



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT ELDORET

CIVIL SUIT 60 OF 2008

PAUL MUTAI PAUL MUTAI KEINO KOSHIOR:...PLAINTIFF

VERSUS

JOEL KIPCHIRCHIR:.....DEFENDANT

R U L I N G

Before the court is an application by Chamber Summons brought under S.3A of the Civil Procedure Act and Orders 1 Rule 10 (2) and VIA Rules 3(1) and 8 of the Civil Procedure Rules. This is the Plaintiff's application praying for leave to enjoin some five (5) parties to the suit as defendants and to amend the plaint so as to include claims of fraud and specifically plead special damages. It is brought on the grounds that it is necessary to amend so as to allow the court to adjudicate on all issues and that the additional parties are necessary. The further ground is that the omission to plead fraud and special damages was inadvertent and by accident and in any event the defendant/Respondent will not suffer any prejudice or injustice which cannot be compensated by costs. The application is supported by the sworn Affidavit of the Plaintiff wherein he repeats on oath the grounds upon which the application is based and also annexes the draft proposed amended plaint.

The application was opposed on the grounds that the claims intended to be brought in by way of amendment are time-barred as the cause of action arose over some five years ago and these are completely new causes of action which will prejudice the Defendant and since according to the Defendant the application to amend has been brought after a long delay of over ten months since the filing of the suit, the same should not be allowed. There was a Replying Affidavit by the Defendant.

The Applicant's case is that the proposed amendments will not cause any prejudice to the Defendant as he has a chance to file an amended defence and the court should be put in a position to determine all the matters in issue. No admission was made as to the claims being time barred as the same were said to have been discovered within the time leading to the filing of the application under consideration.

It is trite law that an application for amendment pleadings can be made any time before judgment. And the decision as to who to sue is essentially that of the Plaintiff. In the case of **Beoco Ltd –vs- Alta Laval Co. Ltd. (1994) 4 ALL E.R 464** it was stated that the guiding principle is that all amendments should be freely allowed at any stage of the proceedings provided that the amendment or joinder as the case may be will not result in prejudice or injustice to the other party which cannot properly be compensated for in costs.

The overriding consideration in application for leave to amend is whether the amendment are necessary for the just determination of the controversy between the parties and that was stated yet again by **Chittaley and Rao in AIR COMMENDARIES ON THE INDIAN CIVIL PAROCEDURE CODE VOL.2 6th Edition at Page 2245** in the following words:-

“A party is allowed to make such amendments as may be necessary for determining the real question in controversy or to avoid a multiplicity of suits, provided there has been no undue delay, that no new or inconsistent cause of action is introduced, that no vested interest or accrued legal right is affected and that the amendment can be allowed without injustice to the other side.”

The proposed amendment to the plaint does bring in the dual issues of fraud and special damages. It is not true that these are barred by time; I do not have to be sitting on trial of the suit to note that from the pleadings. And if they are or they are not the Defendant will have an opportunity to amend his defence to so plead. The plaint here was filed on 14th May 2008 and the application under consideration was filed on 3rd February 2009. That, to my mind, cannot be described as undue delay and in any event mere delay perse is not a ground to refuse an amendment unless it is shown that such delay is likely to cause the other side prejudice which cannot be compensated in costs.

In this case I find and I hold that the proposed amendments are necessary so that all issues are determined together.

The parties proposed to be introduced by the amendment are in my view necessary for the effectual and complete adjudication of all the questions involved in the suit between all the parties.

In the result I allow the application. The amended plaint annexed to the application and marked P2 shall be deemed duly filed upon payment of due court fees. The same will be served thereafter to all the parties who will then have the usual time to file their amended defence and defence as the case may be if they so wish.

There will be orders accordingly.

DATED AND DELIVERED AT ELDORET THIS 13th DAY OF MAY, 2009.

P.M.MWILU

JUDGE

IN THE PRESENCE OF:-

Paul Ekitela - Court clerk

Mrs. Mutai - Advocate for the Applicant

N/A - for the Respondent.