



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT MERU
CIVIL CASE NO. 15 OF 2005**

**MOUNT KENYA BOTTLERS LTD.PLAINTIFF
VERSUS
DANIEL KANYURU DEFENDANT**

RULING

The plaintiff sued the defendant alleging that the defendant owed it Kshs. 1,795,259.00/= and 2471 cases of empties of a beverage worth Kshs. 2,091,870/=. The plaintiff in the plaint filed on 23rd November 2004 alleged that there existed between it and the defendant a distribution agreement dated 24th and 26th February 2000. The defendant, through his defence filed on 7th January 2005, denied being indebted to the plaintiff and denied that he had entered into a distribution agreement as pleaded in the plaint. The plaintiff's case was heard substantially on 5th October 2009. The defence case was heard on 25th May 2010. On that day, the case was concluded and the parties were given a date to submit in writing before judgment was delivered. Before that date, when parties were to present their written submissions, the plaintiff filed a Chamber Summons brought under Order VIA Rule 3 of the Civil Procedure Rules and dated 9th June 2010. By that Chamber Summons, the plaintiff seeks leave to amend the plaint to cancel out the distribution agreement dated 24th and 26th February 2000 pleaded in the original plaint and instead amend the plaint to reflect another distribution agreement dated 29th February 2000. Learned counsel, Mr. Lompo, who swore the affidavit in support of the application for the plaintiff stated that although the agreement marked as plaintiff exhibit No. 1 and submitted in evidence was dated 29th February 2000, that the counsel who handled this case when the plaintiff adduced evidence failed to seek to amend the plaint to reflect the date of 29th February 2000. Learned counsel Mr. Lompo stated that the amendment sought to reflect the agreement dated 29th February 2000 was to define with clarity the real question in controversy. The defendant opposed the application on the basis that it was an afterthought was brought in bad faith and that the application was without merit and would greatly prejudice and

embarrass the defendant. The defendant was of the view that he could not be compensated with costs if the application was allowed. The plaintiff relied on various authorities.

1. **The Book Bullen and Leake and Jacob's Precedents of pleadings** where the learned author had this to say:-

"The court has power at any stage of the proceedings, to allow the plaintiff to amend his writ or any party to amend his pleading on such terms as to costs or otherwise as may be just and in such manner, if any, as it may direct."

The power of the court to grant or refuse leave to amend a pleading is discretionary and is to be exercised so as to do what justice may require in the particular case, as to costs or otherwise. The power may be exercised "at any stage of the proceedings" and accordingly amendments may be allowed before at the trial or after trial or even after judgment or on appeal. As a general rule, however late the amendment is sought to be made, it should be allowed if it is made in good faith and if it will not do the opposite party some injury or prejudice him in some way that cannot be compensated for by costs or otherwise but of course different considerations will apply to different stages of the proceedings or to the different nature of the amendments sought."

2. **Sebastian Njagi Maria Vs. Mrs. Nau Mungania Munyinyi** Civil Case No. 114 of 1998 where the court had this to say:-

"Although these amendments are sought this late, they are necessary and, I believe, made in good faith. The proposed amendments are not introducing a new cause of action but rather clarifying the plaintiff's existing case. For instance, it is important to state the capacity in which the defendant is sued. Similarly, the correction to reflect the actual parcel the plaintiff intended to sell is equally necessary. However, I find the other amendments either technical such as the last proposed amendment or immaterial.

It is also my view that the proposed amendments are not in any way prejudicial to the defendant. They may have caused inconvenience to her and even delayed the conclusion of this matter, but that can be compensated by an award of damages."

The defendant also had authorities he relied upon namely:-

1. **National Bank of Kenya Ltd Vrs. Assad Kamal Siddiqui & others** Nrb HCC No. 2599 of 1996 (unreported) where the court had this to say:-

"The initial defence alludes to some of the material here one way or the other and it was the court's impression that all this came about after the plaintiff's witness had more or less finished his evidence. It would be an injustice at this stage to allow amendment as sought in the defence pleading. It would mean either PW1 beginning to testify all over. Would this coupled with amending the plaint, again if found necessary, be just or amendable to be compensated by way of costs? This court does not think so. The need for the 3rd and 4th defendants to clarify issues because of the alleged mix-up or for the benefit of the court, could as well take the course of cross-examining PW1 or tendering evidence in defence."

2. **Kenya Ports Authority Versus East African Power & Lighting Company Ltd** [1982] KLR (410) where the court had this to say:-

"The application to amend could not be allowed where it was made at a very late stage. Such an application must be brought at the earliest convenience."

3. **Omar Vrs. Cargo Handling Services Ltd** – [1985] KLR (837) where the court had this to say:-

"The provisions of O. VIA Rule 3 (1) Civil Procedure Rules which permits the bringing of an application for leave at any stage of the proceedings.

Although that is so, in law, a litigant who brings an application for leave at the late stage as the defendants did, has a duty to the court to show that the court should exercise its discretion in his favour, notwithstanding the delay. The applicant did not explain and cannot therefore expect indulgence. Exercise of judicial discretion requires that the court looks at both sides. The failure to offer the explanations for the delay in bringing this application leaves me wondering as to the bona fides of the application."

The plaintiff has all along been represented by counsel from the time this suit was filed. The plaint clearly indicates the distribution agreements between the plaintiff and the defendant were dated 24th and 26th February 2000. PW1 on 5th October 2009 whilst being led in evidence by the plaintiff's counsel produced plaintiff's exhibit number 1. That is, the distribution agreement dated 29th February 2000. The cross examination of PW1 by the defence counsel zeroed in on the plaintiff's exhibit number 1 and yet that did not lead learned counsel for the plaintiff to cross check the date of plaintiff exhibit number 1 to check whether they corresponded with the dates in the plaint. The defendant on being called to give evidence had this to say:-

“So, in the plaint they have not mention (sic) date of plaintiff's exhibit number 1.”

The defendant in evidence vehemently denied that he had signed plaintiff's exhibit number 1. With that clear line of defence, one would expect that the plaintiff's counsel would immediately have sought to amend the plaint before the defence case was heard. Even as the defence case proceeded, the defendant clearly stated that the plaintiff plaint did not reflect plaintiff's exhibit number 1. During the hearing of the defence case, the plaintiff was represented by learned counsel, Mr. Lompo. The said Mr. Lompo is the one who has sworn an affidavit in support of the plaintiff's application to amend the plaint. I am of the view that to allow the amendment now would lead to the re-opening of the case which is now awaiting judgment date. I am also of the view that to allow such amendment at this late stage, would lead to injustice to the defendant which cannot be compensated by costs. The defendant vehemently denied signing plaintiff exhibit number 1. If an amendment was allowed to reflect the date on plaintiff's exhibit number 1, the defendant would be denied the opportunity to present hand writing expert evidence to disprove that he was the one who signed plaintiff exhibit number 1. Because I find that the defendant would be prejudice by the amendment sought, I find that the plaintiff's application cannot be allowed. Accordingly, the Chamber Summons dated 9th June 2010 is dismissed with costs to the defendant. At the reading of this ruling, parties will be given a date of judgment.

Dated and delivered at Meru this 26th day of July 2010.

MARY KASANGO
JUDGE