the applicant by the respondent from the suit land.

The proposed amendment also seeks interest on the damages and costs. The proposal has particularized the damaged items.

The application is brought on the grounds that at the time the suit was filed, the applicant had not computed the loss arising from the alleged attempted eviction; that the proposed amendments are

*H.C.C..NO.347/2008*

intended to assist the court to reach a fair and just determination of the issues and the same will not prejudice the respondent.

The respondent through its Current Manager has filed a replying affidavit in opposition to the application stating that this application and an earlier one for contempt of court have been brought to delay the hearing of the respondent's application filed way back on 31<sup>st</sup> December, 2008 for striking out the suit; that there has been inordinate delay in bringing this application; that the amendment sought does not fall within the provisions of Order 6A rule 3 or 5 of the Civil Procedure Rules; that the applicant's licence having expired, no cause of action could arise from its illegal occupation of the suit property. Finally it is averred that the applicant ought to have brought a counter-claim in HCCC No.391 of 2008 in which the respondent is claiming damages for the destruction occasioned by the applicant's agents on the suit property.

I have carefully considered these rival arguments. I have particularly found the authorities cited and the parties' written submissions most useful and I am grateful to both counsel for their industry. Both sides referred to a number of authorities on the question before me – amendment of pleadings, for instance;

- i) Central Kenya Ltd Vs. Trust Bank Ltd. (2000) EA 365
- ii) Kenya Cold Storage (1964) Ltd Vs. Overseas Food Services (Africa) Ltd, (1982) KLR 453

- iii) Shah Vs. Aperit Investments S.A. & Another, (2002) 1KLR 130
- iv) Superdrug Cosmetics Ltd Vs. Hilton International (K) Ltd Nrb. HCCC No.5590 of 1992
- v) Mediterranean Shipping Co. SA Vs. K.P.A., Msa. HCCC 148/2004
- vi) D.T. Dobie & Co. (K) Ltd Vs. Muchina, (1982) KLR 1
- vii) Mowa Publishers & Another Vs. A.G.
- viii) Kyalo Vs. Bayusufu Brothers Ltd. (1983) KLR 229
- ix) Kassam Vs. Bank of Baroda (K) Ltd, 2002) 1 KLR 294.

Having carefully read these authorities, the following principles emerge;

- a) the court has a wide discretion to amend pleadings for the purpose of determining the real question in the dispute and to do substantial justice.
- b) an amendment can be sought at any stage but within a reasonable time and provided costs can compensate the other side.
- c) circumstances which can justify an amendment are numerous and therefore each application for amendment must be considered on its peculiar circumstances.

H.C.C..NO.347/2008

- d) as long as no prejudice will be occasioned by the amendment, an application for amendment ought to be allowed
- e) a proposed amendment must be consistent with the original suit and must flow from that cause of action.
- f) only applications for amendment made in good faith will be granted.
- g) an application for amendment will not be allowed if the court is satisfied that it is devised to abuse the court process
- h) the proposed amendment must not be immaterial or useless or merely technical
- i) the plaintiff will not be allowed to reframe his case or his claim if by an amendment of the plaint the defendant would be deprived of his right to rely on limitation
- j) but the court has powers even (in special circumstances) to allow an amendment adding or substituting a new cause of action if the same arises out of the same facts or substantially the same facts as a cause of action in respect of which relief has already been claimed in the action by the party applying for leave to seek the amendment.

See also **section 100** of the **Civil Procedure Act** for the court's general power to amend pleadings as well as **Order 6A rule 3** of the **Civil Procedure Rules** for the parameters of the exercises of that

H.C.C..NO.347/2008

power. See also **Joseph Ochieng' and 2 others Vs. First National Bank of Chicago**, Civil Appeal No.149 of 1991. It is common ground in this matter that the hearing has not commenced. Indeed there is still one more application pending hearing and determination. It is also not denied that the respondent has filed Nakuru HCCC No.391 of 2008 in which it is claiming damages for the destruction occasioned to its property by the applicant's agent. With respect, I agree with learned counsel for the respondent that the proper course for the applicant would have been to bring a counterclaim in that cause. But I also believe that, for the reasons I am about to give, there was no harm for the route taken by the applicant.

The applicant seeks in the plaint;

“(a) An injunction restraining the defendant whether by its employees, servants or agents or otherwise howsoever from forcibly evicting the plaintiff from occupation of L.R. No.10854/6”

In paragraph 8 of the plaint, the applicant avers that:-

“8. On 1<sup>st</sup> November, 2008, the defendant by its servants and/or agents attempted to forcibly evict the plaintiff from the suit property.”

Once again, I agree with learned counsel for the respondent that if all along the applicant knew that during the attempted eviction,

*H.C.C..NO.347/2008*

some things were destroyed, why was no claim made at the time the plaint was drafted and filed?

The respondent does not contest the allegation of attempted eviction, only arguing that the applicant became a trespasser on the suit property and could not maintain any suit in law or equity.

From the plaint and the statement of defence, I am persuaded that the claim sought to be introduced arose from an alleged attempted forcible eviction which is acknowledged by the respondent. Whether or not any item was destroyed in the course of the attempted eviction is for the trial court. Similarly whether or not the applicant was a trespasser and whether or not on that score the respondent was justified to damage the applicant's goods is also for the trial court to determine. For the purpose of the instant application, I find no delay in the bringing of the same. I find also that the amendments sought are consistent with the original suit; that the application is made in good faith as no bad faith has been demonstrated except that it has been alleged that the applicant has had several bites at the cherry by having two of its applications heard before that of the respondent. That *per se* does not amount to bad faith. I am similarly convinced that the application has not been devised to abuse the court process.

For these reasons, I will exercise my discretion in favour of the applicant and allow this application . Costs will be in the cause. The

*H.C.C..NO.347/2008*

Respondent's application dated 31<sup>st</sup> December, 2008 to be given a hearing date now.

Dated, Signed and Delivered at Nakuru this 8<sup>th</sup> day of March, 2010.

**W. OUKO**  
**JUDGE**