



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Civil Suit 1075 of 2003

GRAND HOLIDAY HOTEL LTD.PLAINTIFF

VERSUS

KENYA POWER & LIGHTING CO. LTD.....DEFENDANT

RULING

The proceedings herein are still going on. The plaintiff is still tendering evidence when the matter came up last for hearing on 04.03.08 after the plaintiffs' last witness had tendered evidence, counsel for the plaintiff made an oral application under Order 6 A Rules 3 and 8 of the Civil Procedure Rules to further amend the plaint for the year to read 1998 as opposed to the pleaded year of 1997.

The reason for the request was that all the evidence tendered point to the fact that the meter was installed in 1998 and not in 1997. Further that the amendment will give the court an opportunity to determine the issue in controversy. That the court is empowered to hear the application orally. The application is timely as it has been made as soon as the error was discovered.

The defendant has moved to object to this oral application because it is meant to scuttle the defence as all the three witnesses stated that the date was 1997 and the issue of 1998 only came up during the cross-examination. They contend this is the major part of the defence as the date itself is in issue. The defence appreciates that the court has power to allow amendments but this should be in a just manner. The application is made under Order VI A Rule 3 and 8. Rule 8 is simply the enabling rule via which the party makes the request either orally or formally. The plaintiff is therefore perfectly in order to make an oral application. All that is required of him is to show that he is within the ambit of the ingredients in Rule 3 (1), (2), (3), (4) and (5). These are:-

- (i)** An amendment can be made at any stage of the proceedings.
- (ii)** The court has power to grant the amendment on such terms as to costs or otherwise as may be just.
- (iii)** The amendment may also be in such a manner as the court may direct.
- (iv)** Even where the period of limitation, current at the period the matter come to court has expired, the court, can still allow a party to amend his pleadings. The only fetter to this is that the court must think that it is just so to do.
- (v)** An amendment can be allowed notwithstanding that its effect will be to add or substitute a new cause of action if the new cause of action 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 suit by the party applying for

leave to make the amendment.

This court has considered arguments of both parties for and against this oral application for an amendment in the light of the enabling provisions and it makes the following findings:-

- (1) Jurisdiction exists to this court to receive an oral application to amend and so the plaintiff's oral application is in order and properly before court.
- (2) It is correctly submitted that the discretion to grant an amendment or not to grant one exists but it has to bear in mind the interests of both parties.
- (3) In view of the stage the proceedings have reached, and in view of the defence assertion that the intended amendment is likely to scuttle their defence, the court has to avoid going into the merits and the demerits of the alleged scuttling.

It is enough to say that the nature of the transactions between the parties herein so far as it has been revealed by the evidence, so far tendered is based on documents made before the dispute was identified and matter came to court. This being the case there is no way either party as well as the court is going or was going to ignore entries made in these documents. It therefore matters not whether the correct date had been pleaded and testified on or not. What was going to matter and will matter is that the documents tendered and admitted in evidence are and will speak for themselves in accordance with the customary best evidence rule. As to what effect or bearing the entries on them will have on the ultimate decision of the court as regards those pleadings, is for the trial court to determine whether the defence case or the plaintiffs case will be scuttle, as a result of the proposed amendment is not to be gone into at this point in time.

It is enough to say that the date revealed to be the date in controversy, should be the operative date in the pleadings of either side as the same is central to the dispute herein.

No prejudice will be suffered by the defence, firstly because even if the plaintiff did not bring it out, the court would not have ignored its presence on the documents tendered. Secondly the defendant has not tendered its evidence and so it will have an opportunity to reorganize its defence bearing in mind the fact that it would not have been possible to go round the entries on the documents made as at the time the said documents were being processed. Thirdly the plaintiff has not closed his case and so the defence can exercise their rights of recall of the plaintiff witnesses for further cross-examination. Fourthly there is room to call controverting evidence if need be.

For the reasons given above the court is of the opinion that request for amendment is proper, merited, in the best interests of both parties, will bring on board the point in issue for the just determination of the matters before court. The same is allowed.

- (2) The application was interposed in the cause of the hearing and so costs on it will be in the cause.

DATED, READ AND DELIVERED AT NARIOBI THIS 28th DAY OF APRIL 2008.

R. N. NAMBUYE

JUDGE