



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT MOMBASA

CIVIL CASE 192 OF 2005

COASTAL BOTTLERS LTD.....PLAINTIFF

VERSUS

1. KENYA PORTS AUTHORITY

2. SDV TRANSAMI KENYA LTD

3. OCEANFREIGHT (EA) LTD.....DEFENDANTS

RULING

The 3rd defendant has lodged this Chamber Summons under Order 1 Rule 10 (2), Order VIA Rule 10 (2) and Order VIA Rule 3 (1) and (3) of the Civil Procedure Rules. It seeks one main order that the amended plaint filed on 5th October 2006 be struck out as against the 3rd defendant. The primary reason for the application is that the said amendment amounted to a substitution of a defendant without the leave of the court and after the period of limitation of bringing the action had elapsed.

The application is supported by an affidavit sworn by Yusuf Saad, the Assistant Manager Claims of the 3rd defendant's company in which affidavit the said ground is substantiated. Annexed to the affidavit is a copy of the Certificate of Incorporation of Oceanfreight (E.A.) Limited.

The application was opposed and a replying affidavit was sworn by Zehrabanu Janmohamed, an Advocate instructed by the firm of Archer and Wilcock Advocates who act for the plaintiff. It is deponed in the affidavit, *inter alia*, that the amended plaint was filed with leave and is not in effect a substitution of the 3rd defendant but a correction of its name. To the said affidavit are annexed copies of the 2nd defendant's amended defence, the amended plaint and a letter addressed to the plaintiff's advocates from the 2nd defendant's advocates.

When the application came up for hearing before me on 20th May 2009, counsel agreed to file written submissions which submissions were duly filed by 30th July 2009. I have considered the pleadings, the application, the submissions of counsel and the authorities cited. Having done so, I take the following view of the matter. It is common ground that at the time the plaintiff filed the amended plaint, pleadings had closed and leave of the court to amend was required under the rules. The gist of the applicant's application is that at no time did the plaintiff seek to amend its plaint and at no time did the court grant it leave to amend the plaint. It is the applicant's further argument that the purported amended plaint was

lodged after the relevant period of limitation had lapsed. In the premises, the applicant contends that the amended plaintiff should be struck out.

It is common ground that the 2nd defendant applied for leave to amend its defence which application was compromised by a consent which was recorded on 22nd September 2006. The consent was in the following terms:-

“By consent the 2nd defendant is granted leave to file and serve an amended (sic) within 15 days. The other parties may file their responses within 14 days from the date of service of the amended defence.”

The applicant was represented when the consent was recorded and now argues that there was no consent order ever made in favour of the plaintiff. With respect, that cannot be correct. The consent order speaks for itself. All the parties other than the 2nd defendant who was the applicant were granted leave to file their responses within 14 days from the date of serve of the amended defence.

Order 1 Rule 10 (2) of the Civil Procedure Rules is in the following terms:-

“10 (2) The court may at any stage of the proceedings either upon or without the application of either party and on such terms as may appear to the court to be just, order that the name of any party improperly joined whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined whether as plaintiff or defendant or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit be added.”

It is plain beyond peradventure, that under the sub-rule, a party need not have made an application before an order for the name of a party improperly joined is struck out or joined whether as plaintiff or defendant or as an additional party. What is significant is that such a party can only be struck out, joined or added by an order of the court. In the matter at hand, the consent order recorded by the parties on 22nd September 2006 clearly permitted the “other parties” who included the plaintiff to file their responses within 14 days from the date of service of the amended defence. A response to an amended defence included filing an amended plaintiff which is the option the plaintiff took.

In the premises, I find and hold that the amended plaintiff was filed with the leave of the court pursuant to a consent recorded by the parties.

Even if I had found that the amended plaintiff had been filed without the leave of the court, I would not have struck out the suit as against the applicant. That is because the amended plaintiff would have been found to be null and void. In other words the amended plaintiff would have ceased to exist. It would have been invalid. The striking out of the invalid pleading would not have affected the original plaintiff. I would in that regard, with respect, agree with Ocheng J in **Lazaro Kibebe – v- Ndege Makau & Another: HCCC No. 1222 of 1999 (UR)** that an amendment which takes the place of the original pleading is one which is validly lodged. Where however the amended pleading is found to have been filed without leave where one is required, such an amended pleading cannot be treated as the original pleading. The original pleading would still be valid. In my view therefore, the facts in this matter are distinguishable from the facts in **Sneache – v – Wotherton Barytes and Lead Mining Company Limited [1904] 1 K.B. 295** and **Warner – v – Sampson & Another [1959] 1All ER 120. Those cases considered validly amended pleadings.**

In **Regina Kavenya Mutuku & 3 Others – v – United Insurance Company Limited [HCCC No. 1994 of 2000] (UR)**, Ringera J, as he then was dealt with an unsigned defence which he found to be invalid and could not be amended. That, with respect is not the position in our case. Sergon J in **Equator Bottlers Limited – v – Kenya Ports Authority and 2 Others [HCCC No. 191 of 2005] (UR)** found that leave to amend the plaintiff had not been obtained and struck out an amended plaintiff because of that default. A copy of the decision furnished to the court is not clear on what the Learned Judge said of the original plaintiff. In

any event, the decision would only be of persuasive value in the event that the factors are on all fours with this case.

The applicant has further argued that the effect of the amendment made by the plaintiff is to burden the applicant with a claim which is time barred under the provisions of the Carriage of Goods by Sea Act (Cap 393) and an application to effect such an amendment should have been lodged. The applicant may be unhappy about the amendment because it has lost a defence under the said Act. I am afraid it is too late now. It should not have been a party to the consent recorded on 22nd September 2009 which consent as already stated permitted the plaintiff to file the amended plaint. However, in my view, even if resistance had been made against the leave given to the plaintiff to respond pursuant to the consent that, *per se*, would not have disentitled the plaintiff to the amendment. I say so because, the applicant had already delivered its defence to the plaintiff's claim which defence rectified the manner it had been described and specifically responded to the averments in the plaint. The applicant did not aver that another entity called Oceanfreight Limited existed and should meet the plaintiff's claim. The defence clearly showed that the plaintiff's claim had validly been raised against the defendant save that it had been misdescribed. In any event under Order VIA Rule 3 (2) and (3) of the Civil Procedure Rules, leave to amend can still be granted even where a relevant period of limitation has expired and even if the amendment would in effect substitute a new party in place of another. The concern of the court being to do justice to the parties.

The upshot of the above consideration of the 3rd defendant's application dated 21st June 2007 is that the same is without merit and is dismissed with costs.

Order accordingly.

DATED AND DELIVERED AT MOMBASA THIS 8TH DAY OF OCTOBER 2009.

F. AZANGALALA

JUDGE

Read in the presence of:-

Mutungi holding brief for Buti for 3rd Defendant/Applicant.

F. AZANGALALA

JUDGE

8TH OCTOBER 2009